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THE
FEDERAL REPORTER.

VOLUME 40.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

NOVEMBER, 1889—FEBRUARY, 1890.

ST. PAUL
WEST PUBLISHING CO.
1890.

ship's agents, at the master's request, paid the salvors, and the ship afterwards delivered the cargo to the consignees upon their executing an average bond to the ship's agents, describing them as "agents or owners of the vessel," and conditioned to pay them such sums as should be found to be a charge upon the goods. A general average adjustment was afterwards made, and the libelants, as insurers of several of the cargo owners, paid most of the amount charged against them by the adjusters; objecting, however, to any commissions, on the ground that the agents had no authority to advance money on their account. A few days afterwards, the same insurers filed libels to recover back the moneys paid, on the ground that the stranding was caused by negligent navigation; the facts constituting the alleged negligence being known to the libelants a considerable time before their payments were made. *Held*, that the ship's agents having advanced the money to pay the salvage in their capacity as the agents and representatives of the ship and her owners, and having taken the bond in that capacity, if the stranding was by negligence, such negligence was a defense against any claim upon the average bond, and that the payments made by the libelants, having been made with knowledge of the facts, were voluntary payments, and could not be recovered back.

In Admiralty. Actions to recover for moneys paid for salvage of cargo.

Butler, Stillman & Hubbard and *W. Mynderse*, for libelants.

Wing, Shoudy & Putnam, for claimants.

BROWN, J. The above four libels were filed on October 10 and 11, 1889, by the insurers of different portions of the cargo on board the barkentine *Nicanor*, to recover from the ship the several amounts which the insurers had paid, or, as alleged, were liable to pay, on account of their insured cargo owners, for their proportion of salvage with which the cargo had become chargeable in consequence of the stranding of the *Nicanor* upon the Jersey coast on the 2d of September, 1889, it being alleged that the stranding occurred solely by the negligence of the vessel. The answers, filed on October 12th, deny the material allegations of the complaint; and the defense, in brief, was—*First*. That there was no negligence, and that the stranding arose from the effect of an unknown temporary inshore current, caused by previous north-east winds, afterwards hauling to the southward; and also by a single white electric light at the Longport Hotel, on the beach, being mistaken for the fixed white light at Absecom, a few miles to the northward: *Second*. That the claims of the salvors had been paid and discharged by the ship through advances from her agents; that the payments made by the libelants were made to these agents after the delivery of the cargo to the owners, on the execution of the usual average bond; and that such payments were made voluntarily, with full knowledge of all the facts, in partial settlement of that demand; and that no action, under such circumstances, would lie to recover back moneys thus voluntarily paid, even if the stranding was caused by negligence.

The vessel having been arrested by the marshal, and being in custody, the causes were brought to an immediate hearing. On the trial, it appearing that no payment on account of salvage had been made by the second libelant above named, the *New York Mutual*, that action was discontinued. The causes have been submitted on the proofs taken in the other three cases.

From the pleadings and proofs it appears that the *Nicanor*, loaded chiefly with hides and wool, bound from Montevideo to New York,

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pursued the usual course up the coast, until about 3 P. M. on September 1, 1889, when she made the Five Fathom Bank light-ship on her port bow off the Delaware coast. The wind being north-easterly and variable, she continued on her starboard tack towards the shore, heading about N. N. W., until she made the land, at 7 P. M., having run in between Five Fathom Bank light-ship and the Northeast End light-ship. At 7 P. M. she tacked off shore. At 9, having the Northeast End light-ship nearly ahead, about half a point on her port bow, and half a mile distant, and the wind hauling towards the south-east, she again came about upon her starboard tack, and was put upon a north-east course, having the wind about half a point free. According to the testimony of her master, first and second mates, and her wheelsman, she continued on that course, heading north-east, until, at half past 1 on the morning of September 2d, she brought up on the beach to the northward of the entrance of Great Egg Harbor, and about six miles south-west of Absecom light. The point where she stranded is about twenty miles north by east from the Northeast End light-ship, so that the ship's actual course must have been about three points to the northward of her alleged heading, and about eight miles to the westward of a straight N. E. course from the light-ship. The wind was moderate, the weather fair, but somewhat hazy and smoky in the evening, particularly towards the land, and by midnight became thick. Assistance was procured from the Atlantic & Gulf Wrecking Company of Philadelphia, and the vessel floated on the following day. On September 4th she arrived at New York without damage to the cargo.

The master had made an agreement with the representative of the wrecking company to pay such salvage as should be fixed by the New York Board of Underwriters. On September 6th the matter was heard by that board, and on the same day \$15,000 awarded in full for salvage compensation. The libelants had knowledge of the agreement, and, by their representatives, attended the hearing before the board, and acquiesced in its decision. On the same day, J. F. Whitney & Co., the consignees and agents of the ship in this port, upon the master's request and order, paid to the wrecking company the full amount of the award, and took its receipt in full to themselves as "agents of the bark Nicanor." Within a few days thereafter they procured the signatures of the various consignees of cargo to an average bond, in the usual form, which recites the stranding of the vessel, and the assistance rendered by the wrecking company; and thereupon the cargo owners "covenant severally with J. F. Whitney & Co., owners, or agents of the owners, of said vessel, that the losses and expenses, or so much thereof as, upon an adjustment by Currie & Whitney according to the laws and usages of this port, should be a charge upon the cargo, should be paid to Whitney & Co., upon notice of the adjustment." Within the following two weeks the cargo was all discharged, and delivered to the consignees. The average adjustment was completed on October 4th, and notice thereof was at once given to the libelants. In the general average there was included, in addition to the salvage award, \$1,261.24 for ropes and sheaves of the vessel, for

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OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

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HON. DANIEL CLARK, DISTRICT JUDGE, NEW HAMPSHIRE.
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HON. WILLIAM MCKENNAN, CIRCUIT JUDGE.
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.

her disbursements in procuring the salvors, for protest, survey, and adjusters' expenses, and agents' commissions for advancing and collecting, and interest. The amount apportioned and charged against the first-named libelants, as insurers of cargo, was \$3,491; against the second named, \$976.50; against Phipps and others, \$2,527; and against the Universal Marine Insurance Company, \$2,514.50. Prior thereto, and about September 14th, at the request of the companies, a preliminary statement was sent them by the adjusters, showing the approximate amount of their shares in the adjustment; and before that, and as early as the 11th, the Universal and British & Foreign Companies were informed, through their attorney, Mr. Lawson, (letter of September 17th,) that J. F. Whitney & Co. had "settled with the salvor, and paid for their account the amount owed." On September 20th the Universal inclosed to J. F. Whitney & Co. its check for \$2,500, as its approximate proportion of the salvage award; refusing, however, to recognize any claim for advancing or collecting, on the ground that J. F. Whitney & Co. "were not authorized to pay the amount owed on account of the salvage award." The British & Foreign Company, by letter of September 14th to J. F. Whitney & Co., stated its readiness to advance its share of the salvage contribution, but refused to recognize any claim for commissions or advancing; and on October 4th that company sent to the average adjusters its check for \$3,250 "on account of the amount due for salvage award," which was transmitted on the same day to J. F. Whitney & Co. On the 5th October, Phipps and others also sent to J. F. Whitney & Co., "agents of the bark Nicanor," a check for \$2,300 as a "payment on account of the sum owed by them for salvage claim," with the statement: "When we have had time to examine the account and adjustment, whatever balance is due will be paid to you." A few days afterwards, as above stated, the foregoing libels were filed to recover back the moneys thus paid.

As respects the master's negligence as the cause of the stranding, the case is by no means free from difficulty. It is not necessary, however, to consider that branch of the case, because I am satisfied that the libellant's claims are brought within that class of voluntary payments in which suits to recover back the moneys paid are not allowed. The rule is well settled that the payment of a money demand, made voluntarily, and with knowledge of the facts, and not in consequence of any fraud, misrepresentation, or mistake, nor under any duress or oppression of person or property, is binding, and cannot be recovered back. A known defense, in such cases, must be made before payment, and even a protest will be of no avail. *Radich v. Hutchins*, 95 U. S. 213; *Mariposa Co. v. Bowman*, Deady, 228; *Glass Co. v. City of Boston*, 4 Metc. 187; *Flower v. Lance*, 59 N. Y. 603, 610; *Quincey v. White*, 63 N. Y. 370, 376.

The present case is not within any of the exceptions to the general rule. The libelants, at the time of their payments, had knowledge of all the material facts. The master's statement before the board of underwriters, at which the libelants were represented, was, in substance,

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HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.

¹Appointed October 29, 1889, to succeed Hon. JOHN T. NIXON.

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HON. GEORGE M. SABIN, DISTRICT JUDGE, NEVADA.

HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.

¹Appointed to succeed Hon. MARTIN WELKER, retired.

²Appointed Justice U. S. Supreme Court, December 18, 1889.

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

BOOTH *et al.* v. ST. LOUIS FIRE-ENGINE MANUF'G CO. (No. 3,057.)

WALKER v. ST. LOUIS, A. & T. H. R. CO. (No. 3,041.)

(Circuit Court, E. D. Missouri, E. D. September 28, 1889.)

FEDERAL COURTS—CORPORATIONS—RESIDENCE.

A corporation cannot acquire a residence in a state other than one in which it is incorporated, within the meaning of act Cong. 1887, which provides that, "when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant."

On Motions to Dismiss.

John S. Booth, for Booth *et al.*

Edward J. O'Brien, for the St. Louis Fire-Engine Manufg Co.

A. R. Taylor, for James L. Walker.

Taylor & Pollard, for the St. Louis, A. & T. H. R. Co.

BREWER, C. J. We have here two cases, in each of which the plaintiffs are not citizens nor residents of this state, and in each of which the defendant is a corporation organized in some state other than this. They are suits originally brought in this court; and the question is whether, under the act of 1887, this court can take jurisdiction. In each of them it appears that the corporation defendant has an office and transacts business in this state, and some of its officers reside here; and in one of them (No. 3,057) it would seem from the allegations that all the officers are here, and all its business transacted here. The law of 1887 provides that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." These cases are of that nature, and jurisdiction is only invoked on the ground of diverse

citizenship; so, the plaintiffs being confessedly non-residents, the question is whether the defendants can be considered as residents of this district.

There has been some difference of opinion expressed by the judges of the trial courts, and I do not intend to enter into any discussion of the question. I simply state what conclusions I have come to in this matter, not from this argument alone, but in prior cases. In three cases the supreme court of the United States have spoken of the residence and citizenship of corporations. In the case of *Insurance Co. v. Francis*, 11 Wall. 210, the court says:

"The declaration avers that the plaintiff in error (the defendant in the court below) is a corporation created by an act of the legislature of the state of New York, located in Aberdeen, Miss., and doing business there under the laws of the state. This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will; and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

In *Ex parte Schollenberger*, 96 U. S. 377, the court says:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter."

And in the still later case of *Railroad Co. v. Koontz*, 104 U. S. 5, the court uses this language:

"By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."

Now, those declarations of the supreme court are not simply affirmative in character, asserting that a corporation is a citizen and resident of the state which creates it, but also negative, and declaring that it cannot change its citizenship or residence. In the light of those declarations, I hold that a corporation created under the laws of another state is a citizen of and resident within that state. It can acquire no residence here. The motions will be sustained, and suits dismissed.

TEFFT et al. v. STERNBERG et al., (two cases.)

(Circuit Court, S. D. Georgia, W. D. July 27, 1887.)

1. COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION.

When property is seized and held under mesne or final process of either a state or United States court, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ, and the possession of the officer having it in custody cannot be disturbed by another court of co-ordinate jurisdiction. Such disturbance would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer.

2. SAME.

Of course, this rule is not applicable in those cases where the courts of the United States exercise superior jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States.

3. SAME—MORTGAGE FORECLOSURE—INJUNCTION.

The statutes of Georgia provide that, for the foreclosure of a chattel mortgage, the mortgagee shall make affidavit of the amount of principal and interest due thereon, annex the affidavit to the mortgage, and file both in the office of the clerk of the superior court of the county in which the mortgagor resides. The clerk shall thereupon issue execution, bearing teste in the name of the judge of the court, commanding the sale of the mortgaged property, and the sheriff shall proceed to sell the same as in other judicial sales. The mortgagor may avail himself of his defenses by making affidavit of illegality to the execution, and, when it is filed, the levying officer shall postpone the sale, and return all the papers to the court from which execution issued for a trial of the case by jury. *Held*, that such a foreclosure is a proceeding of the state court, within the meaning of Rev. St. U. S. § 720, providing that no injunction shall be granted by a federal court to stay proceedings in a state court.

4. SAME.

Where a sheriff under such an execution has taken possession of the property of an insolvent mortgagor for the purpose of such foreclosure, the court from which process issued has complete jurisdiction of the subject, and the federal courts will decline to appoint a receiver to take charge of the balance which may remain after satisfaction of the mortgage liens, and to distribute the same to the general creditors.

In Equity. On bill for injunction and appointment of a receiver.

Walter R. Brown, Wimbish & Gilbert, and Francis D. Peabody, for Tefft, Weller & Co.

Hill & Harris, for Dunham, Buckley & Co.

Peabody, Brannon & Hatcher and L. F. Garrard, for defendants.

SPEER, J. Separate bills were filed by the plaintiffs, citizens of New York, against Sternberg & Loewenherz, an insolvent firm of Columbus, in this district, with averments which, if proven, under repeated decisions of this court, make an unquestionable case for the appointment of a receiver to take charge of the assets of the insolvent firm, and to hold them, subject to proper disposition by the final decree of the court, for the satisfaction of the creditors. A temporary injunction having been granted, it appeared on the hearing of the rule to show cause why an injunction proper should not issue, and a receiver be appointed, that the entire stock of merchandise of the respondents, Sternberg & Loewenherz, amounting in value to about \$150,000, had been taken in charge by J. G. Burrus, sheriff of Muscogee county and of the superior court of the state of Georgia for that county, by virtue of the foreclosure of several chattel mortgages made by the insolvent firm to certain preferred creditors. These mortgages, in the aggregate, did not exceed the sum of \$31,566; but it appeared that various other creditors had placed in the hands of the sheriff other mortgages amounting to \$15,415, and, under the provisions of a state statute, (Code, §§ 3969, 3977,) claimed the right to share in the distribution of the fund to be raised by the sale of the merchandise levied upon under the chattel mortgage *fi. fa.* Certain other creditors had sued out garnishment against the sheriff to subject any balance in his hands to their debts, and, subsequently to the filing of the bills and to the issuance of the temporary injunction by this court, a bill similar to those pending here had been presented to the Honorable JAMES M.

SMITH, the judge of the superior court of Muscogee county, Ga., by which an injunction and the appointment of a receiver were sought before that tribunal. It appeared further that, after the satisfaction of the mortgages which had been foreclosed under the state law, and also the mortgages which had been placed in the hands of the sheriff to share in the fund, all of which last-mentioned mortgages were left with the sheriff before the litigation here began, there will be large values in the hands of the sheriff which it is insisted are subject to distribution by this court, and which its receiver, when one is appointed, would be entitled to have for the benefit of the creditors who have sought this forum to enforce their rights.

On the hearing the complainants were, at once, confronted with the proposition that the foreclosure of the chattel mortgages, and the seizure of the stock by the sheriff, had given absolute and exclusive jurisdiction of the subject-matter to the court of the state, and that the court of the United States could not, with judicial propriety, interfere; and upon this proposition a great many authorities were cited, among them *Diggs v. Wolcott*, 4 Cranch, 179; section 720, Rev. St.; *Dial v. Reynolds*, 96 U. S. 340; *Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 451; *Chapin v. James*, 23 Amer. Rep. 412. The plaintiffs, in reply to the obvious weight of these authorities, pressed with much force the argument that the foreclosure of a chattel mortgage upon an *ex parte* affidavit, and the subsequent sale of the mortgaged property, as directed by the Georgia statute, do not constitute "proceedings in any court of a state," and they also maintained that the custody of the property by the sheriff was not the custody of the state court. They relied upon the case of *Weil v. Calhoun*, 25 Fed. Rep. 865, where Judge McCAY held, in the circuit court for the northern district of Georgia, that, where the ordinary of a county is required by a special statute to examine the returns, count the votes, and declare the result of a local election, his action in this regard is not such a "proceeding of a court" as will inhibit an injunction from a federal court. A stronger case is that of *Carpenter v. Talbot*, 33 Fed. Rep. 537, where it was held that a foreclosure sale by a public officer, under a chattel mortgage, is not a proceeding in a state court, within the meaning of section 720, Rev. St. There seems, however, to be a palpable distinction between the Vermont statute, in contemplation of which the decision in *Carpenter v. Talbot* was made, and the Georgia statute, under which the chattel mortgages here were foreclosed. The former provides that, where the condition of the mortgage is broken, the mortgagees may cause the mortgaged property to be sold "at public auction, by a public officer." The Georgia statute requires the mortgagee to go before some officer authorized to administer an oath, and, having made affidavit of the amount of principal and interest due on the mortgage, to annex the affidavit to the mortgage, and file both in the office of the clerk of the superior court in the county where the mortgagor resides, etc. It shall then be the duty of the clerk to issue an execution directed "to all and singular the sheriffs and coroners of this state," commanding the sale of the mort-

gaged property to satisfy the principal and interest, together with the cost of proceedings to foreclose the said mortgage. The sheriff then proceeds to advertise and sell, as in other judicial sales. The mortgagor may avail himself of his defenses. These are presented by an affidavit of illegality to the execution. When this affidavit is filed, the levying officer, by direction of the statute, shall postpone the sale, and return all the proceedings and papers in the case to the court from which the execution issued to be tried by a jury, etc.

Now, can it be doubted that this is a proceeding in a court of the state? It is altogether unlike the foreclosure in the case from Vermont. Indeed, the Code of Georgia (section 3504) providing that an affidavit which is the "foundation of a legal proceeding" cannot be amended, the supreme court of the state, in the case of *Rich v. Colquitt*, 65 Ga. 115, held that the affidavit as to the principal and interest due on a mortgage, under section 3971, was not amendable, it being, of course, the "foundation of a proceeding at law." Besides, the execution itself must bear test in the name of the judge of the court, (Code, § 3632,) and must be returned and docketed as other executions, (Id. § 3635.) It follows, therefore, indisputably in the opinion of the court, that the foreclosure of a mortgage upon personalty in Georgia is a proceeding in the state court; that our duty as to this question is plainly defined by the supreme court of the United States in numerous decisions, many of which have been cited by defendants' solicitors, *supra*, and many others equally as cogent and conclusive. These are admirably collated and considered in the case of *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355, Mr. Justice MATTHEWS delivering the opinion of the court. That eminent jurist quotes with approval the following language of Mr. Justice NELSON in *Freeman v. Howe*, *supra*, which itself was but an application of *Taylor v. Carryl*, 20 How. 583:

"The main point there decided was that the property seized by the sheriff under the process of attachment from the state court, and while in the custody of the officer, could not be seized or taken from him by a process from the district court of the United States, and that the attempt to seize it by the marshal, by notice or otherwise, was a nullity, and gave the court no jurisdiction over it."

And, further:

"The majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a state and federal process, and in order to avoid unseemly collision between them, the question as to which authority should, for the time, prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question which jurisdiction had first attached by the seizure and custody of the property under its process."

It does not matter whether it is process *in rem* or process at law or in equity, the right to hold the property belongs to the court under whose process it was seized. Chancellor Kent, in 1 Comm. 410, having stated that "if a marshal of the United States, under an execution in favor of the United States against A., should seize the person or property of B., then the state courts have jurisdiction to protect the person and the prop-

erty so illegally invaded," the court proceeds to point out the error of this proposition, and adds: "We need scarcely remark that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

The proposition, as settled by an ample and, indeed, irresistible array of decisions, may be broadly stated as follows: When property is seized and held under mesne or final process of either a state or United States court, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ, and the possession of the officer having it in custody cannot be disturbed by another court of co-ordinate jurisdiction. Such disturbance would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer. Of course this rule is not applicable in those cases where the courts of the United States exercise superior jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States. *Covell v. Heyman*, *supra*. Mr. Justice MILLER, in *Buck v. Colbath*, 3 Wall. 341, gives an admirable statement of the law, as follows:

"Whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control, for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

The case of *Covell v. Heyman*, *supra*, and the opinion of Mr. Justice MATTHEWS, afford the following valuable observations on this subject:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but, between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent; and, although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues." "The jurisdiction of a court," said Chief Justice MARSHALL, "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised." *Wayman v. Southard*, 10 Wheat. 1.

These citations of elevated and paramount authority are, perhaps, more copious than is requisite, but since nothing would so seriously prejudice the character and usefulness of the courts of the United States or of the state as those unseemly conflicts of authority, which not only ex-

cite communities, but which, both in this country and in England, have afforded occasions for intemperateness in the assertion of jurisdiction on the one hand, and for its denial on the other, hardly comporting with the serene and impartial reserve of the bench, the settled rule upon the subject, whenever its announcement is appropriate, cannot be too strongly emphasized or too amply supported by those impregnable statements of principle which stand out in the decisions of the supreme court of the United States,—statements which bear in lucid phrase the precise expression of sovereign and beneficent law. Moreover, the apparent conflicts of authority between the courts of the state and of the United States furnish no proper occasion for nice or narrow divisions of the subject of litigation,—none for divisions of jurisdiction. In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents.

It is true that there will be, doubtless, a balance of some amount in the hands of the sheriff after the more important liens there depending are satisfied, and this court might be justified by the letter of the law in appointing a receiver, to whom the sheriff would account for such balance. This, however, would not accord with that spirit of absolute reserve which, in matters of concurrent jurisdiction, should mark the action of the courts of the United States towards the state courts. The superior court of Muscogee county has the same power to dispose of all the matters in litigation that would obtain here. It is therefore presumably unnecessary, were it otherwise seemly and appropriate, to go forward and grant the extraordinary relief sought. Besides, if the complainants choose to press their claim for a general and final decree, as usual in equity in this court, they may then, by a petition *pro inter esse suo*, intervene in the state court, and ask for distribution of the fund or balance. They may intervene at once in the litigation pending there. There is ample authority for this course to be found in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27, and especially in the recent case of *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. Rep. 379, where the procedure indicated is fully considered.

The superior court of Muscogee county being in control of the subject and the substance of the litigation, the law and the principles of comity alike forbid the action and orders sought by the plaintiffs, and the court, for the reasons stated, declines to grant the application for an injunction and for the appointment of a receiver.

SAYLES *et al.* v. BROWN *et al.*

(Circuit Court, D. Maryland. July 9, 1889.)

1. CORPORATIONS—STOCKHOLDERS—CONTRIBUTION—PENAL LIABILITY OF CORPORATION.

Certain citizens of Rhode Island, stockholders of the American File Company, a Rhode Island corporation, who were required to pay a judgment against that corporation by a decree affirmed by the supreme court, (*File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. Rep. 90,) filed this bill in equity to compel the Maryland stockholders to contribute. *Held*, that the proof discloses that the liability under which the complainants as stockholders were compellable to pay the debt due by the corporation was not a contractual, but a penal, liability, under the Rhode Island law, and not enforceable outside of that state, and therefore was not a burden resting upon the Maryland stockholders, in respect to which they can be called upon for contribution.

2. SAME—UNAUTHORIZED INCREASE OF CAPITAL—LIABILITY OF STOCKHOLDER.

Held, that it appears from the evidence that the increase of capital stock of the American File Company, issued after the filing of the certificate required by section 1, c. 128, Rev. St. R. I., was not an increase authorized by a valid, corporate vote of a majority of the stockholders, and that under the circumstances of this case it did not, in respect to the Garrett debt, entail upon the holders of that stock the liabilities imposed by the first section of the Rhode Island law for failure to file the certificate required by that section.

(Syllabus by the Court.)

In Equity.

Venable & Packard, for complainants.

Robertson & Marbury, Goodwin & Culbreth, Barton & Willmer, Brown & Brune, and G. T. Wallis, for defendants.

Before BOND and MORRIS, JJ.

MORRIS, J. The complainants are citizens of Rhode Island, who were stockholders of the American File Company, a corporation of that state, and some of whom were officers and directors of said corporation, and are the persons who were compelled to pay a debt of said company to Robert Garrett & Sons, decreed to be paid by the decree of the circuit court of the United States for the district of Rhode Island, which was affirmed in the supreme court of the United States in the case of *File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. Rep. 90. Having made said payment on the 18th April, 1884, these complainants filed this bill on the 12th February, 1886, asking a decree requiring the Maryland stockholders of said company to make contribution in proportion to the number of shares of stock held by each. The complainants claim that they are entitled to maintain the present suit for contribution, because the debt thus paid by them under compulsion of law was, as they aver, paid for the benefit and protection of the defendants in this case, as well as all other stockholders, and in satisfaction of a demand for which these defendants were liable as well as the complainants. The American File Company was a manufacturing corporation, chartered by a special act of the Rhode Island legislature, passed in 1863, by which it was declared that its capital stock should not exceed the sum of \$500,000, to be fixed in amount by a vote of the company. It was provided by the charter that there should be an annual meeting of the corporation held in the village of Pawtucket, and that at all meetings of the corporation not less than a

majority of the shares should constitute a quorum for doing business, and that all matters should be decided by a majority of the votes present, allowing each stockholder in person or by proxy one vote for each share by him owned. It was also provided that the liabilities of the members of the company for debts of the corporation, its members and officers, should be fixed and limited by, and the corporation, its members and officers, should in all respects be subject to, the provisions of chapters 125 and 128 of the Revised Statutes of Rhode Island. By the first section of chapter 128 of the Rhode Island Revised Statutes the members of every incorporated manufacturing company were made jointly and severally liable for all the debts and contracts of the company until the whole amount of the capital stock fixed and limited by the charter of said company, or by vote of the company in pursuance of the charter or of law, should be paid in, and a certificate thereof made and recorded in a book kept for that purpose in the office of the town-clerk of the town wherein the manufactory was established, and no longer, except as afterwards provided. By the eleventh section it was provided that every such company should file in the town-clerk's office of the town where the manufactory was established, annually, a certificate, signed by the president and a majority of the directors, truly stating the amount of all assessments voted by the company and actually paid in, and the amount of all existing debts; and by the twelfth section it was provided that if the company should fail to file such annual certificate all the stockholders should be jointly and severally liable for all the debts of the company.

It is evident that the individual liability of stockholders under the first and second sections of the Revised Statutes is contractual, and the liability under the twelfth section is penal. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. Rep. 263. But in the case of *Garrett v. Sayles*, neither in the circuit court (1 Fed. Rep. 375) nor on appeal in the supreme court (110 U. S. 288, 4 Sup. Ct. Rep. 90) was it necessary or material to consider under which of these sections the liability arose. That case was begun in a Rhode Island court, and it made no difference, in a case instituted within that state, whether the liability was contractual or penal. The Garretts, in their suit against these complainants, after alleging that the file company was "a manufacturing company, located and transacting business, and whose manufactory is and always has been established, in the town of Lincoln," further aver "that said company or its officers never did file any certificate in the town-clerk's office of said Lincoln, where the manufactory of said company was established, as required by the said act of incorporation and by said statutes, so as to exempt the stockholders of said company from personal liability as aforesaid for the debts of said company;" and in that case these complainants, by their pleadings, admitted the liability, unless the equitable defenses there set up by them could be maintained. 1 Fed. Rep. 375. If, however, the fact was that the actual liability under which complainants rested was penal, and could only be enforced in Rhode Island, then, plainly, they cannot maintain this suit against the Maryland stockholders, who were

not under that liability, and cannot compel them to contribute on the ground of having been relieved of a common burden. To meet this state of the law, the complainants have framed their bill in this case, to allege and show that they have discharged a liability which arose from an entire failure to comply with the first section of the statute. The following are some of its averments:

"And thereupon your orators complain and say that (1) the American File Company, a body corporate, was duly chartered by a special act of the general assembly of the state of Rhode Island, enacted at the May session thereof, A. D. 1863, for the purpose of manufacturing files, and for other manufacturing purposes connected therewith. (2) Under this charter the said company was duly organized, and commenced the business of manufacturing files in the town of Lincoln, in the county of Providence, in the state of Rhode Island, some time in the year 1863, and continued the said business for a number of years. And the said company never carried on business at any other place. (3) By the special provisions of the act of incorporation, as by the same, when produced, will appear, the capital stock of said company was not to exceed five hundred thousand dollars, the amount to be fixed by a vote of the company, and to be divided into shares of one thousand dollars each. By a vote of the company the capital stock was in 1863 fixed at one hundred and fifty thousand dollars. This was all subscribed for and taken in shares of one thousand dollars par value. On or about the 16th day of July, A. D. 1863, the amount of the capital stock was by vote of the company made two hundred thousand dollars, and the additional fifty thousand dollars was subscribed for and taken in shares of the same par value. (4) Subsequently, and on or about the 12th of May, A. D. 1864, by an amendment to the charter of said corporation, the par value of each share of the capital stock in said corporation was reduced from one thousand dollars to one hundred dollars per share, and new certificates of stock were issued to those persons, who held certificates of stock of the par value of one thousand dollars per share for an amount of stock, in shares of the par value of one hundred dollars each, equal to the amount which each had held in shares of the par value of one thousand dollars each; the certificates of stock in shares of the par value of one thousand dollars each being surrendered when the certificates of stock in shares of the par value of one hundred dollars each were delivered. (5) Afterwards, to-wit, on or about the 16th day of April, A. D. 1868, by vote of said corporation, another additional issue of capital stock in said corporation was made to the amount of one hundred thousand dollars, making the entire amount of the capital stock three hundred thousand dollars, and said additional issue of capital stock was subscribed for and taken in shares of the par value of one hundred dollars each." "(33) By the special provisions of the act of incorporation of said company, as by the same, when produced, will appear, and also by the statutes of the said state of Rhode Island in such cases made and provided, in force at the times of the transactions hereinbefore referred to, the members or shareholders of said company were jointly and severally liable for all debts and contracts made and entered into by said company until the whole amount of the capital stock, fixed and limited by the charter of said company, or by vote of the company in pursuance of the charter or of law, had been paid in, and a certificate thereof had been made and recorded in a book kept for that purpose, in the office of the town-clerk of the town wherein the manufactory of said company was established, to-wit, the said town of Lincoln in the state of Rhode Island. (34) Neither the said American File Company, nor any of its officers or stockholders, ever did file in the town-clerk's office of the said town of Lincoln, where the manufactory of said company was established, the said certificate required by the said act of incorporation and by

said statute, and the said stockholders of said company were and continued to be jointly and severally liable for all the debts of said company. (35) It was with the knowledge, consent, and acquiescence of the stockholders in said American File Company that said certificate was not filed as aforesaid, because, as your orators aver, it was known, acquiesced in, and consented to by all the stockholders in said company that its business could only be conducted by means of the credit given to it by the fact that the individual stockholders therein were personally liable for its debts." "(44) All the stock issued by the said American File Co., as aforesaid, has been paid in full, and nothing is due or owing to said company from the stockholders thereof on any of said stock; and the said American File Company is totally insolvent, and is not possessed of or entitled to any property whatsoever, and has long ceased to do any business whatsoever; and it would be costly and of no benefit whatsoever for your orators to institute or prosecute proceedings to recover from said corporation any of the moneys due and owing on said bonds and coupons and interest, by reason of the insolvency of said corporation; and the said company has no officer or representative residing in the state of Maryland, or within the reach of the process of this court."

Some time after the overruling of defendants' demurrers to this bill, in July, 1886, and after the filing of the answers of some of the defendants, in October, 1886, it was discovered and became known to both complainants and defendants that some of the averments in complainants' bill were not in fact true; that in fact the company had first, in the year 1863, established its manufactory in the village of Pawtucket, in the town of North Providence, and had continued established there until some time in the year 1869, when, having built new works in the town of Lincoln, it established its manufactory there; and it also became known that a certificate in conformity with the first section of the Rhode Island law, signed and sworn to by the president, treasurer, and clerk, and a majority of the directors, had been filed on January 19, 1864, in the clerk's office of the town of North Providence, where the manufactory was then established, certifying that the capital stock had been fixed at \$200,000, and had been actually paid in. These facts were set up in the answer of George S. Brown, filed 29th December, 1886, and adopted by other defendants. A general replication was filed by the complainants on 17th February, 1887, they having failed to amend, and electing to stand on their bill as filed.

The testimony has established that the \$200,000 of stock was actually paid in, and that the certificate filed January 19, 1864, was in compliance with the law. The allegation in the bill that the company never carried on business at any place other than Lincoln is not sustained, and the proof shows that it could not possibly be true that the Baltimore stockholders ever consented, as alleged in the bill, to the withholding of any certificates for the purpose of giving credit to the company by becoming individually liable for its debts. The proof does disclose that, during the period the stockholders were not contractually liable to creditors because the certificate required by section 1 had been duly filed, they were always penally liable under sections 11 and 12 because of the failure to file the annual certificates. If there were nothing more in the case than is disclosed by the allegations of the bill, which are denied

by the answers and disproved by the testimony, we think it would be evident that the bill should be dismissed, but it is contended on behalf of the complainants that the proof does still show facts upon which they are entitled to relief, and upon which the essential averments of the bill can be maintained. In the minute-book of the meetings of the stockholders of the company the following appears:

"PAWTUCKET, April 16th, 1868.

"The stockholders met according to agreement. Present: J. Y. Smith, John R. Brockett, W. F. Sayles, H. A. Thompson, A. Chambers, J. O. Starkweather; and the following gentlemen were duly represented by H. A. Thompson, viz.: H. Woods, Jr., Geo. S. Brown, Joseph Reynolds.

"Resolved, that the capital stock of the company be further increased to an amount not exceeding one hundred thousand dollars, and the directors are hereby authorized to issue new shares for that amount to the present stockholders at the rate of \$50 per share, provided the stockholders shall consent to such issue. Resolved, that the directors be fully empowered to carry into effect the resolutions passed at the meeting of stockholders held March 20th last, at such time, and in such manner, as may seem most expedient for the interests of the company." (This had reference to selling the real estate and buildings in Pawtucket, and procuring a less expensive property elsewhere.) "Resolved, that, whereas the affairs of this company have reached a point when it is absolutely necessary that the sum of \$50,000 shall be raised by sale of our stock, as already proposed, the Baltimore directors are requested to call the Baltimore stockholders together, to ascertain what proportion of the proposed increase of capital stock will be taken by them, and the Rhode Island directors are requested to pursue the same course in regard to the Rhode Island stockholders. Adjourned to meet on Thursday, April 30th, at 10 A. M.

Attest: W. F. SAYLES, Secty. *pro tem.*"

In accordance with this vote, stock to an amount \$17,500 less than \$100,000 of face value was issued, to be disposed of to stockholders at \$50 per share of \$100 par value. Mr. Chapman, a Baltimore stockholder, subsequently pledged himself that he would get the Baltimore stockholders to take their *pro ratu* proportion, and certificates were made out and dated October 14, 1868, and sent to him, as follows: George S. Brown, 60 shares; Henry A. Thompson, 30; Hiram Woods, Jr., 30; Joseph Reynolds, 35; Thomas J. Wilson, 20; Horace Love, 15; R. Norris, Jr., 10; A. A. Chapman, 245 shares. Many of these persons refused to accept the certificates, and declined to be subscribers for the stock. Mr. Chapman, in his testimony, says:

"Some of them took it, and some did not. Mr. Brown did not take his; I bought his entire interest out in the factory. Mr. Thompson and Mr. Woods took their stock. Mr. Reynolds took his. I am not positive whether Mr. Wilson took his or not. I know that Mr. Love did not take his, and Richard Norris did not take his."

The fact that the names appear on the stock register is entitled to but little weight, as the certificates were issued without previous authority, except from Mr. Chapman, who settled for it all with promissory notes of the company, which he had taken up and held. Arising out of the transactions connected with this vote to increase the capital stock from \$200,000 to \$300,000 many difficult questions have been presented and

argued at bar. In the first place, it is contended on behalf of the defendants that there never was any valid corporate act authorizing this increase of capital stock, because the meeting had not been properly called, and because a majority of the stockholders were not present or represented at the meeting which voted its issue. It is a fact which appears from the minutes that there was not a validly authorized representation of a majority of the stock. At this meeting of 16th April, 1868, assuming that Henry A. Thompson represented Allen A. Chapman's stock, which does not appear from the minutes, but probably was so because the proxy filed in the minute-book authorized Thompson to vote Chapman's stock as well as that of the other persons whom the minutes state he did represent, still there was not a majority of the 200 shares present, unless W. F. Sayles was authorized to represent and vote the \$36,000 of Taft stock. The testimony is very convincing that Sayles' only authority with respect to the Taft stock was either a verbal one or an assumed one. This stock was pledged to Sayles, and in his testimony he referred to the written agreement of pledge as containing his authority to vote it, but, when produced, the agreement, which is dated 12th March, 1868, is found to contain no such authority. The Rhode Island statute (section 24) specially enacts that the pledgeor and not the pledgee of stock shall have the right to vote it.

The filing of the certificate in the township of North Providence on July 19, 1864, ended the contractual individual liability of the stockholders under the first section of the law as to the debts thereafter contracted; and one question in this case is whether as to those who never took the new stock their individual liability was revived by the issuing of the new stock, supposing its issue to have been valid, and as to which no certificate was or could be filed. In construing a statute so harsh and so destructive of the very purposes of incorporation, it does not seem to us we should, if avoidable, give it a construction which would put it in the power of those holding a majority of the stock, many of them, perhaps, as was the fact in this case, themselves personally responsible by indorsement and otherwise for the bulk of the company's large indebtedness, by voting an increase of capital by the issue of partially paid up stock to impose a ruinous burden upon stockholders whose individual liability had once ended. The reasoning of the opinion of the court of appeals of New York in *Veeder v. Mudgett*, 95 N. Y. 295, is to us very convincing, and the judgment of that court upon a similar statute, but under which the stockholders could only be held to an amount equal to the par value of each one's stock, was that holders of the original stock were not liable, and that the liability rested solely upon the holders of the new stock, and only to the extent of their holdings of that new stock. But the question still remains whether any of the stockholders are to be held liable on account of the alleged increase of stock of this company? The charter of the American File Company provided that the capital should not exceed \$500,000, "to be fixed in amount by a vote of the company." The first section of the law speaks of "the whole amount of the capital stock fixed and limited by the charter of the company, or by a vote of

the company in pursuance of the charter or of law." The only reference to an increase is in the last clause of section 2 which says: "In case of increase of capital stock of said companies, like proceedings shall be had as to the amount added and paid in." It seems to us, reading the terms of the statute with the strictness which all courts have held such legislation demands, that the changing of the capital stock once fixed by a vote of the company must, in order to subject any of the stockholders to a liability so greatly in derogation of common right, be a change made by a valid corporate act. How far a stockholder would be estopped from setting up such invalidity as against a creditor who had been misled to his injury in dealing with the corporation on the faith of such invalid increase is a question which cannot arise in this case. The Garretts took the bonds of the company, issued in 1870, from Chapman, knowing nothing of the company, and making no inquiry, and the complainants themselves, or those they represent, were the active managers, officers, and directors of the company, and they were all liable in Rhode Island to the Garretts for this debt, without reference to the supposed increase of stock. They are not in the position of innocent creditors of the company, who might by any possibility have been misled to their injury with regard to the stock, assets, or solvency of the company. The company never paid any dividends, and this third issue of stock, so far as it was taken at all, was divided among certain of the old stockholders simply to relieve the company by converting a floating debt into stock. The company's indebtedness was not afterwards increased, and the bonds upon which the Garretts recovered judgment were issued to take up liabilities of the company then existing. So far as this case discloses, we see no ground upon which to found a suggestion that any innocent person who has dealt with the company could be injuriously affected by the proposed increase of capital stock being held invalid for want of a valid corporate vote authorizing its issue.

We think the complainants' bill must be dismissed as to the defendants generally upon the following grounds:

1. Because the allegations of the bill are not sustained by the proofs.
2. Because the contractual liability of the defendants, who are holders only of shares of the old \$200,000 of stock, was extinguished as to after-contracted debts by the filing of the certificate on the 19th July, 1864, with the town-clerk of North Providence, where the manufactory was then established, and was not revived by the subsequent increase of stock, even if valid.
3. Because, as the issue of stock in 1868 was not authorized by a valid corporate vote, it did not impose any liability under the first section of the Rhode Island law, even upon those of the defendants who accepted the new stock.
4. That therefore the liability under which the complainants were compellable to pay the bonds issued in 1870, held by the Garretts, was the penal liability for not filing the annual certificates under section 12, which could only be enforced in Rhode Island; and in respect to which these defendants cannot be called upon to contribute.

There are special defenses pleaded on behalf of certain of the defendants, which in our opinion are good, but the view we have taken of complainants' case makes it unnecessary to discuss them. The bill must be dismissed.

BOND, J., concurs.

MILLER v. CLARK *et al.*

(Circuit Court, D. Connecticut. October 5, 1889.)

1. GIFTS—INTER VIVOS.

C., a married woman, having some \$6,000 in her name in a savings bank, in accordance with a previously expressed intention directed the bank teller to transfer \$1,500 to each of three nieces, which he did, charging her account with \$4,500. On her desire that the bank-books should be so made that the money could not be drawn during her life, the teller indorsed on the pass-books: "Only Mrs. C. has power to draw." C. and her nieces wrote their names in the signature book, the word "Trustee" being added to that of C. by the teller. The books were given to C., who, during her life, declared that she was trustee as to this money for her nieces. The nieces accepted the gifts in the life-time of C. Held a valid gift *inter vivos*, and that, owing to the express declaration of trust by C., no cessation of control over the property given was necessary.

2. EVIDENCE—DECLARATIONS.

Evidence of declarations and acts of the donor at or about the time of the acceptance of the gift, showing her purpose in transferring the deposits to her nieces, was admissible.

In Equity.

James H. McMahon and J. M. Buckingham, for complainant.

W. L. Bennett and W. B. Stoddard, for defendants.

SHIPMAN, J. This is a bill in equity by one of the residuary legatees under the will of Irene Clark, deceased, to compel three of the defendants to deliver to the executor of said will three savings bank books alleged to be in their possession, and to compel the executor to receive said books, to inventory the deposits named therein as a part of the assets of said estate, and to collect the amount due thereon for the benefit of said estate. Mrs. Irene Clark, of Milford, Conn., died in April, 1887, leaving a last will, which was executed in November, 1881, by which, after a specific legacy to her husband, she gave all the rest of her personal estate to six nieces, Irene M. and Martha A. Buckingham, Emma J. and Mary Belle Clark, Ellen C. Platt, and Rosalie Merwin, to be equally divided between said persons; and appointed Alburtus N. Clark, the husband of said Emma J., her executor. At the time of her death she was from 76 to 78 years old, without children, the second wife of Bela Clark, to whom she was married late in life. Her living relatives were a sister and a brother, divers nephews and grand-nephews, nieces and grandnieces. Her personal property, besides a small amount of household goods and wearing apparel, amounted to \$7,509.83, mostly consisting of deposits in savings banks. On October 15, 1884, she had \$5,871 on deposit in the Connecticut Savings Bank, of New Haven. In

pursuance of a previously expressed intention, she went to said bank on said day, accompanied by Mrs. Nellie C. Platt, gave the teller her bank-book to be written up, and directed that \$1,500 should be transferred from her account to each one of the three defendants, Nellie C. Platt, Emma J. Clark, and Mary Belle Clark. This was done, and three new accounts were opened in the names of said three persons, whereby each was credited with \$1,500, and Mrs. Irene Clark's account was correspondingly reduced \$4,500. Three new pass-books were made out in the names of said three new depositors, and were given to Mrs. Irene Clark. She told the teller that she wanted to have the bank-books so fixed, or the entries so made, that the money should belong to the persons named, but so fixed that they could not draw it and spend it during her life. The teller thereupon entered upon the pass-books the words: "Only Mrs. Irene Clark has power to draw." The ledger accounts were in the names of said three persons. The said bank has a "signature book" so called, in which are entered the signatures of each depositor, and, when trust accounts are opened, the signatures of the trustee and of the *cestui que trust*. Other facts in regard to the depositor or the *cestui que trust* are also entered in this book for the purpose of identification. Mrs. Irene Clark on this day wrote her name in the signature book, to which the teller added, in writing, the word "Trustee," but it did not clearly appear when the word was written. Mrs. Platt wrote her name in the book opposite the number of her pass-book, and the two signatures were included in a bracket. The words, "Mrs. Clark only to draw," were also written in the margin by the teller. Blank slips for the other two donees to sign, and upon which to state the required facts, were given to Mrs. Clark. Upon her return to Milford, on that day, she showed the husband of Mrs. Platt the three bank-books, said that she had given the girls \$1,500 each, showed the two slips, and instructed him to have the two other nieces informed that they must be signed and returned to the bank. These slips she kept. In a few days the said two nieces were informed that their aunt had given to each a bank-book of \$1,500, and that she wanted them to come to her house and get some slips to sign and return to the bank. The slips were obtained, signed, and returned to the bank, and the portions containing the signatures of the *cestuis que trust* were pasted in the signature book, opposite the respective numbers of the books. The other facts were entered by the teller and some other clerk. After the signatures were pasted in the book,—but how long after did not appear,—the teller also wrote the words, "Mrs. Irene Clark, Trustee," below each signature, and the words, "Mrs. Clark only to draw," in the margin. The bank-books were retained by Mrs. Irene Clark until a short time before her death, when all the seven bank-books in which she was interested were intrusted by her to Mrs. Platt, for some purpose not known, and were, at the request of Mrs. Clark, returned to her three or four days before her death. This request to return was manifestly to satisfy and quiet her husband. Nothing has ever been drawn upon the three books in controversy, either as principal or interest. Other testimony in regard to the executed purpose of Mrs. Irene Clark to give the

three deposits of \$1,500 each to the said three persons, as declared by her after her return from New Haven and before the acceptance of the gifts by the absent nieces, and also about the time of and either before or soon after said acceptance, was given. Her executed and completed intention to give said deposits to the three donees, the actual gift, its consummation by an acceptance on their part, and her express declaration of trusteeship during her life, of the said moneys for the benefit of the named persons, were clearly proved. Her purpose to give the several sums so that the funds should belong to said parties, and to create a trusteeship thereof in herself during her life, was plainly declared at the bank, and was honestly, and, so far as appears, at the request of Mrs. Irene Clark only, attempted to be carried out by the teller in accordance with her wishes by the entries which he made upon the books of the bank and the pass-books.

The facts bring the case within any rule which has been laid down in regard to the validity of gifts *inter vivos*. The courts of last resort in Massachusetts and in New York differ from each other in regard to the absolute necessity of an acceptance of the gift of the donee, (*Gerrish v. Institution*, 128 Mass. 159; *Martin v. Funk*, 75 N. Y. 134;) but there can be no doubt that the donees in this case knew of and accepted the gifts. The authorities unitedly declare that the gift may be made by delivering to the donee, or by the creation of a trust in a third person, or in the donor; and that, where there is an express declaration of trust in the donor, the rule which requires cessation of control and dominion by the donor over the personal property which is given, is not applicable. *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Young v. Young*, 80 N. Y. 422; *Scott v. Bank*, 140 Mass. 157, 2 N. E. Rep. 925; *Minor v. Rogers*, 40 Conn. 512; *Boone v. Bank*, 84 N. Y. 83. Testimony in regard to the declarations and acts of the donor which were made or which took place before or about the time of the acceptance of the gifts, and which declared her purpose in transferring the deposits to the donees, was objected to. This species of testimony is wont to be admitted in this class of cases for the purpose of showing the intention of Mrs. Clark in making the transfer and holding the books, and of showing the character of said acts. *Scott v. Bank*, *supra*. These statements, being also against the interest of Mrs. Clark, and tending to prove the fact of the gift, are admissible. By the statute of Connecticut, in actions by or against the representatives of a deceased person, the entries, memoranda, and declarations of the deceased relevant to the matter in issue may be received as evidence. No testimony was given by any of the parties to the suit in regard to the acts or declarations of the donor. The complainant makes the point that, in case these transfers were gifts, they were in partial ademption or satisfaction of the residuary bequests under the will. Without stopping to consider the question whether the principle of the ademption of a general or specific legacy is applicable to the case of these residuary legatees, it is sufficient to say that the testimony proves the existence of an intent on the part of the testatrix that the gifts were to have no reference to the testamentary disposition of her property. Let the bill be dismissed.

CARRINGTON v. LENTZ *et al.*

(Circuit Court, E. D. Missouri, E. D. September 24, 1889.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASERS—EQUITABLE TITLE.

Complainant claimed land under deed from S., who was alleged to have bought it from the county. There was no direct evidence of a sale to S., but it appeared that the county had taxed the land, and he had paid the taxes; that in a book preserved in the office of the clerk, but not one of the records of the county, there was a statement of the sale to him; that in one of the official books there was an entry of money received from him in payment for the land; and it appeared from one certificate, signed by the register of the county, that the land had been sold to S., and from another, signed by the receiver of the county, that he had paid for it. Defendant afterwards bought the land from the county, but it was proven that he had access to all of the records, and had notice before the sale was completed that complainant claimed the property. *Held*, that the equitable title was in complainant, and defendant would be compelled to convey the legal title to him.

2. COSTS—REFUSAL TO DISCLOSE INTEREST.

The fact that a defendant holds a contract in respect to the land, and refuses to produce it, will justify a decree divesting him of all title, and subjecting him to costs with the other defendants.

3. WASTE—WHO IS LIABLE.

Though a defendant assisted in obtaining the title, yet, if he did not take part in, or receive benefit from, the waste to the property, damages will not be decreed against him.

In Equity. Bill to compel the conveyance of legal title.

William H. Clopton, for complainant.

E. R. Lentz, for defendants.

BREWER, C. J. In this case is a bill filed by complainant, alleging that he has the equitable title to a tract of land in Butler county; that the legal title is in defendants; and seeking to charge them as trustees for him; to compel the vesting of the legal title in him; to recover possession; and have an accounting for waste. The land is what is known as "swamp land." The defendant Potter obtained title from the county in 1887. Complainant insists that in 1857 one James Stunson bought and paid for the land. By the act of September 28, 1850, the swamp lands in Missouri were granted to the state of Missouri. 9 U. S. St. at Large, 519. By the act of the legislature of Missouri of March 3, 1851, (Laws 1851, p. 238,) and the act of February 23, 1853, (Laws 1852-53, p. 108,) the title to these lands passed to the county of Butler. So held by the supreme court of the state in *Linville v. Bohanan*, 60 Mo. 554, and *Mitchell v. Nodaway County*, 80 Mo. 264. By the act of March 1, 1855, (Laws Mo. 1854-55, p. 154,) the clerks of the several county courts were made *ex officio* registers, and the treasurers *ex officio* receivers, for the purpose of performing all duties in respect to the sale of swamp lands in their respective counties. By other statutes the counties were authorized to sell, and by an act of November 5, 1857, (Laws 1857, p. 258,) irregular sales were ratified.

Now, the first and pivotal question is whether Stunson bought and paid for these lands. There is no direct testimony of purchase or payment. Stunson is dead. It appears that the land was taxed by the county, and that Stunson, and those claiming under him, paid the taxes.

Of course the land, while it belonged to the county, was not taxable, and the fact that it was taxed, and the taxes paid by Stunson, is evidence that it had been sold, and sold to Stunson. There is found in the office of the county clerk of Butler county a book which is marked "Receiver's Register of Swamp Lands of Butler County, Missouri." I should judge from the testimony that it was not looked upon as one of the official county records, and yet it was preserved as a book of the office, and on that book is a statement of the sale, describing the lands, the purchaser, and the price. There is also in one of the official books of the county, (Record D,)—an entry of a receipt from James Stunson of warrants, \$240; and on the front leaf of that book is written, "Charges of money received for swamp lands;" and at the head of the first page is written, "Treasurer of Butler county, in account current on account of swamp-land funds of said county." There is also in the office of the state register of lands two certificates,—one signed by the register of that county, and the other by the receiver of the county; the one showing a sale to James Stunson of this land, and the other payment for this land. It is contended on the part of defendants that those certificates are not in form. They should have been simply receipts, as prescribed by the statute, instead of certificates. Be that as it may, these various records in the county offices and in the state land-office, coupled with the fact that the land was subjected to taxation, and taxes paid by James Stunson and those claiming under him, is satisfactory evidence of a sale to him, and, in the absence of all contradictory evidence, sufficient to prove that he bought and paid for the land as claimed. On the records of the county is to be found a deed from James Stunson to the father of the present complainant, and one from such grantee to the present complainant, so that there can be no question but that the equitable title to these lands passed from the county, through Mr. Stunson, to the complainant.

It is further insisted by the defendants that Mr. Potter is a *bona fide* purchaser without notice; that the entries in those books in the county clerk's office were not entries made by authority of statute, and therefore furnished no constructive notice; and that Mr. Potter in fact had no actual notice. There is testimony—contradicted, it is true, but testimony which commends itself to the consideration of the court—that some time before Mr. Potter purchased he was informed that this complainant owned the land, and was holding it for sale. All these entries on the books of the state land-office and on the books found in the county clerk's office, as well as the entry on the county clerk's official record, were within his reach, if he had been anxious to find whether there had been a prior sale. More than that, after the negotiations for a purchase, and before the deed was made to him, the county court was advised that the title was in this complainant. It thereupon rescinded the order of sale, and of that Mr. Potter unquestionably had information. Indeed he threatened the court with *mandamus* to compel a deed. We are clear that Mr. Potter does not stand in the position of a *bona fide* purchaser. He either knew of the outstanding equitable title, or was put in posses-

sion of information sufficient to compel an inquiry. The equitable title being in the complainant, and Potter having taken with notice of such equitable title as against him, complainant is entitled to a decree. Mr. Nasmith stands in no better position, for he simply furnished money to Mr. Potter, who acted in all things as his agent, and notice to the agent is notice to the principal.

Mr. Lentz files a disclaimer, and asks to be discharged with his costs. But he holds a contract from Mr. Potter in respect to part of the land. He refuses to produce such contract, and hence we are not advised of its provisions. But the fact that he holds some kind of a contract is sufficient to justify a decree against him divesting him of all title, and subjecting him, with the others, to the costs of this suit. A decree will go canceling the title held by all the defendants, and vesting it in the complainant, and directing, further, that the defendants deliver to the complainant, upon production of a copy of the decree of this court, within five days, possession of the land, and that, upon a failure to so deliver possession, a writ of assistance be issued to put him in possession.

With respect to the damages it appears that since his purchase Mr. Potter, for himself, his children, or his principal, has stripped the land of its timber. The value of the waste done is estimated differently by different witnesses. Mr. Lane, who was the agent of the complainant, says that there was about 295 acres of timber, and that the value of that timber was \$4 an acre. We do not think that this is a case in which the court ought to strain a point to relieve from responsibility, for it looks very much as though it was a scheme to get a semblance of title in order to strip the land of the timber. We think \$900 would be a fair amount of damages to charge against these defendants. So far as Mr. Lentz is concerned, while he was instrumental in obtaining the title from the county, yet that fact does not necessarily make him a participant in the waste done thereafter, and, unless he took part in such waste, or was to share in the profits therefrom, the mere fact that he assisted in obtaining the title does not make him responsible.

We are unable to see from the testimony that he has conducted himself in such manner as to be responsible for the destruction and carrying off of the timber. As to Mr. Lentz, the decree will be for possession, title, and costs, and as against the others, for possession, title, cost, and \$900 damages.

CONSOLIDATED ELECTRIC LIGHT CO. v. M'KEESPORT LIGHT CO.

(Circuit Court, W. D. Pennsylvania. October 5, 1889.)

1. PATENTS FOR INVENTIONS—ELECTRIC LIGHT CARBONS—EXTENT OF CLAIM.

The claims of letters patent granted May 12, 1885, to the Electro Dynamic Light Company, for improvements in electric lamps, (excluding the third claim, which was not in issue,) are substantially as follows: (1) A conductor of carbon, made of fibrous or textile material, and of an arched form; (2) a conductor of carbon, made of fibrous material, in an hermetically sealed chamber, without regard to form; (3) the combination of a conductor of carbon, made of fibrous or textile material, in an arched form, and the glass chamber, hermetically sealed, and deprived of carbon-consuming gas. *Held*, in view of the state of the art, and the evident necessities of the case, that these claims amounted to the broad claim of the exclusive use, in incandescing lamps, of all carbons made of fibrous or textile materials.

2. SAME.

Such a claim is void for want of novelty, in view of the fact that wood charcoal had previously been used for electric lighting in incandescent lamps.

3. SAME—AMENDMENT TO APPLICATION.

The original application of Sawyer & Man, filed January 9, 1880, for a patent for improvements in incandescing electric lamps, was evidently intended to secure only the arched form of the carbon burner; but in 1885, after Edison's inventions had been published to the world, the purpose of the application was changed to secure the use of all carbons made of fibrous material. *Held*, that such a change was not justifiable, and the claim based thereon is void.

4. SAME—INVENTION.

Held, further, from the evidence in the case, that Sawyer & Man did not invent a successful lamp, and did not discover the principle on which such a lamp could be made; but that the true principle for constructing such a lamp was described in the patents of Edison applied for in April, 1879, and November 4, 1879, and numbered 227,229, and 223,898, as exhibited in the filamental or thread-like conductors or burners, inclosed in a more perfect vacuum than had ever before been used.

In Equity. Bill for infringement of patent.

Edmund Wetmore, Thomas B. Kerr, Amos Broadnax, and John Dalzell, for complainant.

R. N. Dyer, B. F. Thurston, G. P. Lowry, W. R. Griffin, and Magnus Pflaum, for respondent.

BRADLEY, Justice. This is a bill for the alleged infringement of a patent, filed December 8, 1887, and the patent alleged to be infringed is dated May 12, 1885, and is for improvements in electric lamps. It was granted upon the application of William E. Sawyer and Albon Man, of New York, to their assignees, the Electro Dynamic Light Company, and by mesne assignments was transferred to the complainant, whose title commenced in October, 1882, before the patent was issued. The application for the patent was filed January 9, 1880, and the issue was delayed by various proceedings in the patent-office, including an interference with an application of Thomas A. Edison, which had been filed a month earlier, to-wit, December 11, 1879. Various defenses were set up in the answer, such as anticipation by prior inventors, vagueness of description, want of novelty and utility, undue change of specification after filing, surreptitious claim of an invention made by Edison, etc. It is conceded that the defense of the suit is conducted by the Edison Electric Light Company, a corporation of New York, which sells the lamps complained of as infringements of the patent, and is interested as assignee in

the patents, for electric lights formerly owned by the Edison Electric Light Company, and in the question of interference between Edison and the complainants. In the specification of the patent sued on, called "Sawyer and Man Patent," the invention is described as relating to that class of electric lamps employing an incandescent conductor, inclosed in a transparent, hermetically sealed vessel or chamber, from which oxygen is excluded, and constituting an improvement upon the apparatus shown in a previous patent granted to the same parties (Sawyer and Man) June 18, 1878, and numbered 205,144. It is further stated in the specification that the invention relates more especially to the incandescent conductor, its substance, its form, and its combination with the other elements composing the lamp; and that the improvement consists, first, of the combination in a lamp chamber, composed wholly of glass, as described in the said former patent, of an incandescent conductor of carbon, made from a vegetable fibrous material, in contradistinction to a similar conductor made from mineral or gas carbon, and also in the form of such conductor, combined in lighting circuit within the exhausted chamber of the lamp. The construction of the lamp is then described; reference being made to the drawings for illustration. The lamp as described and shown in the drawings is a glass cylinder, with rounded top, cemented at the bottom to a glass disk or plate, ground to fit closely to the cylinder, and the whole bottom inclosed in a cup filled with wax or suitable cement, to prevent, as far as possible, the access of atmospheric air. Two holes are made in the bottom of the lamp for the passage of the wires which convey the electric current into and out of the lamp. The carbon conductor within the glass cylinder is connected by its extremities to these two wires, respectively, in a mode specified in another patent of Sawyer and Man, dated December 10, 1878, and numbered 210,809, so as to constitute a part of the circuit; and having a low conductivity, and presenting a certain amount of resistance to the current of electricity, it becomes incandescent and highly luminous. If the carbon in this condition were exposed to atmospheric air, that is, to oxygen, it would be consumed by combustion. Hence another part of the combination necessary to the result consists in filling the lamp with nitrogen gas, or other gas, which prevents combustion, to the exclusion of atmospheric air. The mode of doing this is pointed out in the patent No. 205,144, before referred to. It is further stated, in the specifications, that in the practice of the invention the applicants had made use of carbonized paper, and also wood carbon; also that they had used conductors of different shapes, such as V-shaped, and with rectangular corners, but preferred the arch-shaped, as shown in the drawings. It is added that a description of the mode of making the illuminating carbon conductors described, "and making the subject-matter of this improvement," was unnecessary, as they could be made, by any one skilled in the art, by the ordinary well-known methods in practice. The specification then states the proposed practical advantages of the arched form of the conductor, by its permitting the carbon to expand and contract, and casting less shadow, and the advantage of making the wall of the lamp

wholly of glass, by its preventing oxidation, leakage, etc., and states particularly the advantages resulting from the manufacture of the carbon from vegetable fibrous or textile material, instead of mineral or gas carbon. "Among them," it says, "may be mentioned the convenience afforded for cutting and making the conductor in the desired form and size, the purity and equality of the carbon obtained, its susceptibility to tempering, both as to hardness and resistance, and its toughness and durability." "We have used," it is added, "such burners, inclosed in hermetically sealed, transparent chambers, in a vacuum, in nitrogen gas, and in hydrogen gas, but we have obtained the best results in a vacuum, or an attenuated atmosphere of nitrogen gas; the great *desideratum* being to exclude oxygen or other gases, capable of combining with carbon at high temperatures, from the incandescing chamber, as is well understood." The patent has four claims:

"(1) An incandescing conductor for an electric lamp, of carbonized fibrous or textile material, and of an arch or horseshoe shape, substantially as hereinbefore set forth. (2) The combination, substantially as hereinbefore set forth, of an electric circuit and an incandescing conductor of carbonized fibrous material, included in and forming part of said circuit, and a hermetically sealed chamber, in which the conductor is inclosed. (3) The incandescing conductor for an electric lamp, formed of carbonized paper, substantially as described. (4) An incandescing electric lamp, consisting of the following elements, in combination: *First*, an illuminating chamber, made wholly of glass, hermetically sealed, and out of which all carbon-consuming gas has been exhausted or driven; *second*, an electric circuit conductor passing through the glass wall of said chamber, and hermetically sealed therein, as described; *third*, an illuminating conductor in said circuit, and forming part thereof, within said chamber, consisting of carbon made from fibrous or textile material, having the form of an arch or loop, substantially as described, for the purpose specified."

The great question in this suit is whether the patent sued on is valid, so far as it involves a general claim for the use, in electric lamps, of incandescing carbon conductors, made of fibrous or textile substances. If it is, the complainant must prevail; if it is not, the bill must be dismissed. The claims of the patent (excluding the third claim, which the defendant does not use, and which is not involved in the case) may be summarized as follows: (1) A conductor of carbon, made of fibrous or textile material, and of an arched form; (2) a conductor of carbon, made of fibrous material, in an hermetically sealed chamber, without regard to form; (3) The combination of a conductor of carbon, made of fibrous or textile material, in an arched form, and the glass chamber, hermetically sealed, and deprived of carbon-consuming gas. The claim of the combination last named may be dismissed from consideration as a separate claim; because a glass chamber, hermetically sealed, for holding the light, has always been used, and must necessarily be used, in all incandescing carbon electric lamps. It was used by King in 1845, by Greener and Staite in 1846, by Roberts in 1852, by Konn in 1872, by Kosloff in 1875, and by others. Unless the patent is valid for the conductor of carbon, made of fibrous or textile material, in an arched form, it cannot be made valid by combining such conductor with a glass cham-

ber, hermetically sealed. We are equally of opinion that the giving of an arched form to the conductor was not new, and could not give to the claim any validity which it would not have as a broad claim of the conductor itself, made of carbon produced from a fibrous material. The arched or bent shape in incandescent conductors was applied in 1848 by Staite to an iridium conductor, in 1858 by Gardiner and Blossom to a platinum conductor, and in 1872 by Konn to a carbon conductor. In the last case the conductor was inclosed (as it had to be) in a glass lamp or case filled with nitrogen or other gas incapable of supporting combustion. The carbon, it is true, is presented in a V-shaped form; but in a similar patent, applied for a few weeks afterwards, claiming the same apparatus for the production of heat, the patentee very properly says: "It is evident that stems of other shapes may be used." If the U or V shaped form had not been given to carbons made in fibrous material, for incandescent light, before Sawyer and Man adopted that form, it was merely an application by them of an old device to a new and analogous use. But the carbons used by Konn included charcoal, as well as other carbons. He mentions graphite as preferable, but he claims the use of carbon generally. As before stated, therefore, the patent must be construed as making the broad claim to the use, in electric incandescing lamps, of all carbons made of fibrous or textile substances.

Is the patent valid for such a broad claim? The defendant contends that it is not—*First*, because no such invention was set forth in the original application, but was introduced for the first time more than four years after it was filed, and after the same material had been used by Edison, and claimed by him in an application for a patent; *secondly*, because Edison, and not Sawyer and Man, was really the original and first inventor of an incandescent conductor made of fibrous or textile material for an electric lamp; *thirdly*, because, if Edison was not the first inventor, the thing claimed as an invention was old, and neither of the parties was entitled to a patent for it. The whole vegetable kingdom is composed of fibrous material, and all carbon or charcoal made therefrom comes within the scope of the complainant's claim. Silk is fibrous or textile, and carbon made from silk thread is therefore within the claim. Mineral coal, and the carbon produced in gas-retorts, are not included. Can it possibly be said, when we look at the history of the art of electric lighting, that carbon made from fibrous or textile material was never used for that purpose until Sawyer and Man used it in 1878? We think not. We do not propose to describe in detail the various English patents of prior date which have been adduced in evidence. The word "charcoal," as well as "carbon," is constantly used to define the material from which the conductors were made; and that word, in the English language, *prima facie* refers to carbon or coal made of wood. We cannot yield our assent to the ingenious theory of the complainant's counsel, and some of their witnesses, that the word has come to have an artificial or technical meaning, in this particular art, signifying gas or mineral carbon. We think that carbon made from wood or other vegetable material is generally intended. In King's patent of 1845 he says:

"The nature of the invention consists in the application of continuous metallic and carbon conductors, intensely heated by the passage of a current of electricity to the purpose of illumination." "When carbon is used, it becomes necessary, on account of the affinity this substance has for oxygen at high temperature, to exclude from it air and moisture. To accomplish this in the most perfect manner, it should be inclosed in a Torricellian vacuum."

He does not confine himself to any particular kind of carbon. It is true, he does afterwards say: "That form of carbon found on the interior of coal-gas retorts which have long been used, is well suited for this purpose;" but his claim is general, for "the application of metallic and carbon conductors, intensely heated," etc., and the use of wood carbon would have infringed the patent. Greener and Staite, in their patent of 1846, in describing how they prepared the carbon for the incandescing stems in their lamps, say:

"We take a quantity of lamp-black, or of charcoal reduced to powder, or of coke reduced also to powder, which has been purified," etc. "The carbon thus highly purified we next bring into a state of great dryness, and then convert it into solid prisms, or into cylinders, both solid and hollow," etc.

The charcoal here referred to is clearly wood charcoal. Roberts, in his patent of 1852, says:

"Another part of my invention consists of a mode of obtaining electric light by passing a current of electricity through a thin piece of graphite, coke, or charcoal, or other infusible body, being a conductor of electricity, whilst it is inclosed in a vacuum, or space not containing any oxygen or other matter, which can cause the combustion or destruction of it, when brought into an incandescent state by the action of the current of electricity."

This certainly refers to wood charcoal. We have already alluded to Konn's patent of 1872, in which he claims carbon stems generally, arranged as specified in the patent, for giving incandescent light. We may add that, in the earliest experiments of Sir Humphrey Davy and others on the effects of the electric current in producing light in various substances, charcoal was one of the most frequent articles used for that purpose. Long prior to 1878 it was a well-known fact in science and the arts that the transmission of the electric current through a pencil of charcoal, interposed in a metallic circuit, would produce intense light; and that when this charcoal was guarded from contact with oxygen, in a vacuum or otherwise, it would not be consumed. This is fully verified, not only in scientific writings, but by the statements found in several of the patents referred to. The great *desideratum* was to construct an apparatus and to discover a process which would make the light economical and convenient of use for ordinary domestic purposes. We are clearly of opinion, therefore, that neither Sawyer and Man nor Edison can maintain any just claim to the exclusive use of charcoal generally, in any form, as an incandescing conductor in an electric lamp. This view of the subject is sufficient to decide the present case against the complainants. But there are other considerations which go to corroborate the conclusion to which we have come, which, however, we shall only cursorily examine.

It is very clear to us that, in the original application for the patent sued on, the applicants had no such object in view as that of claiming all carbon made from fibrous and textile substances as a conductor for an incandescing electric lamp. Nothing on which to base any such claim is disclosed in the original application. We have carefully compared it with the amended application, on which the patent was issued, and are fully satisfied that, after Edison's inventions on this subject had been published to the world, there was an entire change of base on the part of Sawyer and Man, and that the application was amended to give it an entirely different direction and purpose from what it had in its original form. It is true that the last claim of the original was for "an illuminating arc, made of carbonized fibrous or textile material." But this claim had special reference to the arched form of the conductor, rather than to the material of which it was composed. And this claim is the only expression in the application which even suggests any exclusive right to all vegetable carbons, or any invention or discovery in relation thereto. No advantage in the use of said carbon is anywhere alleged. The whole scope and purpose of the application related to the arched form of the conductor. A subsidiary purpose was to claim carbon made from paper or pasteboard. They say distinctly: "Our improvement consists in the employment of an incandescent arc of carbon in the circuit as the light-giving medium,"—"carbon" generally, not any particular carbon. By an adroit amendment made in 1885 they say: "Our improvement relates more especially to the incandescing conductor, its substance, its form, and its combination with the other elements composing the lamp." The purpose of this amendment is obvious, and needs no comment. After explaining the drawings, the original application goes on to say:

"Our improved burner or incandescent arc consists of an arch-shaped or semi-cylindrical piece of carbon, A, mounted in its clamps or supports in the usual well-known ways. We have tried carbonized paper covered with powdered plumbago, wood carbon, or charcoal, and ordinary gas carbon. We have also used such arcs or burners of various shapes, such as pieces with their lower ends secured to their respective supports, and with their upper ends united, so as to form an inverted V-shaped burner. We have also used arcs of varying contour, that is, with rectangular bends, instead of curvilinear ones, but prefer the arch-shaped, as the shadow cast by such a burner is less than that produced by other forms of burners. We have used such burners in close transparent chambers, in a vacuum, in nitrogen gas, and in hydrogen gas, but have attained the best results in a vacuum or attenuated atmosphere of nitrogen; the great *desideratum* being to exclude oxygen from the combustion chamber, as is well understood. The operation of our improved apparatus will readily be understood from the foregoing description."

Then come the claims, as follows:

"*First*, incandescing arcs for electric lights, made of carbon, substantially as hereinbefore set forth; *second*, incandescing arcs of carbon, in combination with the circuit of an electric light; *third*, the combination, substantially as hereinbefore set forth, of the circuit of an electric light, an incandescing arc of carbonized paper, included in the circuit, and a close transparent chamber

in which the arc is inclosed; *fourth*, an incandescing arc, made of carbonized fibrous or textile material."

This is the whole of the original application, except the formal introduction. The arc is everything. The changes are rung on the arc. The fact is that Sawyer and Man were unconscious that the arc was not new, and supposed that they could get a patent for it; but, as their eyes were opened, they changed about, and amended their application, and made the material of the conductor the great object,—carbon made from fibrous or textile material. Compare the original with the amended application, as first stated in this opinion, and this purpose most obviously appears. The carbons mentioned in the original application are merely mentioned by the way, to show that the arched form would apply to all kinds of carbon. "We have tried carbonized paper, covered with powdered plumbago, wood carbon, and ordinary gas carbon." This is changed in the amended application to the words: "In the practice of our invention, we have made use of carbonized paper, and also wood carbon." The object of this change is manifest. In other parts of the amended specification the importance of vegetable carbon, as distinguished from gas carbon, is dwelt upon. Thus they say in a former paragraph:

"Our improvement consists, first, of the combination in a lamp chamber composed wholly of glass, and described in patent No. 205,144, of an incandescing conductor of carbon, made from a vegetable fibrous material, in contradistinction to a similar conductor made from mineral or gas carbon, and also in the form of such conductors, so made from such vegetable carbon, and combined in the lighting circuit within the exhausted chamber of the lamp."

The fact that the whole object of the application was changed is evinced by the correspondence of the parties. In a letter from William B. Baldwin, one of the attorneys of the applicants for the patent, to his clients, the Electro Dynamic Light Company, (who then owned the interest in the invention,) dated January 8, 1880, he says:

"I have this day prepared an application for patent of arched form of an incandescent carbon electric lamp, made by Wm. E. Sawyer and Albon Man, as joint inventors, containing a request for the issuing of such patent to your company, etc. I will not make any alteration in the claims or specification of said patent, enlarging its scope beyond its intended purpose of covering the arched or angular form of the carbon used for incandescent electric lights."

In a letter from Albon Man, one of the applicants for the patent, to a Mr. Cheever, dated December 12, 1880, he says:

"I have received your two notes of 11th inst., inclosing letter from the patent-office, advising Messrs. Baldwin, Hopkins, and Payton of substitution of Mr. Broadnax as attorney in carbon arch matter."

This had relation to the application in question; Baldwin, Hopkins & Payton being the solicitors in the case, and Mr. Broadnax being substituted in their place. "Carbon arch matter" are words that could hardly be more suggestive. As before stated, Edison had filed an application for a patent in December, 1879, about a month prior to the application in question; and in September, 1880, an interference was declared be-

tween the two applications. The controversy raised on this interference related principally to carbon made from paper, which Edison claimed in his application. The case was not finally decided until the beginning of 1885. Mr. Broadnax was examined as a witness in this suit, and testified as follows:

"After the decision of the commissioner of patents of the interference, awarding priority of invention to Sawyer and Man, I resumed the prosecution of the application, insisting upon our right to the claims that had been once rejected by the examiner, among which was one for the U-shaped or loop-carbon illuminant. My attention was then called for the first time by the examiner to the British patent of Konn, in which is shown an arch-shaped carbon illuminant, and which, as I thought, anticipated broadly the claim for the U-shaped or arch-shaped carbon illuminant; and then, in the discussion of the case with the examiner, my attention was called to the patentability of the fibrous carbon illuminant, as such, on account of the properties such carbon possessed, which made it available for electric lighting above all other carbons."

Being asked when this was, he said it followed soon after the decision of the commissioner of patents upon the question of priority, or as soon as he could, in the ordinary course, get the case before the primary examiner again. His best recollection was that it occurred in February, 1885. This testimony of Mr. Broadnax, which is undoubtedly to be relied on, in connection with the letter just quoted, shows that the idea of claiming carbons made from fibrous and textile materials was an after-thought, and was no part of the purpose of the original application. The amendments relating to this new and broad claim were made afterwards, in February and March, 1885. We are of opinion that the changes made in the application in this regard were not justifiable, and that the claim in question cannot be sustained.

There are other aspects of the case, to which we might refer, which operate strongly against the claim of the complainants. We are not at all satisfied that Sawyer and Man ever made, and reduced to practical operation, any such invention as is set forth and claimed in the patent in suit. Their principal experiments were made in 1878, and perhaps the beginning of 1879. The evidence as to what they accomplished in the construction of electric lamps is so contradictory and suspicious that we can with difficulty give credence to the conclusions sought to be drawn from it. We are not satisfied that they ever produced an electric lamp with a burner of carbon made from fibrous material, or any material, which was a success. During the year referred to, 1878, and the beginning of 1879, they applied for and obtained ten different patents (besides an English patent) on the subject of electric lamps; but not one of them contains a suggestion or a hint of any such invention as is claimed in the patent in suit, which was not applied for until 1880. They all relate to lamps with straight pencil burners, generally of carbon, but without any preference given to one kind of carbon over another. The application for the patent in suit was not made until January, 1880,—nearly or quite a year after all their experiments had ceased, and after the inventions of Edison had been published to the

world. One cannot read the patents before applied for by Sawyer and Man, with all their detail of apparatus and process for constructing and managing the straight stem conductors, without distinction of carbons,—apparatus and processes, many of which would be needless in the lamp now claimed,—without indulging some degree of astonishment at the pains and ingenuity gratuitously expended or wasted, if it was true that, all the time, they had in their possession a secret invention which would take the place of those complicated contrivances. The explanations made by the complainants for the delay in applying for the patent in suit fail to satisfy our minds that Sawyer and Man, or their assignees for them, have not sought to obtain a patent to which they were not legitimately entitled. But suppose it to be true, as the supposed inventors and some of the other witnesses testify, that they did in 1878 construct some lamps with burners of carbon made of fibrous material, and of an arched shape, which continued to give light for days or weeks or months, still, were they a successful invention? Would any one purchase or touch them now? Did they not lack an essential ingredient which was necessary to their adoption and use? Did they go any further in principle, if they did in degree, than did other lamps which had been constructed before? It seems to us that they were following a wrong principle,—the principle of small resistance in an incandescing conductor, and a strong current of electricity; and that the great discovery in the art was that of adopting high resistance in the conductor, with a small illuminating surface, and a corresponding diminution in the strength of the current. This was accomplished by Edison in his filamental, thread-like conductors, rendered practicable by the perfection of the vacuum in the globe of the lamp. He abandoned the old method of making the globe in separate pieces, cemented together, and adopted a globe of one entire piece of glass, into which he introduced small platinum conductors, fastened by fusion of the glass around them; thus being able to procure and maintain, perhaps, the most perfect vacuum known in the arts. In such a vacuum the slender filaments of carbon, attenuated to the last degree of fineness, may be maintained in a state of incandescence, without deterioration, for an indefinite time, and with a small expenditure of electric force. This was really the grand discovery in the art of electric lighting, without which it could not have become a practical art for the purposes of general use in houses and cities. It is unimportant to trace the various steps by which this great discovery was arrived at. It is well indicated and shown in Edison's patent applied for in April, 1879, and issued May 4, 1880, No. 227,229, and is more fully described in that which he applied for November 4, 1879, and issued January 27, 1880, No. 223,898. An extract from the latter will serve to explain the principles of this invention. Edison there says:

"Heretofore light by incandescence has been obtained from rods of carbon of one to four ohms resistance, placed in closed vessels, in which the atmospheric air has been replaced by gases that do not combine chemically with carbon. The vessel holding the burner has been composed of glass, cemented

to a metallic base. The connection between the leading wires and the carbon has been obtained by clamping the carbon to the metal. The leading wires have always been large, so that their resistance shall be many times less than the burner, and, in general, the attempts of previous persons have been to reduce the resistance of the carbon rod. The disadvantages of following this practice are that a lamp having but one to four ohms resistance cannot be worked in great numbers in multiple arc without the employment of main conductors of enormous dimensions. That, owing to the low resistance of the lamp, the leading wires must be of large dimensions and good conductors, and a glass globe cannot be kept tight at the place where the wires pass in and are cemented; hence the carbon is consumed, because there must be almost a perfect vacuum to render the carbon stable, especially when such carbon is small in mass, and high in electrical resistance. The use of a gas in the receiver at the atmospheric pressure, although not attacking the carbon, serves to destroy it in time by air-washing, or the attrition produced by the rapid passage of the air over the slightly coherent, highly heated surface of the carbon. I have reversed this practice. I have discovered that even a cotton thread, properly carbonized, and placed in a sealed glass bulb, exhausted to one-millionth of an atmosphere, offers from 100 to 500 ohms resistance to the passage of the current, and that it is absolutely stable at very high temperatures; that if the thread be coiled as a spiral, and carbonized, or if any fibrous vegetable substance which will leave a carbon residue after heating in a closed chamber be so coiled, it offers as much as 2,000 ohms resistance, without presenting a radiating surface greater than three-sixteenths of an inch; that, if such fibrous material be rubbed with a plastic composed of lamp-black and tar, its resistance may be made high or low, according to the amount of lamp-black placed upon it; that carbon filaments may be made by a combination of tar and lamp-black, the latter being previously ignited in a closed crucible for several hours, and afterwards moistened and kneaded until it assumes the consistency of thick putty. Small pieces of this material may be rolled out in the form of wire as small as seven one-thousandths of an inch in diameter, and over a foot in length, and the same may be coated with a non-conducting, non-carbonizing substance, and wound on a bobbin, or as a spiral, and the tar carbonized in a closed chamber by subjecting it to high heat, the spiral after carbonization retaining its form. All these forms are fragile, and cannot be clamped to the leading wires with sufficient force to insure good contact and prevent heating. I have discovered that if platinum wires are used, and the plastic lamp-black and tar material be moulded around it, in the act of carbonization, there is an intimate union by combination and by pressure between the carbon and platina, and nearly perfect contact is obtained without the necessity of clamps; hence the burner and the leading wires are connected to the carbon, ready to be placed in the vacuum bulb. When fibrous material is used, the plastic lamp-black and tar are used to secure it to a platina before carbonizing. By using the carbon wire of such high resistance, I am enabled to use fine platinum wires for leading wires, as they will have a small resistance compared with the burners, and hence will not heat and crack the sealed vacuum bulb. Platina can only be used, as its expansion is nearly the same as that of glass. * * * I have carbonized and used cotton and linen thread, wood splints, papers coiled in various ways; also lamp-black, plumbago, and carbon in various forms mixed with tar, and kneaded so that the same may be rolled out into wires of various lengths and diameters. Each wire, however, is to be uniform in size throughout."

The first claim of this patent is for an electric lamp for giving light by incandescence, consisting of a filament of carbon of high resistance, made as described, and secured to metallic wires, as set forth. The

second claim is the combination of such filaments with the receiver, made entirely of glass. Of course, the form of the filament in the receiver or globe may be varied at pleasure. It may be in the shape of a coil, or of a horseshoe, or it may be wound on a bobbin. All these forms are old. The principal and great thing described is the attenuated filament, and its inclosure in a perfect vacuum. There may be a preference of materials from which the filament is made. Practice will evolve all these collateral advantages. We think we are not mistaken in saying that, but for this discovery, electric lighting would never have become a fact. We have supposed it to be the discovery of Edison, because he has a patent for it. This may not be the case. It may be the discovery of some other person; but, whoever discovered it, it is undoubtedly the great discovery in the art of practical lighting by electricity. We have given a more detailed account of it, in order to illustrate what we mean, when we raise the question whether the claimed inventions of Sawyer and Man were ever successful. They may have made a lamp that would burn; but was it a success, or was it a failure? Did it ever go into use? What was the object of all the experiments made by them and others? Was it not to make an electric lamp that could be successfully used by the public, and have a commercial value? Did they succeed in making such a lamp, or in finding out the principle on which it could be made? We do not so read the evidence. The bill must be dismissed.

KELIHER v. THE NEBO.

(District Court, S. D. New York. July 5, 1889.)

SHIPPING—LIABILITY OF VESSEL FOR TORT.

A cross-beam belonging to the ship N., and supporting a platform, made under orders of the mate, at request of the stevedore, to aid in discharging the cargo, broke from being overweighted, seriously injuring one of the men. The captain, knowing the beam to be weak, or without sufficient support, claimed to have cautioned the men not to put too much weight on it. *Held*, that the ship was liable; that her officers had no right to thus authorize the use of the defective beam, but should have stopped further loading of cargo on it. Damages assessed by the court at \$1,250, with costs.

(Syllabus by the Court.)

In Admiralty. Libel for personal injuries.

James Hillhouse, for libellant.

E. B. Converse, for claimant.

BROWN, J. I have carefully considered the evidence in the above case. I cannot regard the defense interposed by the master, or his testimony in support of it, as characterized by either good faith or credibility to but a very limited extent. The proof puts it beyond question that the cross-beam was shipped under the orders of the mate, by the ship's carpenter and seamen, and by them only; and that the mate's order was given, on the request

of the stevedore, to make a platform for use in stowing the cargo. And yet the answer, (paragraph 9,) sworn to by the captain, says that the stevedore rigged his platform "without authority from the officers of the ship, or any of them, and solely for his own convenience." Alleged cautions from the mate to the men at work on the platform are testified to, but the mate was not sworn, and all the stevedore's men deny any such cautions. The captain swears that about half an hour before the accident he looked down the main hatch and saw a lot of stuff on the platform, and said to the men: "That beam is not put there to keep all that weight up. It has no support underneath, and I would advise you to put that cargo in the between-decks;" and that the men answered, they thought it would stand the few more slings that were on the dock; on which he went to his cabin without any further reply. The captain further says in reference to stowing near the beam that the practice was to "fill up the lower hold until we could stand on the top of the cargo and ship the beam; then we would fill up the hold, but we would take care never to put any weight on that beam." If this last piece of testimony is to be credited, it must mean that that beam was not fit to bear much, if any, weight; otherwise they certainly would not take care never to put any weight on it. And yet the mate caused the beam to be shipped for use in stowing the cargo, whether temporarily or permanently was of no consequence; and the captain, after his alleged caution to the men, which they deny, walked to his cabin, acquiescing virtually in the men's putting a few more slings on it, when, as he said, it was already heavily weighted. If the beam was known to be weak, or without sufficient support, neither the mate nor the master had any right to authorize its use for a platform to hold cargo; and, having done so, the ship cannot be exempted from liability simply because they advised the men not to put too much on it, if they did so advise them. The men had no means of knowing or testing its strength. If the master believed that there was too much weight there, it was his business to stop the further loading of it; but the inconsistencies of the defense make it impossible to accept the master's version, in view of the extent to which he is contradicted.

I find it difficult to determine the extent of the libelant's injuries. I do not think a case of *paralysis agitans* is fairly established. I award the libelant \$1,250, with costs.

HAKES v. BURNS *et al.*

(Circuit Court, D. Colorado. October 1, 1889.)

1. REMOVAL OF CAUSES—CITIZENSHIP.

A sheriff levied on a stock of goods sold by a failing debtor to one H., who afterwards replevied the goods from the sheriff in the state court. In the replevin suit a verdict was rendered in favor of H., which the court set aside. One of the attaching creditors was added, on request, to the sheriff, as a party defendant, and asked a removal to the federal court, on account of citizenship. *Held*, that the application, after one trial, in which the creditor was represented by the sheriff, came too late, when the new trial was to be on the same issues and questions.

2. SAME—LOCAL PREJUDICE.

An affidavit, made by an agent, for removal on account of prejudice, under the act of congress of 1887, is insufficient, which alleges that "I have reason to believe" in the existence of prejudice, and does not cause the prejudice to "be made to appear to the court."

At Law. Motion to file transcript of cause as on removal from the state court.

Caldwell Yeaman, for plaintiff.

J. F. Merryman, for defendant.

BREWER, J. The question in this case is one of removal. The facts are these:

On June 29, 1888, John Davis, a merchant in Trinidad, Colo., made a bill of sale of his entire stock to the plaintiff, W. H. Hakes. He was largely indebted to his creditors, the Trinidad National Bank and N. K. Fairbank & Company. Immediately thereafter, these creditors commenced suit, and levied attachments upon the stock; the bank levy being prior in time. Under these attachment writs, defendant W. T. Burns, as sheriff, seized the property, and held it until July 21, 1888, when Hakes commenced a replevin suit. It is claimed that the Trinidad National Bank, the first attaching creditor, entered into a conspiracy with Hakes, with a view of appropriating all of the property to the satisfaction of its debt, leaving nothing for Fairbank & Company, although the property was sufficient to pay both claims. Burns, the sheriff, filed answer; and the case, as a suit between Hakes and Burns, went to trial in the latter part of December, 1888, and a verdict was returned in favor of Hakes, which was set aside by the judge on the 4th of January, 1889. On the 20th day of July, 1889, Fairbank & Company presented an intervening petition, stating that they were the real parties in interest; that the defendant Burns, sheriff, was only a nominal party; and asking to be substituted in lieu of defendant Burns. On this application, the court made an order allowing them to intervene, and be made party defendant with the sheriff, Burns, but refused to substitute. Immediately thereafter they filed a petition for removal to this court, on the ground of diverse citizenship and local prejudice. The state court declined to grant a removal; and, under the rule in force in this district, the clerk of this court will not file removal papers, in such a case, without an order of the judge. That order is now asked for.

I think the action of the state court correct, and that the petitioners are not entitled to a removal. So far as the matter of citizenship is concerned, the application is not in time. There had been one trial of the issues; and it is immaterial whether Burns, the sheriff, was a substantial, or only a nominal, party. It is claimed that he was only a nominal party; but, if so, he represented Fairbank & Company; and with him, as such representative, one trial has been had. The introduction of Fairbank & Company as a party defendant presents no new question for trial. There is no new and independent right asserted; and as Burns, their representative, could not, after answer and one trial, obtain a removal on the ground of diverse citizenship, neither can they, by being made a party after the first trial. Whatever might be the rule if an intervenor presented some new and independent interest or question, when he simply comes in to carry on the litigation over the same issues and questions he acquires no right of removal different from that possessed by him who had been carrying on the litigation as his representative. The application for removal on the ground of diverse citizenship came too late. Parties cannot experiment on the result of litigation in the state court, and, finding it unfavorable, then, for the first time, seek a removal into the federal court. Neither can the application be sustained on the ground of local prejudice. The affidavit made by an agent is insufficient. This is its language: "I have reason to believe, and do believe, that, from prejudice and local influence, the petitioner, N. K. Fairbank & Company, will not obtain justice," etc. It is an affidavit which, if made by a petitioner himself, would have been sufficient under the law of 1867; but the law of 1887 has changed the rule. *Short v. Railway Co.*, 34 Fed. Rep. 225. Now, there must be a positive affidavit. The court is to be satisfied; or, in the language of the act, it must "be made to appear to the court." I considered this question in the case of *Short v. Railway Co.*, *supra*, and it is unnecessary to add anything to what was there said. For these reasons the application now presented will be denied.

SPIES v. CHICAGO & E. I. R. Co.

(Circuit Court, S. D. New York. October 10, 1889.)

1. RAILROAD COMPANIES—BONDS AND MORTGAGES—INCOME MORTGAGE.

An income mortgage, made by a railway company, conveyed, as security to the bondholders, several lines of railroad running between specified termini, constituting the company's system of roads, and pledged the net earnings of this system of lines as security for the payment of annual interest. The mortgage provided that in each year during the currency of the bonds the board of directors should ascertain, fix, and declare what amount of net earnings had been made during the fiscal year applicable to the payment of interest on the bonds; that in such ascertainment there should be deducted from the gross income the operating expenses, taxes, interest, together with such expenditures for renewals, repairs, and betterments as might be requisite to maintain the line of railroad and its appendages in a first-class condition; that after deducting such expenses the board of directors should thereupon "fix, establish, and adjudge" whether any, and if so how much, net income existed applicable to the interest upon the bonds; that if, on such as-

certainment, the board of directors should adjudge no net income had been realized during the year applicable to such interest, their adjudication should be final and conclusive as an award, and bar any claim of any bondholder for interest for such year; that, if they should adjudge a specific sum to be applicable out of the earnings as interest, such interest should be allowed and paid; and that no right of action should exist in favor of any bondholder for interest until the same should first be adjudged and awarded as aforesaid. Subsequent to the execution of the mortgage, the railway company acquired additional lines of railway. Distinct accounts were not kept of the income of the original lines, but the earnings and expenses of those lines and of the new lines conjointly were kept as a single account. The board of directors, without endeavoring to ascertain whether net income had been earned by the original lines, resolved that no income had been earned applicable to interest. In an action brought by a bondholder, alleging that interest was payable, for an accounting, *held*, (1) that the lines specifically described in the mortgage constituted the income fund pledged to the bondholders; (2) that it was the duty of the company to keep a separate account of earnings and expenses of these lines, and of the board of directors to make an ascertainment annually whether income had been earned; (3) that the company could not charge against the income of the original lines the expenses or losses incurred in operating the new lines; (4) that the fact that no award of interest had been made by the board of directors was not a defense to the action.

2. SAME—FRAUD OF DIRECTORS—PLEADING.

The bill filed by the holder of income bonds charged that the directors, in order to make him exchange his bonds for certain consol bonds, willfully made a fictitious, false, and fraudulent ascertainment of the income earned, and fraudulently adjudged that no income applicable to interest had been earned; and it appearing that the directors erroneously, but in good faith, made the ascertainment by mingling the accounts of the original railway lines mortgaged with those subsequently acquired, *held*, the bill should be dismissed, because the complainant, having alleged a case of fraud, cannot be permitted to support his case on any other ground.

In Equity. On bill for an account.

For report of opinion on demurrer, see 30 Fed. Rep. 397.

John W. Weed, for complainant.

Austen G. Fox, for defendant.

WALLACE, J. The cause has been brought to hearing upon bill and answer, with a stipulation admitting that the complainant's title to the bonds which are the foundation of his claim is to be deemed as established by the pleadings. The complainant is the owner of certain income bonds secured by a mortgage executed in 1877 by the defendant, pledging the net earnings of its line of railway for the payment of interest. The mortgage includes "all and singular the line of railways belonging or hereafter to belong to the party of the first part, and extending from Chicago, Cook county, Ill., through the counties of Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, together with a branch from Bismarck's Junction easterly through Warren and Fountain counties, Ind., to Snoddy's Mills, and its equipments and appendages, and the net income thereof." The bonds are conditioned for the payment of such interest on the principal, not to exceed 7 per cent. for any one year, as shall be declared and fixed by the board of directors in each year in accordance with the mortgage. The mortgage provides that in each year during the currency of the bonds, beginning with the year 1878, the board of directors shall in the month of October ascertain, fix, and declare what amount of net earnings has been made during the preceding fiscal year ending the 1st day of September, and is justly applicable to the payment of interest on such issue of income bonds; and in such ascertainment of net earnings there shall be deducted from the gross

income all operating expenses, taxes, insurance, liability for either interest or sinking fund on any of the existing bonds of the company, necessary rentals, and purchase or hire of equipments, together with such expenditures for renewals, repairs, and betterments as may be proper and requisite to maintain the line of railroad and its appendages in a first-class condition for effective service; and that, after deducting all such payments, expenses, and liabilities from the amount of gross income received during the year, the board of directors shall thereupon fix, establish, and adjudge whether any, and, if so, how much, net income exists which is applicable to the payment of interest on the said issue of income bonds. The mortgage further provides that if on such ascertainment the board of directors adjudge that no net income has been realized during the year applicable to such interest payment, they shall thereupon enter a resolve to that effect on the journal of their proceedings, and the adjudication shall be final and conclusive as an award, and shall operate as a perpetual bar against any claim or demand of any holder of such income bonds for the payment of interest for such year; and that, if the said board shall, on such ascertainment of net earnings, adjudge that a specific sum is available out of the net earnings for such interest payment, then a resolve shall be entered in their minute of proceedings in the nature of a final and conclusive award, fixing and declaring what ascertained sum is properly available out of that year's net earnings for the payment of interest on such income bonds, and the payment or rate of interest to be allowed and paid. The mortgage further provides that no right of action shall exist in favor of any holder of such income bonds for any alleged liability for interest, until the same shall first be adjudged and awarded as aforesaid. The bill alleges that prior to September 1, 1883, interest on the bonds had been ascertained and declared by the board of directors, and duly paid to the holders of the bonds; but that thereafter the defendants and its officers and board of directors conspired to fraudulently compel the complainant and other holders of said income bonds to surrender the same, and exchange them for consol bonds subsequently created, and to fraudulently withhold at first a portion and then the whole of the net earnings which were properly payable upon said bonds; and with a view to carrying this evil design into effect they willfully, maliciously, and fraudulently failed to make any true ascertainment in the month of October, 1884, or in the month of October, 1885, of the net earnings for the preceding fiscal year, and willfully made a fictitious, false, and fraudulent ascertainment of the same, whereby they sought to make it appear that nothing had been earned on account of such interest; and that the officers and board of directors well knew at the time of each of said pretended ascertainments that the net earnings, if the same had been ascertained in the manner prescribed by the mortgage, were more than sufficient to have paid 7 per cent. interest upon the principal of said bonds. The bill then sets out what devices were resorted to by the board of directors to cover up and defraud the holders of income bonds out of the net earnings properly applicable to interest thereon,—among others, the mingling of the

accounts of the division of the railway covered by the mortgage with the accounts of consolidated, constructed, and leased lines acquired by the defendant after the execution of the mortgage, including charges for additional equipment for the new lines. The answer fully meets and denies all the averments of fraud and conspiracy, but it admits that separate accounts have not been kept by the defendant of the net earnings of the original lines; that the accounts of the earnings and expenses of these lines and those subsequently acquired have been mingled together; and that the board of directors did not attempt to make any ascertainment in 1884 or 1885 of the net earnings of the original lines. It appears by the bill and answer that the new lines built, acquired, or leased by the defendant embrace a large mileage, and have cost the defendant a large sum of money; and that in June, 1884, the defendant issued consol bonds bearing interest at 6 per cent. per annum, secured by a mortgage upon its property, which have been used in part to pay for the new lines and their equipment, and has used part of its earnings to pay interest thereon. The bill prays for an accounting, and a decree for the payment of what is ascertained to be due from the defendant.

When the case was before the court on a former occasion upon a demurrer for want of equity, and alleging that the trustee named in the income mortgage was a necessary party, the demurrer was overruled by Judge WHEELER, (30 Fed. Rep. 397.) The questions then considered and decided adversely to the defendant cannot be appropriately reconsidered now. It must be held, therefore, for present purposes, that the complainant is entitled to the relief sought, unless the material averments of the bill are sufficiently met and denied by the answer.

Under the terms of the income mortgage it was the duty of the defendant to keep an account of the earnings, expenses, and net income of the lines included in the mortgage, as distinct from those subsequently acquired. The granting clause in the mortgage subjecting to the lien the "line of railway belonging or hereafter to belong" to the defendant is qualified by the description of the line which follows it; and the words "hereafter to belong" refer to such lines between the specified termini as the company did not then own,—like the road from Chicago to Dalton then leased by the company, and constituting the link by which its line of railway extended from Chicago to Danville. If the mortgage provides expressly or by implication that the board of directors are to set apart the income of the railway lines particularly described for the payment of the maturing interest upon the bonds, the bondholders are entitled to that income; and their pledge is not to be transmuted from one upon the earnings of a particular line of railway to one upon the earnings of a system of which the line may be a part. This would dilute their security upon a designated fund into a nebulous lien upon the profits of such new enterprises as the corporation might see fit to undertake. The terms of the mortgage are that in ascertaining net earnings there is to be deducted from gross income expenditures or liabilities for ordinary expenses, interest, or sinking-fund requirements, and for renewals, repairs, and betterments requisite to maintain the line of railroad in a first-class condi-

tion. All this detail of specification would be unnecessary, if the mortgage were not intended to define carefully what expenses and liabilities may be treated as an offset to gross income, and limit the offset to those incurred in the operation and improvement of the particular lines described. Within this limitation the amount that may be appropriated for the specified objects, and the manner in which the railway lines may be managed, are matters resting exclusively in the discretion and good faith of the directors.

An income railway mortgage, although it is a pledge of tangible property for the payment of the principal sum, is, as a security for the payment of interest, but little more than the pledge of the good faith of the company in managing its lines. It necessarily contemplates that such improvements as seem necessary to the efficient use and operation of such property, and such alterations in the *corpus* as appear desirable, are to be made, at the discretion of the directors; and unless it contains some limitations upon the powers of the directors, express or implied, the right of the company to conduct its operations as it may see fit, subject only to the conditions of its organic law, is unqualified; and consequently the company can lawfully extend its lines, acquire new ones, discontinue old ones, and thus essentially change the earning capacity of the property. It is important, therefore, that any limitations upon the general powers of the directors, intended to define the boundaries of their discretion, should be given due effect if such a mortgage is to afford any substantial security to bondholders for the payment of their interest; and if these are found in the instrument they should not be nullified by a latitudinarian interpretation calculated to relegate bondholders to the position of stockholders. They are not stockholders, but creditors, who contract upon the assurance that the income fund upon which they rely when they purchase the bonds is to continue to exist during the life of the mortgage. When the mortgage implies that the income fund is to consist of the profit of the future transactions of the company from all sources, as may be the case when the property pledged to the fund includes not only what is owned by the company at the time of the execution of the instrument, but also all that may be thereafter owned or acquired by the company, the bondholders cannot complain if, when the interest periods occur, it is found that the profits which would have been made by operating the original lines exclusively have been depleted by the losses arising from the operation of new lines in conjunction with the old ones. *Day v. Town of New Lots*, 107 N. Y. 148, 13 N. E. Rep. 915; *Buck v. Seymour*, 46 Conn. 156. But where, as here, the terms are that specific lines are granted, and that income is to be ascertained by taking the gross earnings of those lines and deducting from them specified expenses and liabilities, the bondholders are entitled to hold the company to its promise. It is to be inferred that they have invested upon the faith of the earning capacity of the particular property, basing their expectations for the future upon the results of the past, and not intending to trust wholly to the integrity and good judgment of a body of directors whose *personnel* may change at any time.

The case, then, presents the question whether the board of directors are justified in deducting the expenditures and expenses, including interest charges, incurred by operating the new lines acquired by the company from the earnings of the original lines. Clearly they are not, unless these new lines are to be deemed "betterments requisite to maintain the line of railway [described] in first-class condition." The mere statement of the proposition is the only answer it requires. If it is said that the successful operation of the old lines may have demanded the acquisition of new ones, the answer is that, nevertheless, the income fund consists of the earnings of the old lines, less the expenses of operation, and the bondholders have the right to look to that fund exclusively. The mortgage intrusts the directors with a wide discretion in determining what is to be treated as net income. Their conclusions, when embodied in a resolution of the board, are not vitiated by an error of judgment, and can only be disturbed when the circumstances establish bad faith. But their duty to the bondholders requires them to make an honest effort to ascertain the net earnings of the original lines at the several interest periods; and this they have not done; nor can they do so practically, unless a separate account of the earnings and expenses of those lines are kept. *Barry v. Railroad Co.*, 27 Fed. Rep. 1; *Mackintosh v. Railroad Co.*, 34 Fed. Rep. 582. The perfunctory ceremony of passing a resolution that no income has been earned, without an attempt to ascertain the fact, is not a compliance with the letter or the spirit of the contract. The condition in the bonds and mortgage, whereby the interest is payable, as and when fixed by the action of the board of directors, does not preclude the bondholders from all remedy whenever the directors improperly neglect or refuse to take the necessary action. No corporation can shelter itself behind a contract that it shall not be liable for its own wrongful acts.

It has seemed proper to consider these questions fully, because both parties are anxious for the opinion of the court as to their respective rights and obligations under the bonds, and the argument at the bar has been principally directed to the discussion of them. Nevertheless no relief can be granted to the complainant under the present bill, because, having alleged a case of fraud, he cannot be permitted to support it on any other ground. *Wilde v. Gibson*, 1 H. L. Cas. 626; *Eyre v. Potter*, 15 How. 56; *Fisher v. Boody*, 1 Curt. 206; *Price v. Berrington*, 7 Eng. Law & Eq. 254. The present bill does not even proceed upon the ground of a willful neglect of duty on the part of the directors of the defendant to make the ascertainment and adjudication respecting the income provided for in the mortgage, but it charges them with actual fraud and conspiracy designed to compel the complainant to surrender his bonds and accept consol bonds in lieu, and alleges the failure to make the ascertainment as one of the evidential facts supporting the conspiracy. There is nothing in the facts, as they appear by the pleadings, to justify any inference of *mala fides* on the part of the directors; and it would seem that they have acted under an honest misapprehension of their duties to bondholders, supposing that the position contended for by their counsel

was correct, and that the income of all the lines, the new as well as the old, was the fund pledged by the mortgage. The bill is therefore dismissed, with costs.

TERBELL *et al.* v. LEE *et al.*

(Circuit Court, S. D. New York. October 5, 1889.)

1. MORTGAGES—SALES ON FORECLOSURE—SUPPRESSION OF BIDDING.

In a suit to stay prosecution of an action on bonds executed to commissioners as part payment for certain property purchased by complainants at a sale under foreclosure, it appeared that on a resale thereof for complainants' default in the payment of such bonds the purchasers represented a portion of the bondholders, who had combined to bid in the property in case the amount of the original sale should not be realized. Before such resale, the purchasers had agreed, if they should buy such property, to sell it, on the terms of the original sale, to a certain syndicate, who did not intend to bid at the resale. One M. had agreed with said syndicate not to bid at such resale in consideration of an interest in the property, to be transferred to him on the terms which they should have to pay. The purchasers on the resale sold the property to the syndicate for \$86,000 more than they paid. The commissioners who conducted the resale were not aware of the agreement which had been made between the purchasers and the syndicate, or the agreement between the syndicate and M. Held, that the agreement between the purchasers and the syndicate, not being intended to suppress competition at the sale, was a legitimate one.

2. SAME—ACTION TO SET ASIDE SALE—PARTIES.

Neither the purchasers at the resale, nor the bondholders for whom the sale was made, being parties to the action, the cause cannot be determined in their absence.

3. SAME—ORIGINAL SUIT.

An original suit to set aside a sale under a decree of foreclosure, by the party to a foreclosure suit, where relief can be obtained by a summary application to the court in the foreclosure suit, should only be sanctioned in exceptional cases.

4. SAME—LACHES.

Where complainants failed to apply to have such resale vacated in the trial court, and an unexplained delay of six years has intervened since such resale, it will not be vacated as fraudulent.

5. SAME.

The court will not decree a deduction of such \$86,000, paid by the syndicate to the purchasers in excess of the purchase price, from the amount due on the bonds, as neither the commissioners nor the bondholders not represented by such purchasers were participants in any wrong.

In Equity. On motion for an injunction *pendente lite*.

Joseph H. Choate and John Winslow, for complainants.

John T. Mason and H. O. Cloughton, for defendants.

WALLACE, J. The complainants have filed the present bill to stay the prosecution of a suit at law brought against them by the defendants, and have moved for an injunction *pendente lite*. The suit at law is brought to recover the sum due upon four bonds, for the payment of \$135,000 each, executed by the complainants and others under the following circumstances: A bill was filed in the circuit court of the city of Richmond, Va., to foreclose a mortgage executed by the Washington & Ohio Railway Company upon its railway, and the suit proceeded to a decree of foreclosure appointing the present defendants special commissioners to make sale of the railway, and execute a conveyance to the purchaser.

The complainants and others, associated with one Best, became the purchasers, and the purchase was ratified by the court, and a deed was executed pursuant to the decretal order of the court, May 23, 1882, conveying the property to Best and his associates, who thereupon executed the bonds. The decree provided that upon delivery of the deed Best and his associates should, in accordance with a statute of Virginia, be constituted a corporation under the name of the "Washington & Western Railroad Company," and also provided that the special commissioners should have a lien upon the property for all unpaid purchase money represented by the bonds, to be enforced by a rule for a resale of the property. Default having been made in the payment of the bonds, after possession of the property had been surrendered to the new corporation the court duly ordered a resale of the property, and on the 9th of May, 1883, the property was resold by the special commissioners to Oakman and Bates, who were the highest bidders at such resale, for the sum of \$400,000. On an application made in the cause to confirm the resale, exceptions were filed by Best, alleging, among other things, that the property was sold at an inadequate price; that certain creditors, who were entitled to a distributive share of the proceeds, combined together to suppress competition at the bidding; and that other irregularities occurred. These exceptions were supported by affidavits. The exceptions were overruled, the proceedings on the resale were ratified, and the court made a decree for a conveyance to the purchasers on the resale. Subsequently the court directed the special commissioners to enforce payment of the bonds. They brought suit in this court, and have obtained a verdict.

In the present bill the complainants allege that the resale was not conducted in good faith, and that, by a secret agreement and combination between parties holding 51-100 of the mortgage bonds, represented in the decree of foreclosure, and other capitalists, a scheme to suppress competition was formed, and was carried out at the resale, and that, pursuant to this agreement, the capitalists mentioned paid Oakman and Bates \$86,000 more than the sum for which the property was struck off to them, and took a conveyance from them of the property. They allege that at the resale the property was sold at an inadequate price. They do not allege that the special commissioners were parties to a scheme to suppress competition. They insist that if they are not entitled to any other relief they are entitled to have the amount due upon their bonds reduced by the sum of \$86,000. Among the papers used upon this motion is the stenographic report of the testimony introduced upon the trial of the suit at law, in which suit the present complainants set up as a defense substantially the same matters alleged in their present bill; and upon the trial they were permitted to introduce full testimony in reference to the alleged combination to suppress competition at the resale. From this testimony it appears that Oakman and Bates represented a party of bondholders who had associated together to protect their own interests in the foreclosure proceedings. When the resale was ordered, they determined to bid in the property, unless it should bring as much as it did upon the original sale. Before the time of the

resale they were approached by Martin, representing persons known as the "Cooke Syndicate." Martin suggested that the Cooke syndicate would be willing to buy the property of Oakman and Bates in case the latter should buy it, and it was finally arranged that, if Oakman and Bates should become the purchasers, the Cooke syndicate would take the property of them on terms by which they should realize as much as their bondholders would have realized if the purchase money on the original sale had been paid. Mr. Martin had distinctly stated that under no circumstances would the Cooke syndicate become bidders or purchasers at the sale; that they would be willing to buy the property from Oakman and Bates, but they needed a term of credit which the terms of the resale would not permit. The Oakman and Bates party intended all along to buy in the property at resale as cheaply as they could, unless some other purchaser was willing to bid the price at which it was originally sold. They intended to protect themselves, so that they would get as much as they would have got originally. The arrangement with the Cooke syndicate could have had no influence upon the bidding at the resale, because that syndicate would not have bid under any circumstances. The arrangement was a perfectly legitimate one on the part of Oakman and Bates to protect the interests of their party. There is testimony also of Mr. Miller, who was a bondholder, but not of the Oakman and Bates party, who had tried to form a syndicate to buy the property in order to protect his own interests. He testifies that he conferred with Martin, and made an arrangement with him by which he was to have an eighth interest in the property, on the basis of the price which the Cooke syndicate might have to pay for it. According to his testimony this arrangement was brought about upon his representations to Martin that he would otherwise bid at the sale, and in order to prevent him from doing so. After the Cooke syndicate acquired the property, Miller refused to take the eighth interest on the basis of \$486,000, (the price they paid,) because he thought it was too much. He was not willing to come in on a basis beyond that of \$400,000, claiming that they could have bought it for a good deal less than \$400,000.

Upon such a case, if the cause were here on final hearing the court would not vacate the sale, or grant the complainants any relief. It is apparent that Miller would not have bid more than was bid by Oakman and Bates, and there is nothing to justify the inference that anybody else would have bid more. It was entirely competent for the bondholders represented by Oakman and Bates to combine for the protection of their interests, (*Kearney v. Taylor*, 15 How. 494;) and equally competent for them to make an arrangement in advance by which, in case the property should be bought by them, they should dispose of it at an advance. In no event, by the arrangement, did they have any interest in preventing competition. It was just as much their interest to have the property bring the highest price obtainable as it would have been if there had been no such arrangement. Such agreements are not illegal unless meant to prevent competition, and induce a sacrifice of the property sold. *Wicker v. Hoppock*, 6 Wall. 94.

The view reached makes it unnecessary to consider whether, if the allegations of the bill were sustained by the evidence, the complainants would be entitled to any relief in the present action, whether they are not concluded by the decree of the circuit court of the city of Richmond confirming the resale, and whether they have any remedy, not having sought it at the hands of that court. When they became purchasers at the original sale they submitted themselves to the jurisdiction of that court in the foreclosure suit as to all matters connected with such sale, or relating to them in the character of purchasers. *Casamajor v. Strobe*, 1 Sim. & S. 381; *Requa v. Rea*, 2 Paige, 339; *Blossom v. Railroad Co.*, 1 Wall. 655; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609. They acquired a sufficient status to enable them to apply to that court to vacate the resale. The cases are exceptional in which an original suit should be sanctioned by a party to a foreclosure suit to set aside a sale under a decree, where relief could have been obtained by a summary application to the court in the suit. Ordinarily that is the only court which is competent to protect all parties interested in the sale, because generally that can only be done by ordering a resale upon condition looking to the protection of all. *Brown v. Frost*, 10 Paige, 243. Where the circumstances are such that the purchaser becomes a trustee *ex maleficio*, such suits have been allowed. *Cocks v. Izard*, 7 Wall. 559; *Ribon v. Railroad Cos.*, 16 Wall. 446. In the present case the purchasers are not parties to the suit; neither are the plaintiffs in the foreclosure suit; and the cause could not be determined in their absence upon any theory of relief. They are certainly entitled, as well as those who purchased from them, to be heard before the sale could be vacated. The delay which has intervened before filing the present bill (a period of six years) is not explained, and probably cannot be, because those associated with Best were aware of what took place at the resale when the order confirming it was made; and, in the absence of such explanation, the laches of complainants preclude them from asking to have the resale set aside as fraudulent. *Harwood v. Railroad Co.*, 17 Wall. 78. Moreover it would not be equity to decree against the special commissioners, deducting \$86,000 from the amount due on the bonds, and thus deprive the bondholders not represented by Oakman and Bates of their share, when neither the commissioners nor these bondholders have been participants in a wrong in any way. The motion is denied.

LEE *et al.* v. TERBELL *et al.*

(Circuit Court, S. D. New York. October 5, 1889.)

ACTION—WHO MAY MAINTAIN.

Special commissioners, appointed by a state court to sell mortgaged premises under foreclosure, and authorized to receive purchase-money bonds in part payment thereof, can maintain an action in the federal circuit court sitting in another state upon such bonds executed to them in their official capacity, without ancillary appointment in that state.

At Law. On motion for new trial. For opinion on demurrer to complaint, see 33 Fed. Rep. 850.

John T. Mason and H. O. Cloughton, for plaintiffs.

Joseph H. Choute and John Winslow, for defendants.

WALLACE, J. The only question which it seems necessary to consider upon this motion for a new trial is whether the plaintiffs, as special commissioners appointed by the circuit court of the city of Richmond, Va., to sell mortgaged premises under a decree in a mortgage foreclosure suit, and authorized to receive the bonds of the purchaser in part payment, can maintain an action in this court upon the bonds given to them as such special commissioners. The promise by the defendants, in the bonds, is to the plaintiffs "as special commissioners in the cause," etc. The general rule is familiar that a suit in another state cannot be maintained by persons coming *en autre droit* under the appointment of foreign laws, unless their appointments are repeated under the laws of the state in which they sue. But where, as here, the contract sought to be enforced is made directly to the persons who sue, although they are described in their official characters, it would seem that the suit can be brought by such persons in a foreign jurisdiction in their own names, without the addition of their official character, and that the *descriptio personarum* may be rejected as mere surplusage. *Buffum v. Chadwick*, 8 Mass. 103; *Kane v. Paul*, 14 Pet. 33. However this may be, the plaintiffs can sue here upon the promise made to them, just as a foreign executor could sue in such a case without an ancillary appointment here. *Talmage v. Chapel*, 16 Mass. 71; *Lawrence v. Lawrence*, 3 Barb. Ch. 74; *Johnson v. Wallis*, 112 N. Y. 230, 19 N. E. Rep. 653; *Barton v. Higgins*, 41 Md. 539; *Barrett v. Barrett*, 8 Me. 346. The case of *Wilkinson v. Culver*, 23 Blatchf. 416, 25 Fed. Rep. 639, fully sustains the right of the plaintiffs to sue here. The motion for a new trial is denied.

MCNEILL v. TOWN OF ANDES.

(Circuit Court, N. D. New York. October 9, 1889.)

1. PRACTICE IN CIVIL CASES—STIPULATIONS.

The parties entered into a stipulation to stay proceedings until the decision of an appeal in a test case, as follows: "The plaintiff stipulates and agrees that if upon said appeal the bonds or coupons in controversy therein are held to be void, or for any reason shall be held not to be the valid obligations of said town, then that this action shall be forthwith dismissed, with costs. And the defendant stipulates and agrees that unless such decision is rendered, then that defendant's answer shall forthwith, after the decision of said appeal, be stricken out, and that the plaintiff shall have judgment as demanded." The appeal was decided, not on its merits, and without reference to the validity of the bonds. *Held*, that defendant could not be relieved on the ground that the action of the appellate court was not in the contemplation of the parties when the stipulation was signed.

2. SAME—WAIVER OF DEFENSES.

Defenses not reserved by the stipulation are thereby waived, though they are not presented by the record in the test case.

3. SAME—NEWLY-DISCOVERED DEFENSES.

Newly-discovered defenses, which would not be sufficient cause for a new trial, will not justify relief.

At Law. On application to be relieved from a stipulation.

In the autumn of 1888 the defendant made a motion for a stay of proceedings pending the decision of the supreme court in the case of *Slauson* against this defendant, involving substantially the same questions. An order was entered granting the motion, on condition that the defendant would file a stipulation, within 10 days from the date of the order, that this cause should abide the result in the supreme court. In default of such stipulation the cause was to proceed in the usual manner. On the 30th of October the parties, after due deliberation and consultation, entered into a stipulation, the important part of which is as follows:

"Stipulated, that all proceedings herein shall be stayed until the determination of the appeal now pending in the United States supreme court of the town of Andes, plaintiff in error, against Albert Slauson, in consideration of the following: The plaintiff stipulates and agrees that if upon said appeal the bonds or coupons in controversy therein are held to be void, or for any reason shall be held not to be the valid obligations of said town, then that this action shall be forthwith dismissed, with costs. And the defendant stipulates and agrees that, unless such decision is rendered, then that defendant's answer shall forthwith, after the decision of said appeal, be stricken out, and that the plaintiff shall have judgment as demanded."

But for this stipulation, and the stay obtained by virtue thereof, the plaintiff could have obtained judgment at the November term, 1888, as the law, so far as this court is concerned, was settled beyond dispute in the *Slauson Case*. In April, 1889, the supreme court affirmed the judgment in that case for the reasons stated in the opinion. 130 U. S. 435, 9 Sup. Ct. Rep. 573. It was not a decision upon the merits. The defendant now asks to be relieved from the stipulation, for the reason that the action of the supreme court could not have been anticipated, and was not in the contemplation of the parties when the stipulation was signed.

J. B. Gleason, for plaintiff.

W. H. Johnson, for defendant.

COXE, J., (*after stating the facts as above.*) I do not see how the court can properly interfere to relieve the defendant. The stipulation is very broad. Its terms are unmistakable. The agreement was that, if the bonds were for any reason held to be void by the supreme court, the plaintiff's suit should be dismissed. On the other hand, if the supreme court did not decide that the bonds were void, the plaintiff was to have judgment forthwith. To entitle the plaintiff to judgment, nothing was required but a decision of the supreme court which did not invalidate the bonds. The decision rendered, or a decision dismissing the writ of error for lack of jurisdiction, or for defects in the record, was just as much within the stipulation as an affirmance on the merits. The court appreciates the dilemma of the defendant, and would gladly afford relief if it could be done with justice to the plaintiff; but the latter has acted in good faith, relying upon the terms of the agreement. The parties cannot be relegated to the position in which they were when the stipulation was entered into. The plaintiff has parted with valuable rights. At any of the four terms lost by means of the stay the plaintiff could have obtained a final judgment. Now, however, the recovery and interest will be sufficient to enable the defendant to carry the cause to the supreme court, with the consequent delay.

Other reasons are urged why the relief should be granted, which may be divided into two classes,—those relating to alleged matters of defense not presented by the record in the *Slawson Case*, and those based upon newly-discovered defenses. As to the former, being within the knowledge of the parties at the time, and not reserved, they were clearly waived by the stipulation. The supreme court could not possibly have passed upon them. As to the latter, I have considered them as if presented upon a motion for a new trial, and see no reason to set aside the judgment. Had they been presented on the trial of the *Slawson Case* the result would have been the same. The motion is denied.

FIFTH NAT. BANK v. ARMSTRONG, (FARMERS' NAT. BANK *et al.*, Interpleaders.)

(Circuit Court, E. D. Missouri, E. D. October 4, 1889.)

BANKS AND BANKING—INSOLVENCY—NEGOTIABLE PAPER—RESTRICTIVE INDORSEMENT.

The claimant bank sent to the F. Bank a sight draft, drawn on a third party, indorsed, "Pay" F. Bank, or order, "for collection for" claimant bank. It was the practice of the F. Bank, in its dealings with claimant, to credit the latter on the day of receipt for all drafts, checks, etc., sent for collection, that were payable at sight or on demand, and the balance thus created was subject to be drawn on; but, if the paper was not paid, it was charged back to claimant. On receipt of the draft, the F. notified claimant that it had been credited, "subject to payment;" but the credit was not drawn against, nor were advances made on the faith of it. Claimant merely kept a memorandum of its transmission for collection. The F. sent the draft to its

reserve agent, indorsed for collection, and the amount of it was counted as a part of the F.'s reserve fund, though this fact was not known to claimant. *Held* that, the indorsement being restrictive, the F. acquired no title to it; and that upon the insolvency of the F., before notification of the collection of the draft, the claimant was entitled to the proceeds of it in the hands of the collecting agent.

At Law.

This is a controversy between the defendants concerning the ownership of a certain fund now in the custody of the complainant. The case is to be decided with reference to the following facts: On June 6, 1887, the Farmers' National Bank of Portsmouth, Ohio, sent to the Fidelity National Bank a sight draft, in the usual form, drawn by Samuel J. Huston on Thomas Shelby, of Lexington, Mo., in the sum of \$4,100. The draft was indorsed as follows: "Pay Fidelity National Bank of Cincinnati, Ohio, or order, for collection for Farmers' National Bank of Portsmouth, Ohio. J. M. WALL, Cashier." On June 11, 1887, the Augusta National Bank of Staunton, Va., sent the Fidelity Bank a similar draft for \$1,216, drawn on Henry Rohr, St. Johns, Kan., which was indorsed in the same form as last described. Both of these drafts were forwarded by the Fidelity Bank to the Fifth National Bank of St. Louis, Mo., for collection for its account; and the latter bank proceeded to collect the same through subordinate agencies, and was notified of the payment thereof on June 21st and 23d, respectively. The Fidelity Bank was insolvent from and after June 6, 1887, and was seized by the comptroller of the currency at 9 A. M., June 21, 1887, and put into liquidation. The Portsmouth and Staunton banks thereafter claimed the proceeds of the respective drafts, found in the hands of the Fifth National Bank, and the latter bank filed its bill of interpleader on August 3, 1887. It was the uniform practice of the Fidelity Bank, in its dealings with the Portsmouth bank, to give the latter credit, on the day of receipt, for all checks, drafts, etc., sent to it for collection, that were payable at sight or on demand; and the balance so created was subject to be drawn upon by the Portsmouth bank. The Fidelity Bank also paid interest, at 2½ per cent. per annum, on the daily balances in favor of the Portsmouth bank, arising from such credits. But if paper forwarded for collection, and credited as aforesaid, was not paid, it was the invariable custom to charge the same back against the account of the Portsmouth bank. The method of dealing here described was well known to the Portsmouth bank, and was assented to by it. The Shelby draft was credited by the Fidelity Bank to the Portsmouth bank, in conformity with the practice in question. Notice was given by mail that the draft had been credited, "subject to payment;" but the credit was not drawn against by the Portsmouth bank, nor were any advances made on the strength thereof, and in point of fact the Fidelity Bank closed its doors before it was notified that the draft was paid. The Portsmouth bank did not charge the draft against the Fidelity, but merely kept a memorandum of the transmission of the same to the latter bank for collection, having been advised by the drawer that it would probably not be paid by the drawee on presentation. It further appears that, by an arrangement between the Fifth National Bank and the Fidelity, the amount of

the Shelby draft, after it was indorsed to the Fifth National for collection, was counted as a part of the reserve of the Fidelity,—the Fifth National being a designated reserve agent of the Fidelity; but the Portsmouth bank, so far as shown, had no knowledge of such fact. The method of dealing as between the Fidelity Bank and the Staunton bank did not differ from that last described with the Portsmouth bank, in any such respect as will distinguish the two cases, or justify a different ruling as to the claims interposed by the respective banks. The question arising on this state of facts is whether the Fifth National should turn over the proceeds of the two drafts, now in its hands, to the Portsmouth and Staunton banks, respectively, or to the receiver of the Fidelity Bank.

William B. Burnet and Wm. G. Hammond, for the Fidelity National Bank.

J. M. McGillivray and A. T. Holcomb, for the Farmers' National Bank.

Jno. D. Stevenson, for the Augusta National Bank.

THAYER, J., (*after stating facts as above.*) The indorsement by which the Fidelity Bank acquired the possession of the drafts in controversy was clearly a restrictive indorsement. It was an indorsement that destroyed the negotiability of the drafts, except for purposes of collection, and gave notice to all parties through whose hands they passed that they were the property of the Portsmouth and Staunton banks, respectively. By virtue of the indorsements alone, the Fidelity Bank did not acquire title to the drafts, but was merely constituted an agent for their collection. Thus far there is no room for serious controversy. *First National Bank v. Reno County Bank*, 3 Fed. Rep. 261, 262; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *White v. Bank*, 102 U. S. 661; *Hoffman v. Bank*, 46 N. J. Law, 604; *Blaine v. Bourne*, 11 R. I. 119; *Bank v. Bank*, 76 Ind. 561; *Sweeney v. Easter*, 1 Wall. 173; *Levi v. Bank*, 5 Dill. 107; 1 Daniel, Neg. Inst. §§ 336, 337.

The contention is, however, that the practice shown of crediting sight drafts, when received for collection, as cash, and the allowance of interest on daily balances into which such credits had entered, alters the case, and that, because of that method of dealing, the drafts became the property of the Fidelity Bank as soon as a credit was given therefor upon its books, and that from that time forward the Fidelity Bank became the debtor of the Portsmouth and Staunton banks, respectively, for the sums severally credited. When checks or sight drafts are indorsed generally by the payee, and deposited with a bank, and credit is given therefor to the depositor, with his consent, as for so much cash, with the understanding, express or implied, that such credit may be drawn upon, the prevailing opinion seems to be that the relation of debtor and creditor is forthwith created between the bank and the depositor, and that the bank becomes at once the owner of the paper, and not merely an agent for its collection. An indorsement in blank, or to the order of the receiving bank, is entirely consistent with that view of the transaction. *Bank v. Loyd*, 90 N. Y. 534, and cases cited; *Railway Co. v. Johnston*, 27 Fed. Rep. 243; *Hoffman v. Bank*, 46 N. J. Law, 605.

But if paper is indorsed, "For collection for account of the depositor," and then deposited, and credit given, a different case is presented. The mere fact that paper thus indorsed is credited by a bank to the depositor as cash, and the privilege accorded to him of drawing against the credit, may not, as it seems, be sufficient to vest the bank with title to such paper. In some cases it appears to be held that such credits are merely provisional, that is, subject to revocation, until the paper is actually collected by the receiving bank, or until the credit has been drawn against by the depositor, and that up to such time the title to the paper is in the depositor, and the bank is a mere agent of the depositor, for collection. *Bank v. Bank*, (Mass.) 20 N. E. Rep. 193; *Levi v. Bank*, 5 Dill. 107-111; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 683; 2 Morse, Bank. §§ 583, 586.

In the opinion of the court, the true criterion, in a case such as is last stated, for determining the question of title to the paper before the same is actually collected, and before the credit has been drawn against, is whether the depositor intended to part with title, and whether the receiving bank intended to purchase the paper, and assume the risk of payment, and give an absolute credit therefor, as in cases of discount. Viewing the matter in that light, I have little difficulty in finding, in the case at bar, that the title to the two drafts, and their proceeds, remained in the Portsmouth bank and Staunton bank, respectively, up to the time the Fidelity Bank failed, and the government took possession of its assets. The indorsements placed on the drafts in question, when forwarded to the Fidelity Bank, is persuasive evidence, notwithstanding the previous course of dealing, that neither the Portsmouth bank nor Staunton bank intended to part with their title to the drafts in question, or to enable the Fidelity Bank to deal with the same as its own. It was a restrictive indorsement, and it must be assumed that that form of indorsement was adopted for a well-defined purpose. It may well be doubted whether the legal effect of that form of indorsement can be controlled or modified by proof of a usage existing to credit such items as cash, and permit the credit so given to be drawn against; it being conceded that in the present case neither of the depositors saw fit to avail themselves of such privilege. But, be that as it may, it is also apparent that the Fidelity Bank did not intend to purchase the drafts in question, and give its customers an absolute credit for the par value thereof. In its letter acknowledging the receipt of the Shelby draft, the Fidelity Bank stated that it credited the same, "subject to payment." This must be understood as meaning that the credit was merely provisional, that is, conditional on payment, and that it did not intend to assume the risk of payment, or give an absolute credit, or put itself in any other relation to the paper than that of an agent for collection. This seems to me to be the proper interpretation of the transaction, looking at it merely with a view of determining what the parties thereto intended. As the Fidelity Bank never received the proceeds of the drafts, and was not even notified of their payment prior to its failure, and as the banks that had deposited them for collection laid claim to the proceeds of the drafts, in

the hands of the subordinate collecting agent, before they had become mingled with the funds of the Fidelity Bank, I think they are entitled to recover the same as against the receiver of the Fidelity. *Hackett v. Reynolds*, (Pa.) 6 Atl. Rep. 689; *First National Bank v. Reno County Bank*, *supra*. It is so decreed.

BARNEY DUMPING-BOAT Co. et al. v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(Circuit Court, S. D. New York. August 12, 1889.)

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF OFFICERS.

The commissioner of street cleaning of the city of New York is an agent of the city, and not an officer of the general public, notwithstanding his duties are partly rendered in the interest of the public health, and his powers are plenary, and, within their sphere, exclusive of the authority of any other officer of the city. The city is therefore liable for his negligent acts done in the course of his official duties.

In Admiralty. Libel for damages. Appeal from district court.

Henry R. Beekman, for appellants.

Hyland & Zabriskie, for appellees.

WALLACE, J. The testimony in this case shows clearly that the injuries to the dumping-boat for which the libelants seek to recover damages were caused by the carelessness of those in charge of the steam-tug belonging to the respondents. Their negligent acts were committed while they were engaged in removing refuse from the streets. These persons were under the immediate employment of the commissioner of street cleaning of the city of New York. That officer, as the head of that municipal department, had the custody of the tug. By act of the legislature known as the "consolidation act" he is charged with the duty of keeping the streets cleaned, and removing refuse, "as often as the public health and the use of the streets may require," and is invested with authority to engage and discharge at his discretion all the employees necessary for the performance of the duties of the department. The only legal question in the case which merits notice is whether the city is liable for the negligence of the employees of this department. If the duties delegated to him by law are such as primarily devolve upon the city, as a municipal or corporate obligation, he and his subordinates are the agents of the city, and the respondents are liable for their acts of misfeasance or non-feasance done in the course of their ordinary employment. It does not seem reasonable to treat the commissioner as an officer of the general public rather than of the city. His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for

the use of those who resort to them. Many cases are reported in the decisions of the state courts in which the city of New York has been held responsible to persons who have sustained injuries in consequence of obstructions which have been negligently suffered to intercept the safe use of the streets. The obligation of the city to keep its streets in such condition that those who use them may do so safely has been repeatedly declared; and the failure to remove ice or snow or dangerous accumulations of any kind by the proper authorities is a breach of that obligation. See *Providence v. Clapp*, 17 How. 161; *Todd v. City of Troy*, 61 N. Y. 506. The duty of cleaning the streets necessarily comprehends the duty of removing such accumulations. It is quite immaterial that the powers and duties of the commissioner are plenary, and within their sphere exclusive of the authority of other officers of the city. The real question is whether his duties are such as primarily rest upon the municipality itself. *Barnes v. District of Columbia*, 91 U. S. 540; *Ehrgott v. Mayor*, 96 N. Y. 264. The precise question has been resolved against the contention of the respondents in the case of *Engle v. Mayor*. The decree of the district court is affirmed.

NOTE BY THE EDITOR. *Engle v. Mayor*, referred to above, has never been reported. It was a decision of the superior court of New York city in October, 1885, on motion for new trial on the judge's minutes. The opinion was as follows:

INGRAHAM, J. The department of street cleaning is regulated by subchapter 14 of chapter 410 of the Laws of 1882, known as the "Consolidation Act." Section 704 provides that "the department of street cleaning shall have exclusive charge of the cleaning of streets, and the removal of ashes and garbage in the city. The commissioner of street cleaning shall have power and authority, and is hereby charged with the duty, of causing the streets of said city * * * to be thoroughly cleaned, and kept clean at all times; and of removing from said city, or otherwise disposing of, as often as the public health and use of the streets may require, all street sweepings, ashes, and garbage; and of removing new-fallen snow from leading thoroughfares, and such other streets and avenues as may be found practicable." Section 705 provides that the "said commissioner shall have power to engage, and, in his discretion, discharge from time to time, all such clerks, laborers, and other employes, and to fix their compensation, as shall be necessary and proper in executing the duties hereby imposed upon him. * * * The said commissioner shall also have power to hire or purchase for his use, as such commissioner, * * * horses, carts, steam-tugs, scows, boats, vessels, machines, tools, and other property required for the economical and effectual performance of his said duty." And the defendant here claims that the power exercised by the street cleaning department, under the provisions of this act, is governmental and public, and comes within the principle established by the case of *Maxmillian v. Mayor*, etc., 62 N. Y. 160. The municipal corporation of the city of New York, having the powers conferred upon it respecting streets within its limits, owes to the public a duty to keep said streets in a safe condition; and this duty rests upon an express or implied acceptance of the power, and is stated by the court in the case of *Maxmillian v. Mayor*, etc., supra, to be a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act. *Conrad v. Trustees*, 16 N. Y. 158. In *Lloyd v. Mayor*, etc., 5 N. Y. 375, the court of appeals expressly held that the power and duty to clean sewers in the city is clearly ministerial, and falls within the class of private powers; and that the corporation was liable for the negligence of one of its agents employed to perform such duty. In this case it is shown that the pilot of the tug-boat was employed by the street cleaning department in the removal from the streets of the city, street sweepings, ashes, and garbage. Acting as such, under the authorities above cited, he was the agent of the city in the performance of the duty with which the city is charged for its own corporate benefit, and the city was liable for the negligent use of its property by its own servant or sub-servant. *Lee v. Village of Sandy Hill*, 40 N. Y. 442. By the verdict of the jury in this case it is established that the injury sued for was caused by the negligence of the pilot of the said tug, and I think that the city is liable. Motion for new trial denied.

WILSON v. FINE.

(Circuit Court, D. Oregon. September 2, 1889.)

PUBLIC LANDS—HOMESTEAD—FRAUD—CANCELLATION OF ENTRY AND CERTIFICATE.

An entry and certificate, issued to a settler under the homestead act for land subject to entry thereunder, cannot be set aside or canceled by the land department, on its own motion, for fraud or mistake committed or occurring in obtaining or issuing it. In such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. *Smith v. Ewing*, 11 Sawy. 56, 23 Fed. Rep. 741, affirmed.

(Syllabus by the Court.)

At Law. Action to recover possession of real property.

Charles B. Bellinger, for plaintiff.

Albert H. Tanner, for defendant.

DEADY, J. This suit is brought to recover the possession of a quarter section of land, situate in Lake county, Or.

From the amended complaint it appears that the plaintiff is a citizen of California, and the defendant a citizen of Oregon; that about three years before the commencement of this action (February 27, 1889) one G. C. Alexander duly received a final certificate to the premises, as a settler thereon under the homestead law, from the proper officers of the land department of the United States, who thereafter duly conveyed the same to the plaintiff; that the plaintiff is the owner of the premises in fee, and entitled to the possession thereof; that about January 1, 1889, the plaintiff being in the possession of the premises, as such owner, the defendant entered thereon and evicted him therefrom, and now wrongfully withholds the possession from him.

The defendant demurred to the complaint, for that it did not appear that the plaintiff had the legal title, without which the action for possession could not be maintained in this court.

After the argument the demurrer was overruled, the court holding that the prior possession of real property is a sufficient legal estate therein to enable a party to maintain an action in this court to recover the possession of the same from an intruder.

The defendant then answered. The answer contains specific denials of sundry allegations of the complaint, and also two defenses, each of which is styled therein "a further answer and defense," although there is but one answer containing these denials and defenses. Comp. 1887, §§ 71, 72.

The first defense is that at and prior to the entry of the premises by Alexander the same was public land of the United States, and subject to entry under the homestead law, at Lakeview, Or.; that prior to his settlement on the premises Alexander had acquired a quarter section of public land under said law, in California, and was not entitled at the time of such entry and the issue of said final certificate to enter on or settle upon any of the public land under the homestead law; and that

said entry and certificate are illegal and void,—of all which the plaintiff had notice before the date of the conveyance from Alexander.

The second defense is that the officers of the land-office at Lakeview, Or., "having been informed," after the issue of the certificate to Alexander, that he had acquired a quarter section of land under the homestead law prior to his settlement on the premises, set aside and canceled said entry and certificate, and reported the facts to the commissioner of the general land-office, who thereupon canceled said entry and certificate on April 27, 1889; that said Alexander was duly notified of said "proceeding" before said officers, and appeared and was heard therein; that about January 1, 1889, the defendant, "with the advice and consent" of the register and receiver, settled on the premises with the intention of claiming the same under the homestead law, he being qualified so to do, and "went into the peaceable possession of the same, and ever since has been and now is in possession of such land, as such settler, and is entitled to remain in the possession thereof in accordance with the provisions of said law and the regulation of the interior department, and within the time allowed by law he offered to file his homestead application and perfect his entry" in the land-office at Lakeview, "and has been instructed and advised by the commissioner of the general land-office to remain in possession of said land, as such settler, and that he was at the time of the commencement of this action, and ever since has been, and is now, in the possession of the land described in the complaint, under the authority and by the direction of the department of the interior and the commissioner of the general land-office,"—of all which the plaintiff had notice at the time of the conveyance to him from Alexander. To these defenses a demurrer is interposed.

The second defense will be considered first. It admits, by necessary implication, that Alexander obtained the certificate for the land under the homestead act by complying with the provisions thereof, including the payment of the price and the five years' residence and cultivation, about February, 1886.

To avoid the effect of these facts it is alleged in the defense that the officers of the district land-office, "having been informed" that Alexander had had the benefit of the homestead act, of their own motion instituted a "proceeding" to set aside and cancel said certificate on that account, which was done, and reported to the commissioner, who, on their recommendation, affirmed their action.

It matters not what advice or direction was given the defendant by any officer of the land department concerning the possession of the premises. Neither of them had any power or authority to authorize or direct him to take possession of the land, and it is not credible that they even did do so. If the law and the facts warranted him in taking possession of the premises, well and good; otherwise not. The *fiat* of an officer of the land department is not law, nor is this a government by Pasha.

I think this so-called "proceeding" to cancel Alexander's entry and certificate was an arbitrary and illegal one. There was no contest about

the matter, which the law authorizes the register and receiver to hear and decide, subject to an appeal to the commissioner and thence to the secretary of the interior. When the certificate had issued without objection, the time for a contest had passed. Upon its issue the land became the property of Alexander, and he was entitled to the patent therefor. Such a right cannot be arbitrarily set aside, canceled, and avoided by the land department, in a "proceeding" self-instituted on mere hearsay.

Nor does it signify that the party had notice of the "proceeding," and took part in it. One may defend one's life or property when it is attacked, without acknowledging the legality of the attack or "proceeding," or being bound by the result of it.

If Alexander was not entitled to make the entry for the reason that he had already had the benefit of the act, the certificate may be set aside on that ground in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals, under like circumstances. *Smith v. Ewing*, 11 Sawy. 56, 23 Fed. Rep. 741.

In this case I had occasion to consider this question of the power of the land department, of its own motion, to recall, set aside, or cancel a certificate of purchase of public lands, regularly issued and valid on its face, and concluded that it did not exist. It was there held, (page 65, 11 Sawy., and page 747, 23 Fed. Rep.): "The right of a party holding a certificate of purchase of public land, and that of his grantee, is a right in and to property, of which neither of them can or ought to be deprived without due process of law."

Since the decision of this case, *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122, has been decided by the supreme court. The general drift of the opinion is to limit and restrain the power of the commissioner of the general land-office to set aside or cancel entries or certificates allowed by the register and receiver. The pith of the opinion on this point is stated in one of the syllabi as follows:

"The power of supervision possessed by the commissioner of the general land-office over the acts of the register and receiver of the local land-offices is not unlimited or arbitrary, but can only be exerted when an entry is made upon false testimony, or without authority of law, and cannot be exercised so as to deprive a person of land lawfully entered and paid for."

All applications for entries of land under the homestead act are noted on the books and plats of the district land-office, and a register kept of the same. These facts, "together with the proof upon which they have been founded," are returned to the general land-office. Section 2295, Rev. St. When it appears from such return, together with the record of the surveys of the public lands, and the prior disposition thereof in the general land-office, that an entry has been allowed in the district land-office contrary to law, the commissioner has power, and it is his duty, to correct the error and disallow the entry.

But if, after the entry is made and the certificate is issued, some one should offer to enter the same land on the ground that the first entry is

illegal, and propose to show the same by new and extraneous proof, I can find no law that authorizes the register and receiver, or the commissioner, to institute or direct a "proceeding" to hear and determine the matter, and therein set aside or cancel the entry and certificate. The subject is no longer administrative in its character. It ceased to be so, so far as the register and receiver are concerned, when, upon the final proof, after notice to the world of the settler's five years' residence and cultivation, the certificate was issued to him.

Admitting the power of the commissioner to disallow an entry for reasons appearing on the face of the return made by the register and receiver concerning the same, thereafter and otherwise, the validity and effect of the certificate as evidence of the right of the settler to the land described therein can only be impeached in a judicial proceeding.

If, upon inquiry, the land-office finds that through fraud or mistake a certificate was improperly issued, a suit should be brought in the proper court to set aside and cancel the same. Such a suit is quite as simple and inexpensive as a hearing in the land department, and much more likely to be attended with correct and satisfactory results.

The allegation in this defense that the defendant took peaceable possession of the premises, and still holds them so, amounts, under the circumstances, to nothing more than an admission that the defendant entered upon the possession of the premises, but without force or violence, and still holds them so. This is not an action of forcible entry and detainer, and, although the complaint alleges that the defendant entered "unlawfully and with force," proof of an unlawful entry and holding will support the action.

The demurrer to this defense is sustained.

The first defense consists simply of the allegation that Alexander, by reason of his having had the benefit of the homestead act, was not entitled to settle upon and acquire the title to the premises under said act.

This defense, also, by a necessary implication, admits that Alexander acquired the possession of the land under the homestead act in the manner therein provided, and that the defendant, without even a claim of right, title, or interest in the premises, entered thereon, and deprived the plaintiff of the possession thereof, as alleged in the complaint.

The demurrer to this defense is also sustained.

WEED SEWING-MACHINE Co. v. BAKER *et al.*(Circuit Court, E. D. Missouri. October, 1880.)¹

QUIETING TITLE—PRIVITIES.

The legal title to certain land was in one F., subject to the equities of J. Plaintiffs brought suit to quiet title against F., and obtained a decree, to which J. was not a party, though he was in possession at the time the suit was brought, claiming as purchaser from F. Held, that J. was not in privity with F., and was not bound by the decree against him, and the decree did not vest the legal title in plaintiff as against J.

At Law. Action in ejectment.

Daniel Dillon, for plaintiff.

Dryden & Dryden, for defendants.

MCCRARY, J., (*orally*.) In this cause the parties waived a jury, and have had a hearing upon the merits before the court. The action is ejectment, to recover certain real estate within the district.

The facts, so far as it is necessary to state them, are as follows: Prior to the commencement of this suit the plaintiff had recovered in this court a decree in chancery against the defendants Franklin Baker and James W. Baker, (but not against defendant John Baker,) quieting title to the land in question in the plaintiff. It is admitted that prior to that decree the legal title was in Franklin Baker, subject to the equities of the defendant John Baker, who was not a party to the decree, and who was in possession at the time of the commencement of the chancery suit, and is still in possession, claiming an interest as purchaser from Franklin Baker. The plaintiff offered the decree as sufficient evidence of his title and right to possession as against all the defendants. The defendant John Baker objected, and on his behalf it is insisted that he is not bound by the decree, since he was no party to it; and, further, that the plaintiff cannot recover as against him upon that proof alone. The plaintiff insists that the decree is sufficient to vest the legal title in it, and that the claim of defendant John Baker upon the land is necessarily equitable in its character, and therefore such as cannot be set up as a defense to an action of ejectment in this court.

It is very clear that no one can be bound by a judgment or decree unless he be a party, or in privity with a party. This, for the reason that he has had no opportunity to be heard, to cross-examine witnesses, or to offer evidence in furtherance of his rights. It is therefore held that, while a decree may be admissible in evidence to prove the fact of its rendition, with all its legitimate consequences, it cannot affect in the least the rights of any but parties and privies. A party in possession of land, claiming an interest as purchaser, or under a contract to purchase, is not in privity with his grantor. On the contrary, his claim is adverse to his grantor, and it must follow that he is not bound by a decree against the latter in a case to which he is not a party, and rendered

in a suit commenced after he purchased and took possession. Those principles, I think, apply with all their force to this action in ejectment. The plaintiff in the decree against Joseph W. and Franklin Baker acquired the legal title only as against them and those in privity with them. It is not a violation of the rule that the legal title must prevail in an action of ejectment to hold that the legal title is not established in the plaintiff as against the defendant John Baker. The case will be dismissed, unless the plaintiff elects to take a nonsuit.

VANACKER v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 18, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—RUBBER BAGS FOR TOY BALLOONS.

Small India-rubber bags, with a small neck or inlet, which are intended to be inflated with gas, and closed, so as to make them buoyant, and then sold as a child's plaything, are "articles composed of India rubber not specially enumerated or provided for," and assessable under act of March 3, 1883, (Heyl, 454,) and not under clause 425 as "toys," as they do not become "toys" until they are inflated by the addition of another material.

At Law. Action to recover an excess of customs duties.

Shuman & Defrees, for plaintiff.

W. G. Ewing, U. S. Dist. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiff imported a quantity of small India-rubber bags, which the collector assessed for duty as "toys," under clause 425 of Heyl's Arrangement of the Act of March 3, 1883, and assessed thereon a duty of 35 per cent. *ad valorem*. Plaintiff, insisting that the goods were "articles composed of India rubber," and not "toys," and dutiable at 25 per cent. *ad valorem*, under clause 454 of Heyl, paid the duties so imposed under protest, and appealed to the secretary of the treasury, by whom the action of the collector was affirmed, and now brings this suit in apt time to recover the duties so claimed to have been paid in excess. The proof shows that the goods in question are small India-rubber bags, with a small neck or inlet, which are intended to be inflated with gas, and closed, so as to make them buoyant, and then sold as a child's toy or plaything. It seems to me that the goods, as imported, cannot be said to be "toys." They are not completed as such. They do not become toys until they are inflated by the addition of another material, and closed so as to prevent the escape of the gas, which involves a further manufacture or finish of the goods from their condition when imported. It is very clear to me they come specifically within the description of "articles composed of India rubber not specially enumerated or provided for," and, as such, should have been made dutiable at 25 per cent. *ad valorem*. The fact that the gas is a volatile sub-

stance, and that but a slight amount of labor is necessary in order to inflate the bags, and prepare them for sale, does not, as it seems to me, essentially change the question in this case. The gas is one of the component materials of the completed article. Without the addition of the gas they are not usable for the purpose intended, and they can only be said to be a completed article when inflated and closed, so as to become buoyant, and attractive as a plaything. I am therefore of opinion that the collector erred in the classification of these goods, and that the plaintiff is entitled to recover.

MORRIS *et al.* v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 18, 1889.)

1. CUSTOMS DUTIES—CLASSIFICATION—PAVING TILES.

Hard-baked, hard-bodied, glazed tiles, which are used for hearths, wainscoting, and on the floors of vestibules, entrance halls, bath-rooms, and conservatories in private residences, and sometimes as a border in the floor of rooms, and which differ from the ordinary paving tile in that they are glazed, are assessable for duty at 20 per cent. *ad valorem*, under customs act March 3, 1883, Schedule B, cl. 7, as "paving tiles."

2. SAME.

Glazed tiles made of clay, Cornwall stone, and flint, which are made porous, and of a white or light-colored body, so as to more readily receive the glaze colors, and which are used for chimney fronts, and to some extent in hearths, and for borders in floors, and for vestibules and bath-rooms, are not "paving tiles," being too brittle in structure and soft in material for such purpose.

3. SAME—SKIRTING, MOULDING, AND SURFACE TILES.

So, also, glazed tiles of the same materials, which are of irregular shapes, some being in the form of an ogee moulding, others a longitudinal segment of a cylinder, and which are intended to take the place of wood base-boards and chair-rails, cannot be classed as "paving tiles," under the similitude clause, as they are manifestly intended for other purposes; nor are they manufactured articles not otherwise enumerated, as they clearly fall within the description of glazed earthenware not specially enumerated, under clause 4 of Schedule B.

At Law. Action to recover excess of customs duties.

P. L. Shuman, for plaintiffs.

W. G. Ewing, U. S. Dist. Atty., and G. H. Harris, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiffs imported into the port of Chicago a quantity of glazed tiles, skirting, moulding, and surbase tiles, which the collector classified and assessed for duty, a part thereof as decorated earthenware, under the second clause of Schedule B of the customs act of March 3, 1883, at 60 per centum *ad valorem*, and a part thereof as glazed earthenware, under the fourth clause of said Schedule B, at 55 per centum *ad valorem*. Plaintiffs protested against such classification and assessment for duty, insisting that said goods should have been assessed at a duty of 20 per cent. *ad valorem*, under the seventh clause of said Schedule B, as "paving tiles," and under section 2499 of said act, as most resembling paving tiles in the material of which composed, and

uses to which they were applied, and under section 2513 of said act, as articles manufactured, in whole or in part, not otherwise provided for; paid the duty under protest; appealed to the secretary of the treasury, by whom the action of the collector was affirmed; and brought this suit in apt time to recover the excess of duties so claimed to have been paid. The goods in question embrace three kinds of tiles, all of which are glazed: (1) A hard-baked, hard-bodied tile, the body being of a brown or brick color, which are used for hearths, and to some extent for wainscoting, and for the breast or front of fire-places, and on the floors of vestibules, entrance halls, bath-rooms, and conservatories in private residences. They are also laid sometimes as a border in the floor of rooms, around next to the base-board. (2) Glazed tiles made of clay, Cornwall stone, and flint, which gives them a white or light color, and makes a more porous and white or light-colored body, which more readily receives the glaze and colors applied thereto; and these, as the proof shows, are used for chimney fronts, and to some extent in hearths, and for borders in floors, and for floors in vestibules and bath-rooms. While they may be said to be hard-burned, they are not of as firm a texture as the hard-bodied brown tiles first mentioned, and are much more easily broken, and the glaze thereon much more readily cracked or defaced, by reason of the material being more porous, and not as strong. (3) Moulding tiles intended for bases around the sides of the room, to take the place of the ordinary base-board, and surbase and skirting tiles; the surbase and skirting tiles being also sometimes used for the edges of hearths, and to lay along on the floor as a trimming to the base-board tile, and also for chair-rail strips. Plaintiffs' contention is that all the flat glazed tiles in question are dutiable at 20 per cent. *ad valorem*, under the seventh clause of Schedule B, as "paving tiles," and that the moulding, skirting, and surbase tiles are also dutiable at 20 per cent. *ad valorem*, under the similitude clause of section 2499, as articles manufactured, in whole or in part, not otherwise enumerated under section 2513 of said act; and on this ground it is sought to recover by this suit the excess of the duties so assessed over 20 per cent. *ad valorem*.

The proof shows that there has been for many years a tile manufactured abroad, and imported to this country, and also manufactured in this country, made of earthy materials, with a plain, unglazed surface, the materials being pressed very hard and firmly together, and fired or burned so as to make them very hard, or what is known as "hard-baked," which are known in the trade as "paving tiles," and used quite extensively for floors in the vestibules of churches, and the halls and vestibules of public and private buildings; and the hard-baked, hard-bodied tiles now in question are made of the same material as such plain, unglazed paving tiles, and are in all respects similar to the plain, hard-bodied, hard-baked, unglazed tiles, except that the tiles in question, being glazed upon one side, will, when laid in the floor with the glazed side upwards, make a floor with a glazed surface. As has already been said, the white-bodied tiles are composed of different material, and made intentionally more porous, for the purpose of making them of dif-

ferent colors by means of the glazing; and the white body is found to receive and hold this colored glazing much more perfectly than the hard-burned tile before mentioned. It seems to me that the hard-bodied, hard-baked, glazed tile in question, while not so exclusively used for floors as the plain, unglazed tiles of which I have spoken, are, at the same time, so far susceptible of use, and have been applied to use in floors to such an extent, as to bring them fairly within the designation of "paving tiles." It is true that, probably, for public halls and buildings where there was much use, where they were walked upon without the interposition of a carpet or rugs, the glazing would soon be so far defaced as to make them undesirable for such a purpose; but for hearths and as borders for floors, where the main portion of the wear and service does not come, and in vestibules and bath-rooms, where they are protected by rugs, these tiles are without doubt used, and I can see no reason why they should not be considered as paving tiles, and classed with the unglazed tiles used for the same purpose.

The white-bodied tiles in question are so brittle in their structure, and are so soft in their material or composition, that it seems to me they could hardly be used on any floor where they were to receive any service; being so fragile and destructible as to make them of little value for such purpose. I think the burden of proof is clearly in favor of the conclusion that their main use is in wainscoting, and for the breasts of fire-places, and in positions where they do not receive any heavy service. I do not, therefore, think that they come within the designation of "paving-tiles," under the seventh clause of Schedule B.

The moulding, skirting, and surbase tiles are made of the same materials as the glazed paving tiles before mentioned, but they are of irregular shapes,—some of them being in the form of an ogee moulding; others, a longitudinal segment of a cylinder,—not adapted for or intended to be laid as floors, but intended to take the place of the wood base-boards and chair-rails in a room. They clearly are not paving tiles, and are manifestly intended for other uses than paving; so that their use does not entitle them to be classed as paving tiles, under the similitude clause. Nor are they manufactured articles not otherwise enumerated or provided for, so as to be admissible at 20 per cent. duty, under section 2513, as they clearly fall within the description of glazed earthenware not specially enumerated or provided for, under clause 4 of Schedule B, where the collector classed them. I am therefore of opinion that the collector erred in not classing the hard-bodied, hard-baked, brown tiles as "paving tiles," but that the white-bodied tiles, and the moulding, skirting, and surbase tiles, cannot be admitted at a duty of 20 per cent., either as paving tiles, or under the provisions of sections 2499 or 2513, as contended by plaintiffs. There will be a finding for the plaintiffs as to the hard-bodied, glazed tiles only.

LESHER *et al.* v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 18, 1889.)

CUSTOMS DUTIES—SILK FABRICS.

A light woven fabric, used for the lining of coats, of which one-sixth of the material is silk and the rest cotton, and in which one proportion in bulk of silk is worth as much as seven proportions of cotton, is properly assessed for duty, under clause 383, Heyl's Arrangement of the Act of Cong. March 3, 1883, at the rate of 50 per cent. *ad valorem*, as manufacture of silk and cotton, of which silk is the component material of chief value.

At Law. Action to recover duties paid under protest.

P. L. Shuman, for plaintiffs.

W. G. Ewing, U. S. Dist. Atty., and G. H. Harris, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiffs imported a quantity of goods invoiced as "silk-striped cotton satins," being a light woven fabric mainly used by tailors for linings for coat-sleeves and the backs of vests. The collector assessed the same for duty as manufactures of silk and cotton, silk being the component material of chief value, and assessed duty thereon at the rate of 50 per cent. *ad valorem*, under clause 383 of Heyl's Arrangement of the Act of March 3, 1883. The plaintiff, insisting that the component material of chief value in said goods was cotton, paid the duties assessed under protest, took an appeal to the secretary of the treasury, by whom the action of the collector was affirmed, and now brings this suit to recover back the excess of duties demanded, insisting that said goods were dutiable, under clause 324a of Heyl, "as cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton not specially enumerated or provided for in this act, 35 per centum *ad valorem*."

The proof in the case shows that the filling of the goods in question is wholly of cotton, and that the warp is made of alternate stripes of silk and cotton, the cotton stripes being about twice as wide as the silk stripes, so that about one-third of the warp may be said to be silk. Assuming that all the filling and two-thirds of the warp is cotton, this leaves one-sixth of the entire material consisting of silk; and the proof further shows that the relative values of the silk and cotton are in the proportion of one to seven,—that is, one proportion in bulk of silk is worth as much as seven proportions in bulk of cotton; while the proof shows that, where the proportion of silk is 12 per cent. or over in bulk, silk would be the component material of chief value. The proof in this case showing that the silk in these goods is equal to 16½ per cent. of the entire bulk, there can be no doubt that the collector correctly classed these goods as silk, and that they were properly dutiable at 50 per cent. *ad valorem*.

Ex parte Cuddy.

(Circuit Court, S. D. California. August 13, 1889.)

HABEAS CORPUS—DENIAL BY SUPREME COURT ON APPEAL—RENEWAL OF APPLICATION.

Where a petitioner for a writ of *habeas corpus* appeals to the United States supreme court from a judgment of the circuit court denying his application, voluntarily omitting a material portion of his case, he cannot, after failing on the appeal upon the record presented, renew his application before another court or justice of the United States, upon the same record, with the addition of the matter thus omitted, without first having obtained leave for that purpose from the supreme court. The question is entirely different when subsequently occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration.

Application of Thomas J. Cuddy to be Discharged from Imprisonment on a Writ of *Habeas Corpus*.

J. A. Anderson, for petitioner.

George J. Davis, U. S. Dist. Atty.

FIELD, Justice. The petitioner applied to me some days ago in San Francisco for a writ of *habeas corpus*, alleging that he is unlawfully imprisoned by the marshal of the United States for the southern district of California, and the warden of the jail of Los Angeles county, contrary to the constitution and laws of the United States; that such imprisonment is had under and by virtue of a warrant of commitment based upon a judgment of the district court of the United States for the southern district of California, adjudging him guilty of contempt, and sentencing him to imprisonment in that jail for the period of six months. An order was thereupon made that a writ issue, to be directed to the marshal, and made returnable before me at this place, Los Angeles, on the 10th instant. The petition sets forth the judgment of the district court, rendered on the 13th of February, 1889, upon which the writ of commitment was issued under which the petitioner is held. It is as follows:

"Whereas, in the progress of the trial of the action of *The United States of America v. W. More Young*, on the 12th day of February, 1889, upon the examination of the term-trial juror Robert McGarvin as to his qualification to sit as a trial juror in the said action, the said McGarvin testified, among other things, in effect, that on the day previous he was approached by one Thomas J. Cuddy, with the object on Cuddy's part to influence his (McGarvin's) action as a juror in the said case in the event that he should be sworn to try the said action; and whereas, from the testimony, this court, on the said 12th day of February, 1889, entered an order directing the said Thomas J. Cuddy to show cause before this court, at the court-room thereof, at 10 o'clock on the 13th day of February, 1889, why he should not be adjudged guilty of a contempt of this court; and whereas, in response to the said citation, said Thomas J. Cuddy did, on the said 13th day of February, 1889, appear before the said court; and whereas, testimony was then and there introduced in respect to the matter both for and against him,—the court, having duly considered the testimony, does now find the fact to be that the said Thomas J. Cuddy did, upon the 11th day of February, 1889, approach the said Robert McGarvin, at the time being a term juror duly impaneled in this court, with a view to improperly influence the said McGarvin's action in the case of the United

States of America against the said Young in the event the said McGarvin should be sworn as a juror in said action. Now, it is here adjudged by the court that the said Thomas J. Cuddy did thereby commit a contempt of this court, for which contempt it is now here ordered and adjudged that the said Thomas J. Cuddy be imprisoned in the county jail of the county of Los Angeles for the period of six months from this date, and the marshal of this district will execute this judgment forthwith."

The petition sets forth the proceedings taken by the court, and alleges that the transaction which was the basis of the charge against the petitioner, and for which the judgment was rendered, took place on the 11th day of February, 1889, when the district court was not in session, and nearly a quarter of a mile distant from the court-house in which that court is held. He therefore claims that the district court had no jurisdiction to try and sentence him for the alleged contempt, because the act charged as such was committed at the time and place designated, and was not adjudged to have been done corruptly, or by threats or force. The purport of the objection is that the act charged as a contempt was not committed in the presence of the court, or so near thereto as to obstruct the administration of justice; and therefore did not present a case within the power of the court to punish summarily, under section 725 of the Revised Statutes, and therefore that the judgment was illegal and void. That section reads as follows:

"The said courts [of the United States] shall have power * * * to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of said courts."

The marshal returns the warrant of commitment under which he holds the prisoner. By consent of parties the record in the case of the petitioner before the district court and in the supreme court of the United States is also presented. By that record it appears that the petitioner, on the 9th day of April, 1889, applied to the district court for the southern district of California for a writ of *habeas corpus* in order that he might be discharged from the imprisonment now complained of, asserting, as now, that the same was illegal for the reason that the court had no jurisdiction to try and sentence him, because the matters set forth in the judgment do not constitute any contempt under section 725 of the Revised Statutes, and because the judgment was not founded upon proceedings in due course of law; that the district court, after due consideration, denied the application for a writ; that thereupon an appeal was taken from the judgment to the supreme court of the United States, where, after argument and due consideration, the judgment was affirmed. 131 U. S. 280, 9 Sup. Ct. Rep. 703. The additional matter set forth in the present application consists only of the testimony which was before the district court when the question of contempt charged against the petitioner was

considered, and which might have been contained in the record of the supreme court, and, if deemed important for the due consideration of the validity of the judgment of the district court, should have been thus presented. The finding and judgment of the district court do not state that the acts constituting the alleged contempt were done in the presence of the court, or so near thereto as to obstruct the administration of justice. The supreme court held that, if done in the presence of the court, "that is, in the place set apart for the use of the court, its officers, jurors, and witnesses, they were clearly a contempt, punishable as provided in section 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment;" but that, inasmuch as the district court possesses superior jurisdiction within the meaning of the familiar rule that the judgment of such courts cannot be attacked collaterally, it must be presumed that it acted rightly upon such a state of facts as authorized its judgment; that the want of jurisdiction not appearing affirmatively, it must be presumed that the evidence made a case within its jurisdiction to punish the petitioner in the mode prescribed. The judgment of the district court was therefore affirmed.

The petitioner, in the present application, as appears from what has already been said, supplies what was omitted in his record to the supreme court. At the outset the question is thus presented whether it is permissible for a party to appeal from a judgment denying his application, voluntarily omitting a material portion of his case, and, after invoking the judgment of the appellate court upon the record presented, and failing therein, to renew his application before another court or justice of the United States, without first having obtained leave for that purpose from the appellate court. Before passing upon this question some consideration should be given to the position of the district attorney as to the jurisdiction of the court to punish summarily as a contempt an act obstructing the administration of justice in pending cases, even if committed at a distance from the court-room. He contends, if I rightly understand him, that all the officers and parties necessarily attending or summoned to attend in pending cases in the courts of the United States as marshals, clerks, jurors, and witnesses "are so near thereto," that is, so connected therewith,—applying the terms "so near thereto" as indicating relationship of subject, rather than relationship of place,—that misbehavior towards them, though they are distant at the time from the court-room, or during the temporary adjournment of the court, constitutes a contempt punishable under the statute. Certain it is that attempts to turn such officers or parties from the performance of their duty, in order to secure the selection of particular persons as jurors, or to bias the judgment of the jurors selected, or to influence witnesses to suppress or qualify their testimony, or to absent themselves from the court, or threats of violence, or the use of insulting language to them respecting, or to influence, their conduct, though uttered or done outside of the court-house, and at a distance from it, are as much an obstruction to the administration of justice as though uttered or done within its walls. Though I am not quite prepared to accept this position of the district attorney, it is entitled to grave consideration.

I do not wish to express an opinion upon it, as it is unnecessary to the disposition of the case, and for the further reason that the justices of the supreme court deemed it of sufficient importance to reserve their judgment upon it.

The statute also declares the disobedience or resistance by any person of any "lawful writ, process, order, rule, decree, or command" of the courts of the United States to be a contempt. It is the practice of the district courts of the United States to command all persons summoned and sworn as term-trial jurors to avoid speaking with others, and not to allow others to speak to them with respect to cases which may be tried before them. Such a command, if a standing rule of the court, or given, as usual, in its instruction to the jurors, when accepted, would bind all persons, jurors, parties, and others cognizant of it; and a disobedience of it would be a flagrant contempt. Nothing, indeed, can tend more to pollute the administration of justice than to allow tampering with jurors. Any attempts, however slight, to swerve them from the strict line of their duty, should be punished with the utmost rigor. Purity in the administration of justice could not otherwise be maintained, and such purity is the only safety of the people under a free and popular government. I suppose such a command was given by the district court in its instructions to the trial jurors of the term, to one of whom the improper approach was made which constitutes the contempt for which the petitioner was sentenced to be imprisoned; but, as no record is preserved of it, I cannot act upon the suggestion of the fact.

I return, therefore, to the question whether the petitioner can renew his application for a writ after the decision of the supreme court on his appeal to that tribunal, without first having obtained its leave. If he can renew it on another record, which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs. No appeal or writ of error was allowed there from a judgment refusing a writ of *habeas corpus*; nor, indeed, could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of *res judicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted. *Ex parte Kaine*, 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration the fact that a previous application

had been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it. I hardly think that an ordinary justice would feel like disregarding and setting aside the judgment of a magistrate like Chief Justice MARSHALL, or Chief Justice TANEY, who had refused an application for a writ after full consideration. In some states an exception is also ingrafted upon the general doctrine where a writ is issued to determine, as between husband and wife, which of the two shall have the custody of their children. In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, or which might have been presented, on the first. The question is entirely different when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are no new facts which did not exist when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused,—a provision which would seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a new application by, the petitioner. He need not have appealed from the refusal of the district court; he could have applied to the circuit judge, and also, afterwards, to the circuit justice. He did not think proper to pursue that course, but took his appeal to the supreme court, and during the argument there no suggestion was made that the record did not fully disclose the petitioner's case; and when that tribunal decided the case, no request was made for permission to renew the application; and now the imprisonment of the petitioner under the judgment affirmed by that court is drawing to a close; it will expire with this day. This writ must therefore be dismissed, and the prisoner remanded; and it is so ordered.

Ex parte FARLEY.

Ex parte WILSON.

(Otroutt Court, W. D. Arkansas. October 14, 1889.)

1. HABEAS CORPUS—JURISDICTION OF UNITED STATES COURT.

A United States circuit or district court, or any judge thereof, may issue a writ of *habeas corpus* in every case where it is alleged a party is restrained of his liberty anywhere in the territorial jurisdiction of such courts without due process of law, or against the constitution or laws of the United States. This may be done by an order or proceeding of a state court, or any United States court, or by a person acting outside of a court.

2. SAME—REVIEW.

By a *habeas corpus* proceeding the jurisdiction of a court trying a person may be inquired into, and the court having power to issue the writ will look into so much of the proceedings as will enable it to determine whether jurisdiction exists or not.

3. COURTS—JURISDICTION.

Jurisdiction in a court to try a case means jurisdiction over the place, the person, and the thing, or the subject-matter. That there may be subject-matter there must be an act that is a crime, and this act must be properly and legally presented before a court.

4. SAME—FEDERAL JURISDICTION.

All courts of the United States are creatures of the constitution and laws of the United States, and have only such jurisdictional powers as are conferred by the constitution and laws of the United States.

5. SAME—COURTS IN INDIAN TERRITORY—GRAND JURY.

The United States court at Muskogee, Indian Territory, has no power to impanel a grand jury, as no such power is given by the act creating it, and section 808 of the Revised Statutes of the United States has reference only to United States circuit or district courts, and the court at Muskogee is neither. The power to impanel a grand jury is not an inherent power of a court of the United States, but is derived from the statutes.

6. STATUTES—CONSTRUCTION.

In construing the meaning of a law the court may consider the statements of those who had charge of the act as to the meaning and purpose of the act made to the legislative body passing it.

7. INDICTMENT AND INFORMATION—ILLEGAL GRAND JURY.

The grand jury impaneled by the United States court at Muskogee was impaneled without authority of law, and was an illegal body. An indictment found by it would be simply a nullity.

8. SAME—DUE PROCESS OF LAW.

A person convicted and sentenced to imprisonment for larceny upon such an indictment would be illegally convicted and sentenced, and is therefore restrained of his liberty without due process of law, and contrary to the constitution and laws of the United States.

9. HABEAS CORPUS—DISCRETION OF COURT.

When such facts are shown, the writ of *habeas corpus* becomes a "writ of right," and the court having the power to issue it can exercise no sound discretion against issuing it.

(Syllabus by the Court.)

On Rule to Show Cause why Writs of *Habeas Corpus* Should not Issue.

The cases of the two petitioners are precisely alike, and they will therefore be considered together. In their petitions they allege that they were, on the ——— day of September, 1889, indicted by a grand jury, so called, impaneled by the United States court for the Indian Territory, for the crime of larceny; that on the ——— day of September, 1889, they were tried upon said indictment by a petit jury in said court. They were by said jury convicted on said charge; that on the 9th day of September, 1889, the court, upon said verdict of guilty, entered judgment against them, and sentenced them to one year's imprisonment in the jail at Muskogee, where they are now confined; that the said parties are now illegally imprisoned; that they are restrained of their liberty contrary to the constitution and laws of the United States, because said indictment was found by a grand jury that had no legal existence, as it was impaneled without authority of law; that the court had no legal authority to impanel a grand jury; that the indictment found by it is a nullity; that they are entitled to the writ of *habeas corpus*, that the legality of their imprisonment may be inquired into.

M. H. Edmiston and Wm. H. Clayton, U. S. Dist. Atty., for petitioners.

Z. T. Walrond, U. S. Atty., for the Indian country, in opposition.

PARKER, J., (*after stating the facts as above.*) This court has no jurisdiction, by writ of error or appeal, to pass even on the jurisdiction of the court at Muskogee. By such means it would have no right to inquire into the cause of imprisonment of a party restrained of his liberty, no matter how illegal such restraint might be. But if the illegality of restraint grows out of a sentence imposed, or any order of imprisonment which the court could not make for want of jurisdiction, the want of jurisdiction may be inquired into by this court by a *habeas corpus* proceeding; and upon the hearing of such a case the court, or any judge thereof, may make such inquiry as is necessary to enable it to see whether the jurisdiction of the court has been exceeded, or that there is no authority to hold the petitioner under sentence. The court may grant this great "writ of right" in every case where a party is restrained of his liberty anywhere in the territorial jurisdiction of the court, against the constitution and laws of the United States, or the petitioner is deprived of his liberty without due process of law. This may be so done by an order or proceeding of a state court, or any United States court, or by a person outside of a court; and if so done in the territorial jurisdiction of a United States circuit or district court, such courts, or any judge thereof, may, upon proper application, issue a writ of *habeas corpus* to inquire into the jurisdiction of a court, or the want of authority in such court, to restrain a party of his liberty. The jurisdiction of the circuit and district courts within their territorial jurisdictions to issue this writ is the same as the supreme court of the United States within its territorial jurisdiction, which is the whole United States.

When the supreme court will review the proceedings of an inferior court by *habeas corpus*, a United States circuit or district court has the power, within their territorial jurisdictions, to inquire, in a case where a party is restrained of liberty by the order of a court, whether that court had jurisdiction to make the order, or had authority to restrain the party of his liberty. The state of case which must exist to warrant the invocation of this writ is clearly settled in *Ex parte Wilson*, 114 U. S. 421, 5 Sup. Ct. Rep. 935, and the numerous authorities there cited. All these authorities give to the courts having jurisdiction the right by *habeas corpus* to inquire whether the court restraining the party of his liberty has jurisdiction to do so. The court, in its inquiry to ascertain the existence of jurisdiction, will look into so much of the proceeding as will enable it to determine whether jurisdiction exists or not. *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18.

It was claimed in argument that each court is the judge of its own jurisdiction. That is true to a certain extent. But it cannot so adjudge its jurisdiction as to deprive a person of the right, by *habeas corpus*, to ask a court having jurisdiction to issue the writ to make inquiry to see if there has been a rightful exercise of jurisdiction. This is sufficient on the motion to dismiss the proceedings in these cases for want of jurisdiction in this court to issue the writ.

The cases of James Farley and Robert Wilson, who petition for a writ of *habeas corpus*, are exactly alike as far as the question of jurisdiction is concerned. They were charged by an indictment found by a grand jury impaneled by the court at Muskogee with the crime of larceny. Jurisdiction in a court to try a case means jurisdiction over the place, the person, and the subject-matter. That there may be a subject-matter there must be an act that is a crime, and this act must be properly and legally presented before a court. These petitioners were tried and convicted upon an indictment, and sentenced to jail upon that conviction, where they now are. As far as these two cases are concerned, it will be sufficient to inquire whether the indictment against them was legally found, as they were charged in no other way than by indictment. The first question is, was the indictment in the case of Wilson and Farley legally found; that is, was the grand jury that found it a legal body? Has the court at Muskogee the power to impanel a grand jury? If it has not such power, the grand jury that found this indictment was an illegal body, and it had no power to accuse any one by indictment. All courts of the United States, whether they be the supreme court of the United States, circuit courts, district courts, United States territorial courts in the territories, or the court for the Indian Territory, established by the act of March 1, 1889, are creatures of the constitution, and the statutes passed in pursuance thereof, and they have only such jurisdictional powers as are conferred by the constitution or by statute. Has the court at Muskogee the power to impanel a grand jury? If it has not this power, there was no subject-matter properly presented in the case of Farley and Wilson upon which the court could proceed to try them. It must get this power from the statutes of the United States. It has no such inherent power, because it is a court created by a statute of the United States. All of its powers, as fundamental as that of impaneling a grand jury, must be found in the statute law of the United States, or they do not exist. Then this right of the court at Muskogee to impanel a grand jury must be found either in the act of congress of March 1, 1889, creating the court, or it must come from some other statute of the United States. The reading of the act creating the court shows an entire absence of any provision for a grand jury. This was no mere oversight in congress, as Mr. Culberson, chairman of the judiciary committee of the house of representatives, when, on February 28, 1889, presenting the final conference report of the two houses to the house of representatives, on the subject of the bill providing for a grand jury, said: "As the court is limited in its criminal jurisdiction to offenses below the grade of felony, no grand juries will be needed, and none are provided for." Congressional Record, vol. 20, p. 2459. This is the language of one of the law-makers; the language of the gentleman who, as chairman of the judiciary committee of the house, had charge of the bill in that branch of the law-making power. The statements of those who had charge of the law, made to the legislative body passing it, as to its meaning and purpose, are always competent. This statement as to the power conferred is fully borne out by the act itself. Unless there

is in this act express provision for a grand jury, the court does not have, by virtue of it, the power to impanel one. There is no express power of this kind in the law creating the court.

Does the court have that power by the general law of the United States? The only general law upon the subject of grand juries is found in sections 808 and 810 of the Revised Statutes of the United States. Section 808 provides that "every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. * * *" The remainder of the section provides a method for filling up the panel when a sufficient number do not attend, or where a challenge is sustained to the panel. Section 810 provides, when a grand jury shall be summoned to attend any circuit or district court, that it is to be done when ordered by one of the judges of the circuit court, or the judge of such district court. These two sections are the only two in the Revised Statutes which provide for a grand jury. It will be observed that the language of section 808 provides for impaneling a grand jury before a district or circuit court, and section 810 confines the summoning of a grand jury to a circuit or district court. These words, "circuit and district," as words of description, certainly have a meaning, and as such words they become words of limitation used to limit the character of the courts in which grand juries may be impaneled to the courts established by the laws of the United States, and by such laws named as circuit and district courts. The supreme court of the United States, in *Reynolds v. U. S.*, 98 U. S. 145, says:

"Section 808 was not designed to regulate the impaneling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts."

This is an interpretation by the highest tribunal of the land of the meaning of the section which really needed no interpretation, as its meaning is manifest from its language.

Then, unless the court at Muskogee is a circuit or district court of the United States, it does not have the power, under the Revised Statutes, to impanel a grand jury. It is hardly necessary to add that it is neither. It is a court of the United States, but it is not a district or circuit court. The tenure of the office of its judge shows that, as he holds his office but for four years, while the tenure of the circuit and district judges is, as provided by the constitution, during good behavior, the court is not a circuit or district court. The nature of its civil jurisdiction, as conferred by the act of March 1, 1889, also shows its character to be other than that of a circuit or district court, for civil jurisdiction is conferred by that act upon this court that congress, under the constitution, cannot confer on a circuit or district court of the United States. Then the Muskogee court does not have the right to impanel a grand jury as an inherent right by virtue of its being a court. It does not get it from the law of its creation. It does not get it from the Revised Statutes, or any other statute. Consequently it has no such right. Not having such right the grand jury impaneled by it was an illegal body, and its charging persons with crime by indictment or information would be simply a nullity. A per-

son convicted and sentenced to imprisonment upon such an indictment would be illegally convicted, and illegally restrained of his liberty, and consequently would be held in custody or deprived of his liberty contrary to the constitution and laws of the United States. He would be restrained of his liberty without due process of law. When the fifth article of the amendments to the constitution provided, "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," it meant a grand jury which was a legal body,—one impaneled by a court which had legal authority to so impanel it. When it appears to a court having jurisdiction to issue the writ of *habeas corpus* that a petitioner for the same is restrained of his liberty contrary to the constitution and laws of the United States, the writ becomes one of right, belonging to the citizen, and a court has no right to refuse it to him. The court can exercise no discretion against issuing it, but it must go as a matter of right.

To my mind the above views are decisive of the cases of Farley and Wilson. That they are held in custody without due process of law there can be no question, and consequently they are restrained of their liberty contrary to the constitution and laws of the United States, and therefore the writ of *habeas corpus* has become a writ of right, and the writ to bring them before the circuit court of this district must be issued; and it is so ordered.

Ex parte McClusky.

Ex parte Brown.

Circuit Court, D. Arkansas. October 14, 1889.)

1. INDICTMENT AND INFORMATION—UNITED STATES LAWS—INFAMOUS OFFENSE.

Under the laws of the United States, an infamous crime is one for which the statutes authorize the courts to award an infamous punishment. Its character for being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but on whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment.

2. SAME.

At the present day, sentence of imprisonment, either with or without hard labor, to a penitentiary where, by the rules of the prison or the laws of the state, hard labor is exacted of the prisoners, is an infamous punishment, and a crime which may be so punished is an infamous crime.

3. SAME—LARCENY.

Larceny, under the laws of the United States, is an infamous crime, and as such a party must, by article 5 of the amendments to the constitution of the United States, be charged with the offense by indictment or presentment of a grand jury, and cannot be legally charged by information.

4. SAME.

The indictment or presentment is necessary to give the court jurisdiction, and without one or the other the court has no jurisdiction to try.

5. SAME—RIGHT TO BE CHARGED BY INDICTMENT—WAIVER.

The right to be charged by indictment or presentment is a fundamental right of a party, which cannot be waived by him so as to deprive such party of afterwards setting up the want of jurisdiction in the court to try him.

6. SAME—HABEAS CORPUS.

In a criminal proceeding against a party he may waive certain things, but he cannot waive a fundamental right affecting the very jurisdiction of the court to try him. And, even though he may have attempted to waive such right, in a case where he has been found guilty and is imprisoned, he may sue out a writ of *habeas corpus*, and obtain his release, because he has been tried and convicted without due process of law, and against the constitution and laws of the United States.

(*Syllabus by the Court.*)

On application for *habeas corpus*.

These cases are alike, and they will be considered together. The petitioners state that on the — day of September, 1889, an information was filed against them in the United States court for the Indian Territory, by the district attorney for the Indian territory, charging them with larceny; that said petitioners were afterwards arraigned before the said court; and that they then and there pleaded guilty to said charge; that afterwards judgment was entered on said plea of guilty, and by said judgment said McClusky was sentenced by said court to imprisonment in the jail at Muskogee, for the period of six months, where he now is; and said Kittie Brown was sentenced to the reform school at Washington, D. C., but, at the time of the filing of her petition for a writ, she was incarcerated in the jail at Muskogee. Each petitioner alleges, in his and her petition for the writ of *habeas corpus*, restraint of liberty, contrary to the constitution and laws of the United States, and upon that ground they pray the issuance of writs of *habeas corpus*, that they may be brought before this court, and relieved of their illegal imprisonment.

M. M. Edmiston and Wm. H. H. Clayton, U. S. Atty., for petitioners.

Z. T. Walrond, U. S. Atty., for the Indian country.

PARKER, J., (*after stating the facts as above.*) The first question is, could these petitioners be pronounced guilty of the crime of larceny, and sentenced to imprisonment for said crime, without being first charged with the crime by an indictment preferred by a legal grand jury? *Second.* If this is a fundamental requisite, is the right to insist upon its being complied with one that may be waived by a party, and is it waived by a plea of guilty to a charge of larceny presented by an information?

Article 5 of the amendments to the constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Is larceny an infamous crime? In *Ex parte Wilson*, 114 U. S. 426, 5 Sup. Ct. Rep. 935, the supreme court says:

"The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one."

In *Mackin v. U. S.*, 117 U. S. 352, 6 Sup. Ct. Rep. 777, the supreme court says:

"We cannot doubt that at the present day imprisonment in a state-prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the states and territories, as well as of congress."

It is not necessary, to make a punishment infamous, that the law shall require that the party should in terms be sentenced to hard labor. If, under the law, he may be sentenced to a state-prison or penitentiary, either with or without hard labor, his punishment is infamous. So says, in effect, *Ex parte Wilson*, *supra*, and so says, expressly, *Mackin v. U. S.*, *supra*. And why is not this a reasonable construction, when it is a fact of common knowledge that, by the laws and rules governing all state-prisons and penitentiaries, hard labor is exacted of those who are sentenced there, and the supreme court, in *Ex parte Karstendick*, 93 U. S. 396, declares that all United States convicts are subject to the same discipline and treatment as convicts sentenced by courts of the state? The punishment is no less infamous when the convict may, under the law, be put to hard labor in the prison, although not in terms sentenced to it, than when the sentence, in obedience to the law, sets it out. The punishment is equally infamous in both cases. When the accused is in danger of being subjected to an infamous punishment, if convicted, the crime of which he is accused is an infamous crime. 114 U. S. 417, 5 Sup. Ct. Rep. 935; 117 U. S. 348, 6 Sup. Ct. Rep. 777; *U. S. v. Tod*, 25 Fed. Rep. 815. When is he in such danger? Why, in every case where the court, under the law, might sentence to a state-prison or penitentiary.

Section 5541 provides:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

Section 5546 provides that—

"All persons who have been, or who may hereafter be, convicted of crime, by any court of the United States, whose punishment is imprisonment in a district or territory where at the time of conviction there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they may have been or may be sentenced in some suitable jail or penitentiary in a convenient state or territory, to be designated by the attorney general."

Of course, when so designated, it becomes the duty of the court to sentence the prisoners to the place so designated. The only difference between these two sections relates to the class of cases where the judge may designate the place of imprisonment, and the class where the attorney general may designate such place. The attorney general may designate the place of imprisonment in all cases where there is not a suitable jail or penitentiary for the confinement of prisoners in a district or territory where they may be convicted. Suppose the judge would, in a case where he can designate, fail to designate a state jail or penitentiary, and send the parties, as he has done with McClusky in this case, to a local jail, would that take away the infamous character of the offense? If this were so, the same act might be an infamous crime in one district and not an infamous crime in another; its character depending on whether the judges

designated, or failed to designate, a state-prison or penitentiary. So with all cases where persons are to be confined in state-prisons designated by the attorney general. If he would designate a state penitentiary as the place of confinement of persons convicted in one district, and fail to do so in another district, the same crime would be infamous in one case, while in the other it would be entirely free from that character. The statement of these propositions shows they are not true. Neither the judge nor the attorney general can, at their pleasure, determine the infamous character of an offense. The test is whether the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is infamous,—whether the accused is in danger of being subjected to an infamous punishment. If convicted of larceny he is, under the power of the attorney general to designate the place of imprisonment, in such danger. By the rule established by the supreme court in *Ex parte Wilson* and *Mackin v. U. S.*, larceny becomes an infamous offense. It was infamous at the common law, not only because it was a crime which exhibited particular turpitude and baseness of character, but because of the nature of its punishment as well. Up to 7 & 8 Geo. IV., it was, if the property stolen was over the value of 12 pence, punishable with death. This was infamous punishment. Then by the above statute it was punished with transportation to a penal colony, or two years' imprisonment, and whipping, if a male, and that was certainly infamous punishment. This was the condition of the common law of England at the time of the adoption of the fifth amendment to the constitution. I conclude that the crime of larceny is an infamous crime, and the person accused must be so accused by an indictment or presentment of a grand jury.

Can a party waive the right to be charged by indictment or presentment; and if so, is his plea of guilty to a charge contained in an information not authorized by the law a waiver of his right to be accused by an indictment? A party cannot waive a constitutional right when its effect is to give a court jurisdiction. *Hawes*, Jur. §§ 11, 12. The fifth amendment to the constitution, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, provides for a requisite to jurisdiction. *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781; *Parkinson v. U. S.*, 121 U. S. 281, 7 Sup. Ct. Rep. 896. If the crime is of such a nature that an indictment to warrant a prosecution of the crime is required by the law, the court has no jurisdiction to try without such indictment. Can a party consent to jurisdiction? Can he, by an agreement with the government, surrender his liberty for a stipulated time? Has any person the right to surrender his liberty in violation of a fundamental right, secured to him for the protection of the liberty of such person by the fifth amendment to the constitution of the United States? No man or no power has the right to take away another's liberty, even though with consent, except by due process of law. Due process of law, in a case like the one charged against petitioners, means compliance by the government with a fundamental requisite, such

as that the party shall be charged with the crime in the way provided by the constitution and laws of the United States. Liberty, under such constitution and laws, is an inalienable prerogative, of which no man by mere agreement can divest himself. Any divestiture not occurring by due process of law is null. 1 Whart. Crim. Law, (9th Ed.) § 145. Mr. Cooley, in Constitutional Limitations, (page 182,) says: "A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement." This means that, by individual consent or agreement, fundamental rights cannot be waived. The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties. The court of appeals of New York, in *Cancemi v. People*, 18 N. Y. 136, said:

"Criminal prosecutions involve public wrongs, a breach and violation of public rights and duties, which affect the whole community, considered as a community, in its social and aggregate capacity. The penalties or punishment, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty, or part with his life. The state—the public—have an interest in the preservation of the liberties and lives of the citizens, and will not allow them to be taken away without due process of law, when forfeited, as they may be as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. These considerations make it apparent that the right of a defendant, in a criminal prosecution, to affect, by consent, the conduct of the case, should be made more limited than in civil actions. It should not be permitted to extend so far as to make radical changes in great and leading provisions, as to the organization of the tribunals, or the mode of proceeding prescribed by the constitution and the laws. Effect may justly and safely be given to such consent in many particulars, and the law does, in respect to various matters, regard and act upon it as valid. Objections to juries may be waived. The court may be substituted for triers to dispose of challenges to juries. Secondary, in place of primary, evidence may be received. Admissions of facts are allowed; and, in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what, without it, would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon, if it is made clearly to appear that the nature and effect are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation, the indictment, is supposed to be a sufficient safe-guard to the public interests."

The above decision most clearly declares the law governing a case where a fundamental right of the citizen is to be affected by a criminal proceeding, such right being one regulating the method of that proceeding. Mr. Blackstone (4 Comm. 189) says: "The king has an interest in the preservation of all his subjects." In this country the state and the law have such a great interest in the life and liberty of the citizen as to see to it that such life or liberty shall not be taken away, even with the consent of the citizen, in violation of one of the great constitutional fundamental requisites regulating the method to be adopted to deprive the citizen of his life or his liberty. Mr. Blackstone (1 Comm.

133) again declares that the "natural life, being an immediate donation of the Great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow-creatures, merely upon their own authority." So it is with the liberty of the citizen. It is a donation of the Great Creator, and cannot be taken by persons upon their own authority, even with the consent of the citizen, whose liberty is taken; but it must be taken by due process of law. None of the fundamental requisites to the proceeding, which make up due process of law, can be so waived as to deprive the person whose liberty is taken from him of afterwards resorting to legal means to obtain his liberty. In such a case as the one charged against these petitioners, the fundamental law of the land—the constitution of the United States—requires that the charge be preferred by an indictment found by a legal grand jury. The infirmity in the proceeding, which resulted in their being sentenced to prison, is that the proceeding is one against the constitution and laws of the United States; one unknown to such laws; one created by the mere voluntary act of the parties; and it is, in effect, an attempt to adopt a species of arbitration to settle the question whether the petitioners have been guilty of offenses against the United States. This is not the way to ascertain this fact. From the principles of this law which I have set out, as well as the reasons for these principles, which I think are sustained by all the authorities which declare the law on the subject, these petitioners could not be legally deprived of their liberty by their pleading guilty to the charge of larceny preferred by an information, and by so doing they did not deprive themselves of the right to regain their liberty by *habeas corpus*. It must, therefore, be held that they are restrained of their liberty without due process of law, and against the constitution and laws of the United States. Therefore the writ must issue, and the parties are entitled to a discharge by it from custody.

UNITED STATES *v.* HOLTZHAUER *et al.*

(Circuit Court, D. New Jersey, September 24, 1889.)

1. CRIMINAL NEGLIGENCE—OFFICERS OF VESSELS—JURISDICTION.

An indictment for violating Rev. St. U. S. § 5344, which provides that "every captain * * * or other person employed on any steam-boat or vessel, by whose misconduct, negligence, or inattention to his duties * * * the life of any person is destroyed, * * * shall be deemed guilty of manslaughter," need not allege that the offenses charged were committed at a place under the exclusive jurisdiction of the United States, or on the high seas, and outside the jurisdiction of any state.

2. SAME—INDICTMENT.

A count in such indictment which charges that by defendants' negligence, misconduct, and inattention to their duties a certain person's life was destroyed, without setting out the facts on which such charge is based, is defective.

3. SAME.

But a count charging that defendants took on board their vessel more passengers than were allowed by law, on reason of which it became unmanageable, and that decedent's death by drowning was caused thereby, is sufficient.

4. SAME.

It is not necessary that such indictment should expressly charge defendants with having committed the crime of manslaughter.

5. SAME—PILOT.

A pilot cannot be convicted under a clause of such statute making "every owner, inspector, or other public officer, through whose fraud, connivance," etc., the life of any person is destroyed, guilty of manslaughter.

On Motion to Quash Indictment.

Saml. Kalisch and *Chauncy H. Beasley*, for defendant.

Geo. S. Duryea, U. S. Dist. Atty., and *Wm. D. Daly*, Asst. U. S. Dist.

Atty.

Before McKENNAN and WALES, JJ.

PER CURIAM. The defendants are jointly indicted for a violation of section 5344 of the Revised Statutes of the United States, which reads as follows:

"Every captain, engineer, pilot, or other person employed on any steam-boat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court of the United States, shall be," etc.

The first count of the indictment charges that the defendants, Holtzhauer and Dauer, on the 23d of June, 1888, being the captain and pilot, respectively, of the steam-boat called the "Olivette," which was plying and sailing in and upon the waters of Newark bay, a common highway of commerce, open to general navigation, and within the territorial and maritime jurisdiction of the United States, it was their duty to conduct and manage the said steam-boat carefully, prudently, and safely, so that the life of any person being a passenger thereon should be safe, and not destroyed; and that, while Augusta Weaver was a passenger on said boat, on the day and year and in the place aforesaid, the defendants "so carelessly and negligently managed and conducted and performed their duties on said steam-boat and vessel so that, by and through their said misconduct, incompetency, unskillfulness, negligence, and inattention to their duties on said steam-boat and vessel, the said steam-boat and vessel was by them run in and upon a certain dyke, or jetty, situate in the waters of the said Newark bay aforesaid, and the said vessel was then and there overturned and upset, and then and there the life of the said Augusta Weaver, a passenger thereon as aforesaid, was destroyed, she then and there being drowned; and she, the said Augusta Weaver, then and there died, contrary to the form of the act," etc. The second count sets forth that it was the duty of the defendants to conduct, manage, and sail said steam-boat "according to law, and not in violation thereof, so that the life of any person being a passenger on said steam-boat and vessel should be safe, and not destroyed;" that Augusta Weaver was a passenger thereon; and then charges that the defendants "did in violation of law take on board the said steam-boat and vessel a greater number of

passengers than was allowed by law; they being allowed by law to take on board and carry twelve persons, when in truth and in fact they did take on board and carry the number of twenty persons to sail in the waters of the said Newark bay aforesaid, and did sail thereon in said steam-boat and vessel with said excess of passengers and persons, and that by reason thereof then and there the said steam-boat and vessel was overloaded and overcrowded, and was then and there unmanageable, and the said vessel was then and there overturned and upset; and then and there the life of the said Augusta Weaver, passenger thereon as aforesaid, was destroyed, she being then and there drowned, and she, the said Augusta Weaver, then and there died, contrary to the form of the act," etc.

To this indictment, the substance and form of which have been stated, several objections are made on behalf of the defendants. The first objection—that the indictment does not set out sufficient jurisdictional facts—is not tenable. Section 5344 was enacted by congress in the proper exercise of its constitutional power "to regulate commerce with foreign nations and among the several states," and it was early decided by the supreme court of the United States that this power included the power to regulate navigation as connected with the commerce of foreign nations and among the states. *U. S. v. Coombs*, 12 Pet. 72; citing and reaffirming *Gibbons v. Ogden*, 9 Wheat. 189. Counsel for the defendants are in error in contending that this section is *in pari materia* with preceding sections, under the title of "Crimes arising within the territorial and maritime jurisdiction of the United States," and which confer jurisdiction on the courts of the United States to try and punish those offenses only which have been committed at certain places within the jurisdiction of the United States and "outside of the jurisdiction of any state." Their proposition is that, as the offenses charged against the defendants were committed within the body of Essex county, in the state of New Jersey, the courts of that state alone can take judicial cognizance of them. It is undoubtedly true that these defendants might be liable to prosecution at common law in the courts of New Jersey, but that fact of itself does not oust the jurisdiction of this court; and it is not necessary, therefore, that the indictment should show that the offenses charged were committed at a place under the exclusive jurisdiction of the United States, or on the high seas, and outside of the jurisdiction of any state. Section 5344 is a separate and independent statute, and must be construed according to its own terms, without reference to any other statute, so far as the question of jurisdiction is concerned. It is silent as to the place where the offense must be committed in order to confer jurisdiction. Its purpose was to establish a supervision over the conduct of the officers and other persons employed on any steam-boat or vessel navigating the waters of the United States, and to make each officer or person so employed personally and criminally responsible for any misconduct or neglect of duty on his part in consequence of which a human life should be destroyed. To provide for the security of the lives of passengers, and to regulate navigation, congress has enacted numerous laws pertaining to the license and enrollment and measurement of steam-boats and

other vessels, the inspection of boilers, the number of passengers to be carried, etc. No one has ever questioned the validity of these laws, and, if valid, it follows that congress can enforce obedience to them by prescribing penalties for their violation, whether such violation shall be committed within or outside of the jurisdiction of any state. The statute for the violation of which the defendants have been indicted belongs to the same class of legislation with the laws just referred to.

The other objections to the indictment are (2) the indefiniteness and uncertainty of its allegations; (3) misjoinder; (4) failure to show that Augusta Weaver's death was the result of the defendant's misconduct or negligence; (5) omission to charge the crime of manslaughter.

Every defendant in a criminal proceeding has the right to know the specific facts of the charge preferred against him, and for which he is to be tried. This is a constitutional right of which no law or practice can deprive an accused person against his consent. Fullness, precision, and accuracy of expression are required; and the want of a specific statement of fact cannot be supplied by intendment or inference. An accusation of perjury, or of forgery, or of obtaining money or goods under false pretenses, must set forth the particulars, not only of the time and place under the general charge that the accused was then and there guilty of the offense, but must also state how, in what manner, and by what means, acts, or omissions he became guilty. In the language of the books, the crime must be stated with as much certainty as the nature of the case will admit. 1 Chit. Crim. Law, 171. This is a cardinal rule, a departure from which might lead to injustice to the accused; the principle of the rule being that he shall be protected from a second prosecution for the same offense.

In the first count the pleader has followed the words of the statute, but this is not always, or even ordinarily, enough. He should have described some facts upon which the government relied to prove "misconduct," "negligence," or "inattention to his duties" on the part of one or both of the defendants. These words and phrases are vague, and may be subject to different meanings and interpretations. What did either of the defendants do or omit to do that makes him guilty of any one of these general charges? It would not have been impossible, or even difficult, to have set out the acts or omissions by the proof of which a conviction was to be asked for. The prosecuting officer must know what these acts or omissions were, and it would be unreasonable and unjust to leave the defendants in ignorance of them until the day of trial, when, if they had been spread on the record, they could be disproved or satisfactorily explained. *U. S. v. Stuats*, 8 How. 44; *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Goggin*, 1 Fed. Rep. 49; *U. S. v. Corbin*, 11 Fed. Rep. 238; *Lamberton v. State*, 11 Ohio, 282. The first count is therefore defective.

The second count charges the defendants with a violation of law in taking on board the Olivette an excess of passengers beyond the number allowed by law, by reason of which the boat was overladen, overcrowded, and rendered unmanageable; the result being that the boat

was overturned, thereby causing the death of Augusta Weaver by drowning. These facts, and the consequences resulting from them, may not be set forth with that technical fullness and verbosity which may be found in some forms of indictments, but the charge is made with sufficient clearness and certainty to inform the defendants of the nature and cause of the accusation against them. They are charged with the violation of a public law, which every one is presumed to know, namely, section 4465 of the Revised Statutes of the United States, which forbids the taking on board any steamer "a greater number of passengers than is stated in the certificate of inspection." The count also charges that the deceased came to her death in consequence of the defendants' disregard of that law.

Nor is it required that the indictment should expressly charge the defendants with having committed the crime of manslaughter. Such a procedure would, perhaps, have been more regular, and more in accordance with precedent, but is not absolutely requisite. The defendants are charged with having committed a statutory offense, which is definitely described in this count in the words of the statute. To have concluded with the words, "and were then and there guilty of manslaughter," would have only added a technical term to what had been already described specifically. Whether or not the defendants are guilty of manslaughter would be a conclusion of law from the proof of the facts alleged, and judgment would be entered accordingly. In *U. S. v. Elliot*, 3 Mason, 156, on a motion in arrest of judgment because the indictment concluded by charging a wrong offense, it was held that such a conclusion did not vitiate the indictment if the offense was in other respects fully and exactly described, and, though the grand jury mistook the nature of the offense, it was sufficient if they had stated all the facts constituting it. It is not necessary that the indictment should state the conclusion of law to be derived from the premises, but merely to state the facts, and leave the court to draw the inference. 1 Chit. Crim. Law, 232; 2 Chit. Crim. Law, 312.

But the second count is defective on account of the misjoinder of parties; for the pilot, Dauer, is not liable, and cannot be convicted under the last clause of the statute, which applies only to an "owner, inspector, or other public officer." "Other public officer," mentioned in the act, evidently means one who had something to do with regulating or limiting the number of passengers to be taken on board, a matter over which the pilot is presumed to have had no authority; nor can it be supposed that he comes within the designation of "public officer." This misjoinder, however, is a defect which may be remedied by dismissing the charge as to Dauer; and, this being done, the count will be sustained against the other defendant, otherwise it will be quashed. 1 Chit. Crim. Law, 271; 1 Whart. Crim. Law, § 432.

Ex parte BROWN.

(Circuit Court, W. D. Arkansas. October 14, 1889.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL.

To make an assault with intent to kill, section 2142, Rev. St. U. S., does not require that the act would be murder if death had ensued. If it would be only manslaughter in case of death, it will be an assault with intent to kill if death does not ensue.

2. SAME—INTENT SHOWN BY USE OF WEAPON.

If a party does an act with a dangerous or deadly weapon, which, from its nature and the way it is done, may naturally, probably, or reasonably produce death, or jeopardize life, the law says that those who try the facts may and it is their duty to attribute to such an act an intent to kill. In the light of such facts a party is not permitted to deny this intent to kill.

3. SAME—JURISDICTION—COURTS OF INDIAN TERRITORY.

The United States court for the Indian Territory, created by the act of March 1, 1889, has no jurisdiction of an assault with intent to kill, but has of an aggravated assault.

4. SAME—INDICTMENT AND INFORMATION.

An assault with intent to kill is an infamous offense. An aggravated assault is, in the law, only a misdemeanor, so named by the statute. An assault with intent to kill cannot be tried on an information.

5. SAME—JURISDICTION—SPLITTING OFFENSE.

The United States court at Muskogee, Indian Territory, cannot carve out of an assault with intent to kill an aggravated assault, and try the latter, because it does not have jurisdiction of the greater crime.

6. SAME.

A court that does not have jurisdiction of a major offense cannot carve out of such offense one of less grade, and try that, as the conviction of a person of such offense so carved out of a higher one does not protect such person against another trial for the higher offense.

(*Syllabus by the Court.*)

Petition for Habeas Corpus.

The petitioner states that, on the 15th day of June, 1889, an information was filed against him by the United States attorney for the Indian Territory, in the United States court for said territory, charging him with assault on one R. H. Bousted, who is alleged in said information to be a United States citizen, by shooting at the said Bousted; that, on the 11th day of September, 1889, he was tried upon said charge, and found guilty by the jury; that afterwards judgment was pronounced by the court upon said verdict, by which petitioner was sentenced to imprisonment in the jail at Muskogee for one year, and to pay a fine of \$100; that afterwards he filed a motion for a new trial, and in arrest of judgment, alleging that said court had no jurisdiction of said case both of which were overruled; that the information by which petitioner was charged with the offense set out the offense known to the law as an "assault with intent to kill;" that said United States court for the Indian country had no jurisdiction to try the petitioner for such an offense. For this reason the petitioner is restrained of his liberty, contrary to the law and the constitution of the United States, and therefore entitled to his discharge from arrest.

M. M. Edmiston, Thomas Marcum, and Wm. H. H. Clayton, U. S. Dist. Atty., for petitioner.

Z. T. Walrond, U. S. Atty., for the Indian country.

PARKER, J., (*after stating the facts as above.*) The question of the jurisdiction of this court to issue the writ of *habeas corpus* in such a case as the one set out in the petition was passed upon in the cases of *Ex parte Farley* and *Ex parte Wilson*, *ante*, 66, (before the court at this term.) Upon the principle there recognized the plea to the jurisdiction of this court to issue the writ of *habeas corpus* will be overruled. The question raised in this case is whether the United States court for the Indian country had jurisdiction to try, convict, and sentence the petitioner to jail for one year, or any other time.

The charging part of the information upon which petitioner was convicted, a copy of which information is attached to the petition, sets out that petitioner, "on or about the first day of June, 1889, within the Indian country, at a place under the exclusive and sole jurisdiction of the United States, unlawfully did then and there assault the person of one R. H. Bousted, a citizen of the United States, * * * with force and arms, with a revolving pistol, a deadly weapon, commonly called a 'revolver,' loaded or charged with cartridges containing gunpowder and leaden balls, and of the caliber of No. 45, in the defendant's hands then and there held and discharged divers times at and against the said complainant, * * * with intent to do him, the complainant, * * * bodily injury, without provocation, and in an abandoned manner," etc. The statement of Mr. Walrond, the United States district attorney, made in his argument before this court in this case, was that the proof offered by the government showed that petitioner presented his pistol in the direction of Bousted, and, while holding it in such direction, within shooting distance of Bousted, across the street from him, fired at Bousted. These facts show a case as set out by the allegations of the information descriptive of the assault, but not such a case as the conclusion of the information would indicate, but an assault with intent to kill. Was this case such a one that the court which tried the case had jurisdiction to try? Section 2142 of the Revised Statutes is that "every white person who shall make an assault upon an Indian or other person, and every Indian who shall make an assault upon a white person within the Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be punishable by imprisonment at hard labor for not more than five years nor less than one year." The offense as presented by this section is made up of two things,—act and intent. That the act may be shown to exist, it must be proven that the force and violence used was of the character, as used, to endanger life. The overt act of violence must be such as to jeopardize life, or put the body in danger of receiving such great violence that death might ensue from such violence. Whenever an act of this kind is done the law attaches a certain intent to such an act, and it does not permit a party to deny that he intended the consequences which usually, naturally, and reasonably follow from acts of like character. Nor does the law permit a pleader, when he sets out acts which make, in the law, an assault with intent to kill, to attribute any other intent to the party who

did the act than the intent which the law attributes to such an act. As the law cannot look into a man's mind to find out his intent, it is forced to judge of his intention from his acts. Acting on this principle, the presumption of law is that a man is held to have intended the natural and ordinary consequences of his acts.

Chief Justice SHAW, in *Com. v. York*, 9 Metc. 103, said:

"A sane man, a voluntary agent acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence, upon the person of another, as this has a direct tendency to destroy life or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act."

Mr. Justice FIELD, in *U. S. v. Outerbridge*, 5 Sawy. 620, said:

"The usual effect of a leaden ball fired from a loaded pistol of the common size at a distance of a few feet only, striking the head or back of a person, is to kill such person. The law, therefore, presumes that any one who fires a loaded pistol within a few feet of the object intends to kill. It therefore implies malice in him."

If the act as charged and proven to have been done by petitioner had resulted in striking and killing Bousted, the crime would have been murder. Then, as a matter of course, under the section of the statute above set out, it would be an assault with intent to kill, as that section, to make an assault with intent to kill, does not require it to be murder if death had ensued, for if in such case it would be manslaughter, the same act, if death did not ensue, would be an assault with intent to kill. Under the principles set out above as having been enunciated by eminent jurists, and in fact under every principle of the law relating to the method of finding intent, the act of petitioner, as charged by the information, and as stated by Mr. Walrond to have been proven, can be nothing else than an assault with intent to kill, as it is defined by section 2142, Rev. St. By the law as declared in *Ex parte Wilson*, 114 U. S. 426, 5 Sup. Ct. Rep. 935, and *Mackin v. U. S.*, 117 U. S. 352, 6 Sup. Ct. Rep. 777, the offense is an infamous offense, and, by article 5 of the amendments to the constitution, cannot be punishable except the party is charged by an indictment or information of a grand jury. The United States court for the Indian country has no jurisdiction of an assault with intent to kill. Section 25 of the act of congress of March 1, 1889, is "that, if any person in the Indian country assault another with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in any sum not less than fifty nor ex-

ceeding one thousand dollars, and imprisoned not exceeding one year." The offense defined in this law is declared by it to be a misdemeanor. The one defined as an assault with intent to kill is an infamous offense, and a party can only be tried for it after an indictment found by a grand jury.

The petitioner was tried for an assault with intent to kill, upon an information. This cannot be done. But it is claimed that the court for the Indian country, although it does not have jurisdiction of an assault with intent to kill, may take an act that is an offense of this character and carve out of it the offense prescribed by section 25 of the act of March 1, 1889, and proceed to try, convict, and punish the party for an offense thus found to exist. Can this be done? What is the real crime that existed, and of which the showing made by the government makes the petitioner guilty? Assault with intent to kill. Then, in legal parlance, he is guilty of no other crime. There was no crime such as is prescribed in the twenty-fifth section of the act of March 1, 1889, which, as an offense, had an independent existence. The lesser crime in such a case is merged in the higher one. When the proof shows a felony, by the law based on public policy, the misdemeanor disappears. When a court does not have jurisdiction to try the infamous offense, the law, founded upon public policy, as well as upon good faith to the party tried, demands that the party shall not be tried for the misdemeanor by such court, as by this method of proceeding, if it were the law, a person might escape punishment for a high offense by going before a court that had the right to try misdemeanors alone and pleading guilty, and receiving an inadequate punishment. But, as this cannot be done, it is a great injustice to a party that he should be tried and convicted twice for the same act. The verdict of the jury and judgment of the court in this case is no protection to petitioner, for the reason that the offense of which he was tried was a misdemeanor, as it is the rule of the law that a trial and conviction, or acquittal, of a misdemeanor is no bar to another indictment for a felony. *People v. Saunders*, 4 Parker, Crim. R. 196; *Dinkekey v. Com.*, 17 Pa. St. 126. To make a trial and conviction or acquittal of a person for an offense a bar to another trial for the same act, the accusation, whether made by indictment or information, must be such as that the person might have been found guilty and sentenced on it for the act of which he is accused a second time, and for which he is put on trial a second time. If, in the trial in this case, the petitioner could not have been found guilty of an assault with intent to kill, because the court had no jurisdiction to try such an offense, then he cannot set up his trial and conviction before that court as a bar to a trial and conviction before the court having jurisdiction to try him for such act upon a charge of assault with intent to kill. *Dinkekey v. Com.*, *supra*; *State v. Hattabough*, 66 Ind. 223.

"If a man has been once fairly tried, there ought to be an end of the accusation forever. The right not to be put in jeopardy a second time for the same cause is as sacred as the right of trial by jury, and is guarded with as much care by the common law and the constitution."

A trial of a party before a court having no jurisdiction, or a judgment that is illegal, may harass and annoy a person as much as though it was legal. Therefore it is that he must be tried for an act by a court having jurisdiction, and in a legal way, that he may be protected.

Mr. Wharton, in his *Criminal Law*, (volume 1, § 563,) says:

"The true test is, could there have been a conviction of the major offense at the time of the conviction or acquittal of the minor? If so, then such conviction or acquittal of the minor is a bar. The reason is that, by convicting or acquitting of the minor on a count in which the major is contained, the defendant is virtually acquitted of the major."

In this case the offense of which petitioner was convicted is the minor one, and that of assault with intent to kill is the major one. The court at Muskogee had no jurisdiction of the major offense. Therefore, the petitioner, by his conviction and sentence there, is not protected against another trial upon the same facts for an assault with intent to kill, by a court having jurisdiction of such offense. When such a state of case exists, a court cannot carve out of the higher offense, of which it has no jurisdiction, one of less grade, and try the party for it, as this is unjust to the public, and it may be unjust to a party charged, and therefore it is against the policy and humanity of the law. To authorize it to do so, it must have jurisdiction of both offenses, and at the trial where the party is found guilty of the one of less grade the charge must be so made as upon that indictment the party might be found guilty of the major offense. The misdemeanor in this case is clearly merged in the felony, and the courts must always try for the crime committed. In *Wright v. State*, 5 Ind. 527, the court said:

"Assault and battery, which is simply a misdemeanor, is not included in any of the degrees of homicide. The misdemeanor is merged in the felony. The merger of the misdemeanor in the felony is as complete in the case of an assault and battery with intent to commit murder as where the murder is committed."

In 2 Russell on Crimes (9th Ed. p. 1026) occurs this paragraph:

"Thus, where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, etc., and the facts of the case, as stated by the counsel for the prosecution, appeared to be that the defendant set fire to his own house in order to defraud an insurance office, and that in consequence several houses of other persons adjoining to his own were burnt down. BULLER, J., said that, if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet, under these circumstances, the prisoner was guilty, if at all, of felony, (the misdemeanor being merged,) and could not be convicted on this indictment; and therefore he directed an acquittal."

If the court at Muskogee can carve a lesser offense out of a higher one, of which it has no jurisdiction, justice might be defeated; because out of every assault with intent to kill there might be carved an aggravated assault, and in this way out of an infamous offense—a felony—a misdemeanor may be made, and, it might be, inadequate punishment administered. As I have said, this policy would be against public justice. If the court at Muskogee had jurisdiction of an assault with intent to kill,

and the petitioner had been indicted for that offense and convicted of an aggravated assault, he could not complain, as such a proceeding would protect him against any further trial; but, as the court at Muskogee has no jurisdiction of assaults with intent to kill, it cannot put a person on trial for that offense; nor can it ignore the higher offense for the purpose of taking jurisdiction of the lesser one.

Congress intended that the Muskogee court should try parties only for the lesser offense. In this case the information shows that the offense is one of which the Muskogee court has no jurisdiction. The allegations of the information in this case determine the jurisdiction. I am clear that, upon the statement in the information, and the facts as stated by Mr. Walrond, the offense is that of an assault with intent to kill.

It is said that perhaps the petitioner shot at the legs of Bousted, and that hence it was only an aggravated assault. Might not death ensue from such an assault? And, if so, is it not an assault with intent to kill? It is so because the intent and purpose of the prisoner was to inflict such a wound as that death might follow from it, and, when he did a wicked and wanton act like this, neither he nor the prosecuting attorney has any right to carve out for him a lesser crime because, perchance, the assailed might not have died. It is enough to know that death might have followed. Is not the main artery of a man's leg almost as vital as the heart itself? It was not claimed for the prisoner that he only intended a flesh wound, or that he aimed at any particular part of the legs. If he shot at Bousted's legs in a reckless manner, is he then entitled to such an interpretation of his wicked conduct as that he only intended to wound Bousted so as to cause great suffering or little suffering, but not to such an extent as to endanger life? How are we to distinguish in such a case between what might have been great bodily harm and a slight injury? If he actually shot at Bousted with a .45 caliber pistol, without cause or excuse, then is he not held to have intended such results as might probably have ensued from the act? There can be no difference between an intent, coupled with an act, to inflict such a wound as would probably result in long suffering and final death, and an intention to shoot a man through the heart, coupled with the act of firing. In such a case, if carving out a less offense is to be done, what line are we to carve to? Where shall we begin, and where shall we end? Upon what principles, or by what authority, can it be said that because a man shoots at another man's legs he only intended to inflict a slight wound? The intent was clearly to wound. Could a man know beforehand what sort of a wound he was going to inflict? The prisoner is presumed to know the nature of the weapon used, as well as the dangerous consequences of the use.

I am satisfied that the court at Muskogee had no jurisdiction to try the petitioner of the offense that he is really guilty of, and he is therefore entitled to a discharge from arrest. I desire to say, in regard to all these cases, which have been before me on *habeas corpus*, that I think the government has made a mistake. By this mistake these petitioners have been wrongfully deprived of their liberty; they have been harassed by a

trial; they have been put to the expense of employing counsel; they have been cast into prison; and, while their trials and convictions before the court at Muskogee cannot be pleaded in bar by them, I think, when the grade of offenses are no higher than these they have committed, the humanities of the law would be subserved by discharging all of them from arrest, and that the government, because of its mistakes, proceed no further. The writ is ordered to issue in this case.

HUSSEY MANUF'G CO. v. DEERING *et al.*

(Circuit Court, W. D. Pennsylvania. August 30, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—MOWING-MACHINES.

Letters patent for improvements in mowing-machines, granted to Ephraim Smith,—one numbered 233,035, and dated October 5, 1880, and another numbered 298,249, and dated May 6, 1884,—construed, sustained, and held to be infringed. Following *Manufacturing Co. v. Deering*, 20 Fed. Rep. 795.

In Equity.

On final hearing. For hearing on motion for preliminary injunction, see 20 Fed. Rep. 795.

George Harding and *Francis T. Chambers*, for complainant.

West & Bond, for respondents.

ACHESON, J. The bill of complaint here charges the defendants with infringing two letters patent for improvements in mowing-machines, granted to Ephraim Smith, the plaintiffs' assignor,—one numbered 233,035, and dated October 5, 1880, and the other numbered 298,249, and dated May 6, 1884. The case was originally heard and considered by the court upon a motion for a preliminary injunction, which was allowed; the views entertained by the court being set forth in an opinion reported in 20 Fed. Rep. 795. Nothing, I think, has been shown at final hearing which should cause any departure from the conclusions expressed in that opinion, and little need be added to what was there said.

1. The distinguishing novelty of Smith's invention of 1880 is his balancing lever, pivoted to the movable hinge-bar, and connected at its inner and longer end to a chain having a yielding support, and provided with mechanism for adjusting the chain, whereby both the outer and inner ends of the finger-bar are counterbalanced, so that the finger-bar shall rest very lightly on the ground and ride freely over obstructions. In none of the prior patents do I find Smith's invention as set forth in his second and third claims,—the ones here infringed. The invention is a meritorious one, and the owners of the patent should be protected against a machine like the defendants', which embodies the substance of the invention, while differing in some formal particulars.

I cannot concur with the defendants in the view that the lifting-lever, G, is an element of the combination covered by the second claim of the

patent. In the first claim it is one of the specified constituents of that combination, but it is omitted from the second claim. Certainly, then, it is not to be lightly imported by implication into the claim. Presumably it was purposely omitted. In fact, the lifting-lever, G, is neither a necessary nor a proper element of the combination in question, for the declared end thereby to be accomplished is this: "Whereby the weight of the finger-bar is partly sustained, and its outer end counterbalanced when the machine is in operation, substantially as herein set forth." But the lifting-lever, G, does not co-operate to produce this result. In truth, it is out of action when the machine is in operation. Its function is to throw up the finger-bar when the machine is not operating, and when the lifting-lever, G, is used the spring ceases to act.

The argument that the third claim is for an inoperative combination, because it omits to specify the hinge-bar and means for securing the chain, is not convincing, as the claim clearly has reference to a mowing-machine as described and illustrated in the specification and drawings.

In respect to the alleged prior use in machines manufactured by C. M. Russell & Co. at Massillon, Ohio, it is sufficient for me to say that the evidence, taken altogether, shows, at the utmost, only an unsuccessful and abandoned experimental use.

2. In the use of a spring-supported finger-bar of great length, constructed under the patent of 1880, a practical difficulty was encountered from the springing and moving upward of the finger-bar in the middle by its own unsupported weight, and that of the cutter-bar mounted thereon, so that the cutter-bar would bend downward at the outer end, and not work freely in its guards or ways. As the result of study and experiment, the patentee obviated this difficulty by the invention covered by the patent of May 6, 1884, which consists in making the finger-bar with a downward curvature in the middle, in the manner explained in the specification, so that the finger-bar, when sustained at the inner end and ready for action, will be practically straight. The defendants contend that the patent does not disclose a patentable invention, but to that proposition I am not ready to assent. The problem which confronted the patentee was to so construct the finger-bar as to make it lie straight upon the ground when sustained from its inner end; and he solved it by simple means, it may be, but successfully, and with highly beneficial results. The problem was new, and its successful solution was not obvious.

The alleged prior use of this invention by the defendant William Deering & Co., at Plano, Ill., is not established by evidence satisfactory to me. Nothing of this kind was asserted at the preliminary hearing, although such use of it, if it was as now claimed, must have been then known to Deering and Steward, whose affidavits were read at that hearing. Moreover, the exhibit "Plano, Cutter-Bar," produced in support of this branch of the defense, is discredited by the testimony of Mr. Gill, a witness for the defense, who states that it undoubtedly had met with an accident, which accounted for its condition in respect to curvature.

The testimony of Lewis Miller as to prior use by his firms is not only

unsupported by the production of any specimen of the alleged manufacture, or otherwise, but is successfully rebutted by the testimony of the workmen at the shops.

Upon the whole, I am of the opinion that, as respects the second and third claims of the patent of 1880, and the first, second, and third claims of the patent of 1884, the plaintiffs are entitled to a decree against the defendants.

NATIONAL AUTOMATIC DEVICE CO. v. LLOYD *et al.*

(Circuit Court, N. D. Illinois. September 23, 1889.)

PATENTS FOR INVENTIONS—UTILITY—GAMBLING DEVICES.

The only use to which the invention described in letters patent No. 410,981, granted September 10, 1889, to Fred. N. Lang, for a "Toy Automatic Race-Course," has been put, being for gambling purposes, it is not a useful invention, within the meaning of the patent laws of the United States.

In Equity. On motion for injunction *pendente lite*.

Selden Fish and Banning, Banning & Payson, for complainant.

W. C. Hoyer, H. D. Paul, B. M. Shaffner, and George Burry, for defendants.

BLODGETT, J. Complainant moves for an injunction *pendente lite* in this case. The bill charges the infringement of patent No. 410,981, granted to Fred. N. Lang, on the 10th day of September, 1889, for a "Toy Automatic Race-Course," and contains the usual prayer for an injunction and accounting. The device covered by the patent is a shaft projecting upwards from the center of the base of a circular shell or case, from 15 to 18 inches in diameter, to which shaft a clock-work mechanism is so geared that it can be made to revolve rapidly by releasing the escapement of the clock-work. On this shaft are mounted two or more radial arms, to the ends of which are attached small toy figures of horses. These radial arms are attached to the shaft by separate collars so loose that they turn easily on the shaft. The clock-work escapement is released by dropping a nickel coin through a slot in the machine, whereupon the shaft commences to revolve rapidly, carrying the radial arms with it, but, after a certain number of revolutions, the force of the clock-work is cut-off, and the radial arms continue to revolve, from the *momentum* they have obtained while the clock-work was going, until such arms finally stop from friction and the resistance of the air. Several objections are urged against the motion for an injunction, such as that the bill is multifarious, non-infringement, etc., which I do not deem it necessary to consider, as it seems to me there is sufficient reason on another ground for withholding the injunction. The proof shows that the only use to which complainant's, or, for that matter, the defendants', machines, have been so far applied, is to place them in saloons, bar-rooms, and other drinking places, where the

frequenters of such places make wagers as to which of the toy horses will stop first, or which will stop nearest to a designated point, after the machine has been put in motion, by dropping a nickel in the slot; in other words, the machine in question is only used for gambling purposes. The law of the United States only authorizes the issue of a patent for a new and useful invention, and in an early case on that subject (*Bedford v. Hunt*, 1 Mason, 302) it was held that the word "useful," as used in this statute, means such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, health, or good order of society, and the principle thus enunciated has been uniformly applied ever since. It is urged that this machine is susceptible of being utilized as a toy, or child's plaything; but it is a sufficient answer to this suggestion that no such use has been as yet made. The patent has been very recently issued, and it is possible that a useful application may yet be found for it; but as the case now stands, the only use to which the invention has been put being for gambling purposes, I must hold that it is not a useful device, within the meaning of the patent law, as its use so far has been only pernicious and hurtful. Injunction refused.

THE SURREY.

DIXON v. THE SURREY.

(*Circuit Court, S. D. New York. January 2, 1889.*)

SHIPPING—CARRIAGE OF GOODS—DISCHARGE WITHOUT NOTICE TO CONSIGNEE.

Where a bill of lading provides that the consignee is bound to be ready to receive his goods on ship's readiness to discharge, otherwise that they may be landed without notice, and at his risk, after they leave the deck of the ship, and the consignee is not ready to receive on ship's readiness to discharge, the ship may land the goods, without notice; and if landed in suitable weather, with opportunity to remove them without injury, the vessel is absolved from all further liability. Reversing 26 Fed. Rep. 791.

In Admiralty. On appeal from district court. 26 Fed. Rep. 191.

Libel to recover damages to green fruit through the alleged improper discharge from the steam-ship *Surrey* on the 24th of January, 1885, in frosty weather. New proofs disclosed the fact that the fruit was discharged on Saturday, January 24, 1885, instead of Monday, January 26th, as found by the court below, and that the weather until late Monday was not so cold as to injure the fruit. The bill of lading provided that, "simultaneously with the ship's being ready to unload the above-mentioned goods; or any part thereof, the consignee of said goods is hereby bound to be ready to receive the same from the ship's side * * * on the wharf at which the ship may lie for discharge, * * * and, in default thereof, the master or agent of the ship * * * are authorized to enter the said goods at the custom-house, and land * * *

them, * * * without notice to, and at the risk and expense of, the said consignee of the goods, after they leave the deck of the ship." The evidence showed that the consignee had no notice of time and place of discharge, and was not ready to receive on ship's readiness to discharge; that the master thereupon landed the fruit on the wharf, where it was destroyed by frost on the night of January 26th; and that other consignees removed their fruit on the 26th without injury.

Hyland & Zabriskie, for libelants.

E. B. Convers, for claimants.

LACOMBE, J., (*after stating the facts as above.*) The additional evidence introduced in this court clearly shows that the fruit was discharged, not on Monday, January 26th, as the learned district judge assumed, but on Saturday, the 24th. It is also clear from the testimony that it was not until well into the afternoon on Monday that the weather became such as to expose the goods to destruction from frost; and that, if removed any time before 4 P. M. of that day, they would have been found uninjured. I am unable, therefore, to concur in the conclusion that the goods were landed at an improper place or time, nor so as negligently to expose them to obvious peril of destruction. The decree of the district court is reversed, and judgment ordered for the ship on both original and cross libel, with costs of both courts.

THE BOSKENNA BAY.

ROLFE v. THE BOSKENNA BAY.

(*Circuit Court, S. D. New York. October 7, 1889.*)

1. SHIPPING—CARRIAGE OF GOODS—BILL OF LADING—STIPULATION—SUBSTITUTED DELIVERY.

The clause in a bill of lading, providing that the consignee is bound to be ready to receive his cargo on ship's readiness to discharge, and, in default, that the master may land it upon the wharf where the ship lies for discharge, without notice, and at consignee's risk, construed as authorizing a discharge without notice, but not as relieving the ship from the duty of exercising reasonable care to protect the goods as long as they are, or ought to be, under the control of the master, is a reasonable and valid stipulation, and, where the consignee is not ready to receive, authorizes a substituted delivery of green fruit, in cold weather, by landing the same upon the wharf, at his risk, provided that, if present, he could have removed it without injury. Reversing 22 Fed. Rep. 662.

2. SAME—BURDEN OF DILIGENCE ON CONSIGNEE—WAIVER OF NOTICE.

Under such provision, the consignee is bound to watch for the ship's arrival, and be ready to receive the goods at the time and place they are deliverable; and, in default, the ship may land the cargo without previous notice.

In Admiralty. On appeal from district court. 22 Fed. Rep. 662.

Libel to recover damages to fruit, through its alleged improper discharge from the steam-ship Boskenna Bay on March 21, 1883, and exposure to frost.

Franklin Bartlett, for libelant.

E. B. Convers, for claimants.

WALLACE, J. The libelant sues to recover damages for injury to a consignment of fruit. The fruit was injured by its exposure to frost, after nightfall, and during the night of March 21, 1883, while remaining in an inclosed pier, No. 44, North river. It was part of a cargo shipped at Palermo to various consignees at New York, by the steamer Boskenna Bay, under bills of lading, which provided for a delivery in good order to the consignee or assigns, "from the ship's deck, where the ship's responsibility shall cease." The bills of lading also contained this condition:

"Simultaneously with the ship being ready to unload the above-mentioned goods, or any part thereof, the consignee of said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein; and, in default thereof, the master or agent of the ship, and the collector of the port, are authorized to enter the said goods at the custom-house, and land, warehouse, or place them in a lighter, without notice to, and at the risk and expense of, the consignees of said goods after they leave the deck of the ship."

The steamer arrived at the port of New York, March 18th, was berthed at pier 44, March 19th, made preparations to discharge March 20th, but, owing to the coldness of the weather, deferred discharging the fruit until March 21st, on which day, the weather being sufficiently mild, she commenced to discharge in the forenoon, and continued till about 5 o'clock in the afternoon. The libelant was not formally notified by the ship's agent or master of the intended time and place of discharge, but he knew of her arrival, and on March 20th made entry of his fruit at the custom-house, and obtained a permit for its removal from the dock, and on the morning of March 21st he paid the freight on his consignment, and received his delivery order. In landing the cargo the several consignments were separated, each lot being placed by itself. A number of the owners of different consignments were present, but the libelant was not present. The building in which the fruit was left was a safe place, but was not sufficiently warm to protect the fruit from the weather at freezing temperature, and the fruit was placed in proper custody. None of the various consignees who were present removed their fruit, but all that was landed from the ship, including the fruit of the libelant, was allowed to remain in the building until the next day, without any special protection against frost. Succinctly stated, the facts are that the cargo was landed at a suitable place for temporary purposes, and at reasonable hours, and in weather suitable at the time, and if the libelant had been present he could have examined and removed his fruit before any risk from cold weather attached; but the state of the weather was such as to denote risk of injury to the fruit from frost if it was suffered to remain overnight at the place where it was left.

Upon these facts the case turns wholly upon the effect which should be attributed to the special conditions of the bill of lading. That instru-

ment was the contract between the parties, and its provisions, so far as they are valid, conclude the libellant. Were it not for these special conditions, the liability of the ship to answer for the loss would be unquestionable. The duty of a carrier by water towards an owner of goods is not satisfied until a proper delivery has been made to the owner; and, unless a valid substituted delivery has been made, the strict responsibility of the carrier as an insurer of the goods does not terminate until actual delivery. If he does not deliver to the consignee actually, he must justify his substituted delivery by showing that it was in accordance with the terms of the particular contract, or with the usage of the port, or with the course of business between the parties. On the other hand, the consignee is bound to watch for the arrival of the ship, and be ready to receive the goods at the time and place at which they are deliverable. If the consignee refuses or neglects to accept the goods, the carrier must, if practicable, give notice to him of the time of the intended discharge; and, when this has been done, and the goods are discharged in a usual and proper place, and at the proper time, the substituted delivery stands in the place of an actual delivery. These are familiar rules of the law of carrier and consignee. No notice was given in the present case, and, except for the special clauses of the contract, the discharge of the goods as made would not have been a delivery. The special conditions are plainly intended to relieve the carrier of any obligation, either to make actual delivery of the goods to the consignee, or to give him notice of the time or place of their intended discharge. As they are explicit, they preclude resort to any usage to define the rights and duties of the parties. Neither the condition for delivery "from the ship's deck, where the ship's responsibility shall cease," nor the condition whereby the consignee is to receive the goods "simultaneously with the ship's being ready to unload," absolves the carrier from the duty of making a proper delivery, actual or substituted; and it would, nevertheless, be incumbent upon the carrier to give due and reasonable notice of the time of intended delivery, and put the goods in a suitable place, under proper care and custody, to constitute a good delivery in the absence of the consignee. *The Santee*, 7 Blatchf. 186; *The Middlesex*, 21 Law Rep. 14; *Gleadell v. Thomson*, 56 N. Y. 194; *Tarbell v. Shipping Co.*, 110 N. Y. 170, 17 N. E. Rep. 721.

But the further clauses by which it is conditioned that, in case the consignee is not ready to receive the goods when the ship is ready to unload, the master or agent of the ship may land the goods at the wharf where the ship lies to discharge, without notice to the consignee, and at the risk of the consignee after the goods leave the deck of the ship, have no significance whatever, unless they mean that the consignee is not to be entitled to notice of discharge of the goods, and that they are to be at his risk, when landed at the place specified, if he is not ready to receive them when the ship is ready to unload. Unless the clause dispensing with notice to the consignee is intended to permit the carrier to make a substituted delivery in place of an actual one, without previous notice to the consignee, it is wholly inoperative, because notice of landing or warehousing goods, or that the ship is ready to discharge, is unneces-

sary when notice of intended delivery has been properly given. According to the contract also, when the goods are thus landed on the wharf at which the ship lies for discharge, they are to remain there at the risk of the consignee after they leave the ship's deck. Taking all the clauses together, by the bill of lading the consignee has, in effect, said to the carrier: "If you will transport my goods to New York for the freight mentioned, I will waive notice of delivery, and be ready to receive them when the ship is ready to unload them; and, if I am not thus ready to receive them, I consent that they may be landed, and remain at my risk at the wharf where the ship may lie for discharge." Although exemptive provisions in bills of lading intended to relax the obligations of carriers in essential matters are not favored, and will not be extended beyond the narrowest construction of which they are reasonably capable, the courts cannot refuse to give effect to their explicit and unequivocal meaning, unless they are void because contrary to public policy. The terms of the present contract would not justify the carrier in discharging the goods at an unsuitable time or place, so as to expose them to obvious danger of being injured. If an unfit wharf were selected, or unfit weather, or an hour of the night when the consignee could not have a fair opportunity to examine his goods and remove them, the discharge would not be a good delivery within the proper interpretation of the contract. The language used is satisfied by placing upon it a more restricted meaning. It is not to be read so literally as to frustrate the beneficial objects of the transaction to which it relates, and it cannot be supposed that the parties intended to protect the carrier against responsibility for his willful misconduct. Nor would the rules of interpretation of contracts authorize it to be read as intended to shield the carrier from the consequences of his own negligence. It was declared in *Magnin v. Dinsmore*, 56 N. Y. 168, that a contract with a carrier will not be deemed to except losses occasioned by his negligence, unless that be expressly stipulated. The authorities are unanimous that no exception, which is not contained in the contract itself, can be ingrafted upon it by implication, either to excuse its non-performance or the exercise of ordinary care in performing it. It suffices to refer to *Navigation Co. v. Bank*, 6 How. 344; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; and *Bank v. Express Co.*, 93 U. S. 174.

Construing the contract as one that authorizes a discharge of the goods without notice to the consignee, but not as one relieving the ship from the duty of exercising reasonable care to protect them so long as they are, or ought to be, under the control of the master, it hardly seems debatable that such a contract is lawful. Judge Story says: "However universal the custom may be to deliver the goods to the owner at the place of destination, still the parties may, by their contract, waive it, and if they do the carrier is discharged." Story, Bailm. § 541. It cannot be doubted that if after the arrival of a ship the consignee instructs the master that he will not require notice of discharge of his goods, but will be ready to receive them whenever the ship is ready to unload at the wharf where she may lie, and that if he is not ready the master may

leave the goods upon the wharf, the latter would be justified in acting upon the instructions. Nor can it be doubted that if the goods were discharged under such circumstances, pursuant to the instructions, the consignee would be estopped from questioning the sufficiency of the delivery. He could be heard to complain in case the master should discharge the goods at an unreasonable time, or should fail in some other respects to exercise reasonable care in respect to them, but not otherwise. If it is competent for the carrier and the consignee to agree upon a particular mode of delivery after the ship has arrived at the port of destination, it is not apparent why it is not equally permissible to do so at the time the goods are shipped. It has been decided that a usage by a carrier, known to the consignee, to leave goods at his usual stopping places, without notice to the latter, is equivalent to an actual delivery of the goods. *Gibson v. Culver*, 17 Wend. 305; *McHenry v. Railroad Co.*, 4 Har. (Del.) 448; *Price v. Powell*, 3 N. Y. 322. Indeed the whole doctrine respecting constructive delivery by carrier to consignee is founded upon usage so general that it has become a part of the commercial law. A special usage has the effect of an express stipulation, because the law implies that it is incorporated in the contract between the parties, and no usage which is contrary to public policy will be recognized. If a good substituted delivery may be had without notice to the consignee, because a special usage or the course of business between the two parties sanctions it, upon principle and analogy the same result must follow where the parties have consented to it by an express contract.

It follows from what has been said that the ship in the present case made delivery of the goods to the libellant according to the contract, and that the contract was a valid one. Undoubtedly there are cases in which the duty of a carrier to a consignee is not wholly satisfied by a valid substituted delivery of goods. The carrier, as in the case of the steamship lines or railway companies which have warehouses at the termini of their carrying points, may, pursuant to usage or the recognized modes of doing business, deliver to himself as warehouseman. He then becomes subject to the liabilities of a warehouseman. So, also, the carrier, although he may not become a warehouseman, may become a bailee of some other description, and remain liable in the capacity in which he receives or deals with the goods. And under no circumstances is it conceivable that the carrier, in making a substituted delivery of goods, would be justified in abandoning them, or negligently exposing them to injury. Subject to these qualifications, the carrier discharges his whole duty to the consignee when he discharges the goods in conformity with the contract. The libellant's goods were discharged at the proper place, at a suitable time of day, in suitable weather, and placed in proper custody. It was at a season of the year when the weather is uncertain, and all that could reasonably be expected of the master was that he should select a day suitable at the time. Moreover, the other consignees who were present apparently were willing to take the chances of the weather during the coming night. The master had no reason to suppose that the libellant would have objected to taking the same chances if he had

been present. It is not suggested that there was anything that the master or agent of the ship could have done to protect the fruit overnight beyond placing it in the building. Nothing was done to this end by the other consignees. Negligence cannot be imputed to the master for acts done strictly pursuant to previous authority from the libelant. The injury that happened to the fruit was the consequence of a risk which the libelant had agreed in advance to assume. Negligence always rests upon a breach of duty, and there was no breach of duty on the part of the ship if the master discharged the libelant's property at the place and time, and in the manner, to which the libelant could not have reasonably objected had he been present. The libel is dismissed, with costs of this court and of the district court.

SATTA v. THE BOSKENNA BAY. MIRTO v. SAME. FOTT v. SAME.

(Circuit Court, S. D. New York. October 14, 1889.)

In Admiralty. On appeal from district court. 36 Fed. Rep. 697.

These cases were tried below with five others against the same steam-ship. Five of the libels were dismissed, and the libelants therein have not appealed. The claimants appealed in the three cases in which the vessel was held liable, and the appeals came on to be heard together. No new proofs were taken.

Franklin & Clifford and *A. H. Bartlett*, for libelants and appellees.

E. B. Conners, for claimants and appellants.

WALLACE, J. The decision in the case of *Rolfe v. The Boskenna Bay*, *ante*, 91, controls the decision of these cases. The decrees of the district court are reversed, and the libels dismissed, with the costs of that court and the costs of this court to be paid by the libelants.

BARLOW *et al.* v. DELANEY *et al.*

(Circuit Court, E. D. Missouri, E. D. November 4, 1889.)

1. COVENANTS—AGAINST KNOWN DEFECTS.

A covenantee can recover of the covenantor for breach of covenant, although at the time of the execution of the covenant the covenantee knew of the defect covenanted against.

2. SAME—BY MARRIED WOMAN—SEPARATE ESTATE.

Rev. St. Mo. § 669, provides that "a husband and wife may convey the real estate of the wife * * * by their joint deed; * * * but no covenant expressed or implied in such deed shall bind the wife or the heirs, except so far as may be necessary effectually to convey from her and her heirs all her right, title, and interest expressed to be conveyed therein." *Held*, that said section does not invalidate a covenant executed by a married woman conveying her separate estate in equity.

3. SAME—VALIDITY.

Under Rev. St. Mo. 1865, c. 108, § 7, providing that "lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement [shall be answerable upon such covenant or agreement] to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law,"—a covenant by one rightfully in possession and owning a limited estate, to warrant and defend against the acts of certain persons named, is valid.

4. SAME.

The covenantor had a life-estate, and her children the remainder, under the will of A. The covenant was to warrant and defend against the acts of J., B., or A., "from whom the said [covenantor] derives title." *Held*, that the covenant was valid.

5. LIMITATION OF ACTIONS—BREACH OF COVENANT—RUNNING OF STATUTE.

A covenant to warrant and defend is broken only by eviction, or what is equivalent thereto, within the meaning of the statute of limitations.

6. JUDGMENT—RES ADJUDICATA.

Complainant had formerly sued the defendants, the heirs of his covenantor, to enjoin them from asserting their title as remainder-men. It was decided that, as they took title not from their mother, the covenantor, but from A., no covenant that she could make would estop them from asserting title. *Held*, that this was not *res adjudicata*, so as to bar complainant from suing defendants to subject a portion of the separate estate in equity of their mother, the covenantor, to the payment of damages sustained by breach of her covenant.

7. COVENANTS—ACTION FOR BREACH—DAMAGES.

Defendants asserted title paramount to the property, and threatened eviction, to prevent which the person in possession, holding under complainant, purchased such title paramount, and complainant reimbursed the person in possession for the amount so paid under his warranty. *Held*, that complainant was entitled to recover the amount so paid in the action for breach of covenant.

8. SAME.

The costs and counsel fees laid out by complainant in resisting by suit the payment of such sum to the person in possession are not part of the damages to which he is entitled in the action for breach of covenant.

In Equity. On final hearing on pleadings and proofs.

Bill by Peter D. Barlow and others against John O'Fallon Delaney and others, the heirs of Mrs. Octavia Boyce, to establish a lien on certain lands held by her in her life-time as a separate estate. The lands in question had been partitioned among defendants (the heirs of Mrs. Boyce) subsequent to her death. Administration upon her estate had been granted before the covenant of warranty referred to in the opinion was broken, and before the bill was filed.

W. H. Clopton, for complainants.

Thomas K. Skinker and George M. Stewart, for defendants.

BREWER, J. This case is now submitted for final hearing on pleadings and proofs. It was before this court on demurrer to the bill a year ago, and an opinion was filed by my Brother THAYER, in which several questions were considered and decided. 36 Fed. Rep. 577. For a history of the facts out of which this litigation arises, see that opinion, and the case between the same parties, 86 Mo. 583. A restatement of the facts is therefore unnecessary.

Counsel for the defendants have challenged the conclusions expressed by my Brother THAYER, and have reargued to some extent the questions then decided. We have together examined those questions as well as the others in the case, and have reached the following conclusions:

It may be stated generally that the claim of complainants is that a covenant in a deed from Mrs. Boyce has been broken, and this bill is filed to recover on account of that breach. It is, in the first place, insisted by defendants that there is no equity in the bill, because the extent of Mrs. Boyce's title was disclosed by the public records, of which complainants' ancestor, Mr. Barlow, was charged with notice. In other words, the claim is that a covenantee cannot recover of the covenantor for breach of covenant if at the time of the execution of the covenant he knows of the defect covenanted against. A statement of this proposition carries its own answer. The very purpose of the covenant is protection against defects; and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one-half its value, besides destroying the force of its language. If from the force of a covenant it is desired to eliminate known defects, or to limit the covenant in any way, it is easy to say so. General in its language it reaches to all defects within its terms, known or unknown.

Again, it is insisted that the covenant relied on is void because the covenant of a married woman. The property conveyed was a part of her separate estate in equity. I do not know that I can add anything to what has been so well said on this subject in the opinion heretofore filed. The invalidity of covenants affirmed in section 669 of the Missouri Revised Statutes refers by the terms of the section to covenants in a joint deed by husband and wife of her statutory estate. By no reasonable or proper grammatical construction can the words "such deed," in the last clause of the section, refer to other than the joint deed named in the first clause. The deed here was no such joint deed. It was the separate deed of the wife and her trustee, conveying a lot belonging to her separate estate in equity. That she had power to make such a conveyance without her husband, and that she can make any contract with respect to that separate estate as freely as a *feme sole*, must now be considered as settled by the decision of the supreme court in *Turner v. Shaw*, 96 Mo. 22, 8 S. W. Rep. 897. This is the declaration of that court upon the question:

"But it may be urged that this deed was utterly invalid, because it was executed by the wife alone. However this may be as to mere statutory estates, which require a joinder of husband and wife in order to their valid execu-

tion, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey without let or hindrance from her husband. With regard to such property she is, in equity, a *feme sole*, and has the *jus disponendi*, which is the inseparable incident of ownership. By virtue of this she charges, she incumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority, both here and elsewhere. *Livingston v. Livingston*, 2 Johns. Ch. 537; *Whitesides v. Cannon*, 23 Mo. 457; *King v. Mittalberger*, 50 Mo. 182; *McQuie v. Peay*, 58 Mo. 56; *Claflin v. Van Wagoner*, 32 Mo. 252; *Schafroth v. Ambs*, 46 Mo. 114; *Kimm v. Weippert*, Id. 532; *Lincoln v. Rowe*, 51 Mo. 571; *De Baun v. Van Wagoner*, 56 Mo. 347; *Gay v. Ihm*, 69 Mo. 584; 1 Bish. Mar. Wom. § 853; 2 Bish. Mar. Wom. § 163; *Taylor v. Meads*, 34 Law J. Ch. 203."

Again, it is insisted that the covenant was void because commencing by disseisin, and made for the purpose of giving effect to that disseisin. There is much curious and intricate learning in the old common law respecting real estate, much of which is without force or significance under the changed rules of to-day respecting real estate and its modes of conveyance. This old doctrine of the invalidity of warranties commencing by disseisin had reference principally to the matter of estoppel, and its effect upon the title; while the modern covenant is not so much for the purpose of establishing title as for protection in case of failure or defect thereof. But further, by section 7, c. 108, of the Revision of 1865, it was provided that—

"Section 7. Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement [shall be answerable upon such covenant or agreement] to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law."

This seems to affirm the validity of a covenant such as this at least, made by one rightfully in possession and owning a limited estate. Indeed, I think it would be rarely found that any of the ordinary covenants in a deed made to-day by one *sui juris* would be declared void on account of any of the old technical rules of the common law respecting warranties and covenants.

Again, it is insisted that, even if the covenant were valid, it would not extend to the defendants' title. Mrs. Boyce had a life-estate, her children the remainder. These estates were created by the will of Ann Biddle, the same instrument creating both estates; and it is urged that it would be an absurdity to say that she warranted against the very instrument under which she herself derived title. The covenant was as follows:

"And the said parties of the first part, O. Boyce and Julius S. Walsh, hereby covenant for themselves, their successors, heirs, * * * to warrant and defend the said real estate unto him, the said party of the second part, and his heirs and assigns, forever, against themselves, the said parties of the first part, * * * and all acts done or suffered by themselves, the said parties of the first part, or John Mullanphy, or Bryan Mullanphy, or Ann Biddle, from whom the said Octavia Boyce derives title."

The meaning of that is plain. She warranted against any act done or suffered by herself. Would it be for a moment thought that that covenant was not broken by the execution of a prior deed by her, and, if that were true as to herself, would it not be equally true as to any conveyance (and the will in this respect is nothing more than a conveyance) made by Ann Biddle or either of the other parties specially mentioned in the warranty? Obviously the covenant was an assurance that no act or deed or omission of either of the parties specially named limited or impaired the full title which she was purporting to convey. No other meaning can be given to this language.

Further, it is urged that, if this covenant be regarded as valid, all right of action thereon was barred before the commencement of this suit; that the covenant was broken, if not before, at least at the time of the death of Mrs. Boyce, which took place more than 10 years before the filing of this bill. But the law of Missouri, like the law generally, seems to be that such a covenant (a covenant to warrant and defend) is broken only by eviction, or what is equivalent thereto. Rawle, Cov. 360; Rev. St. § 3229; *White v. Stevens*, 13 Mo. App. 241.

Again, the decision in *Barlow v. Delaney*, reported in 86 Mo., *supra*, being between the same parties, and growing out of the same transaction, is specially relied upon by defendants as *res adjudicata*. But the two cases are essentially different. In the case in the state court Mr. Barlow sought to enjoin these defendants from asserting their title as remaindermen, while here he is suing for a breach in the covenant made by their mother. In that case the point of the decision was that, as they took title, not from their mother, but from Mrs. Biddle, no covenant that she could make would estop them from asserting title,—in other words, that she could not convey away by her deed, with any covenants, property which her children obtained from a third party, while here complainants are seeking to subject a portion of the separate estate in equity of Mrs. Boyce to the payment of damages they have sustained by a breach of her covenant. The two cases are essentially different in their nature and the relief sought, and the fact that there are some matters kindred to both, and some expressions of opinion thereon in the various opinions filed in that case as it went through the state courts, on matters which we are forced to consider here, does not make the decision there conclusive here. I think a cause of action exists, and that it is not barred by the statute of limitations, or by any prior adjudications.

Coming now to the measure of damages, the general rule in cases of this kind is the purchase price and interest. But the special facts in this case make another rule the correct one. The defendants were the parties asserting title paramount, and threatening eviction. To prevent that, the party in possession, holding under Barlow, purchased such title paramount. The necessity of such a purchase to prevent eviction is conceded. The amount paid was reasonable; but, whether reasonable or not, it was the amount these defendants exacted. It does not lie with them to say that it was unreasonable. Mr. Barlow, by the terms of his warranty, was bound to protect the parties in possession; and when they

were compelled to buy in a title paramount he was bound to reimburse them for the amount paid therefor. The action of the parties all around, therefore, fixes the amount which complainants ought to recover. It is the amount paid by Mr. Barlow, with interest. And as defendants confessedly have in their possession of the property belonging to the separate estate in equity of Mrs. Boyce, which descended to them, far more in value than the amount thus paid, a decree must be entered that a lien be allowed against the same for the damages sustained. It is admitted that one of the heirs has already paid her share, so that the decree will only be *pro rata* as to the rest.

One question further remains. Mr. Barlow did not pay the parties in possession who had bought the paramount title of defendants without suit. He defended, and now claims that the costs and counsel fees of that litigation are also a part of his damages. It is unnecessary to go into the vexed question as to what costs and counsel fees can in an ordinary case be recovered. These defendants were not notified and called upon to make good their mother's covenant, although they had knowledge of the pendency of the suit in New York against Mr. Barlow. But the truth is, Mr. Barlow's defense was on his own account, for his own benefit. Under the views of law then entertained it was not believed that he had any right to recover against these defendants, so that his defense was only in his own interest, and with the hope of avoiding liability. It was not a defense for their benefit, or at their instance; and, as he chose to carry on that litigation, he must bear the costs of it. Nothing was gained by it as against them. They could not question the rightfulness of the payment to them by the party in possession, or the reasonableness of the amount paid; and the litigation in New York did not strengthen, as against them, either one of these matters, or fix the amount of their liability to Mr. Barlow. I think, therefore, the counsel fees and costs are not recoverable. I believe this covers every matter that requires notice.

UNITED STATES *ex rel.* MORRIS *et al.* v. DELAWARE, L. & W. R. Co.

(Circuit Court, N. D. New York. October 18, 1889.)

1. INTERSTATE COMMERCE ACT—UNJUST DISCRIMINATION—USE OF A PARTICULAR LIVE-STOCK CAR.

To an application for a *mandamus* to compel a carrier to transport relators' stock in the cars of a certain live-stock transportation company, the respondent set forth that it had entered into a contract with another transportation company, by which that company was to furnish respondent a certain number of cars per year; that such cars were available to all shippers of stock; that they were much more useful to defendant than other live-stock cars, in that they could be converted into coal-cars when not used for live-stock; and that defendant paid mileage for the use of the cars. *Held*, that the refusal to transport relators' stock in the cars offered at the same rates charged for stock in the other cars was not an "unjust discrimination" in favor of the transportation company, whose cars respondent was using, within the meaning of the interstate commerce act, as the circumstances and conditions were not substantially similar.

2. SAME—MANDAMUS PENDENTE LITE.

The interstate commerce act authorizes the court, in its discretion, to grant a *mandamus*, when any question of fact as to the proper compensation of the carrier is raised, "notwithstanding such question of fact is undetermined" pending the determination of such question. *Held*, that this does not authorize the court to grant relief where a case of unjust discrimination is not made out.

In Equity. Application for *mandamus*. On demurrer to return.

J. C. Clayton, for relators.

Rogers, Locke & Milburn, for respondent.

WALLACE, J. The jurisdiction invoked by the relators is founded on that section of the "Act to regulate interstate commerce," as amended March 2, 1889, which authorizes the court to issue a writ of *mandamus* upon the relation of any person alleging the violation by a common carrier of any of the provisions of the act which prevent the relator from having interstate traffic moved by the carrier "at the same rates as are charged, or upon terms or conditions as favorable as those given, by said carrier for like traffic under similar conditions to any other shipper." The unjust discrimination alleged in the petition upon which the alternative writ was granted consists in the refusal of the respondent to transport cattle for Morris, a shipper of cattle, in cars of a special construction belonging to the American Live-Stock Transportation Company, superior, by reason of their improvements, to ordinary cattle-cars; whereas, it transports cattle for other shippers in cars having some, but not all, of such improvements, belonging to the Lackawanna Live-Stock Express Company. The American Live-Stock Transportation Company, the co-relator with Morris, is a corporation organized for the purpose of transporting live-stock and other merchandise, and its presence would seem to be superfluous, unless it is here to obtain the benefit of an adjudication that the respondent is bound to accept its cars, whenever tendered with cattle for transportation, and allow to it the mileage of three-fourths of a cent per mile for the use of the cars which the relators aver is allowed by the respondent to the Lackawanna Live-Stock Express Company. The return by the respondent to the alternative writ, besides denying in general terms the charge of unjust discrimination, sets forth that it has entered into a contract with the Lackawanna Live-Stock Express Company for the term of five years, by which that company agrees to furnish at least 200 of its improved stock-cars to run on the railway of the respondent; that such cars are not used exclusively by any one shipper of live-stock, but are available to all shippers; that the cars, unlike those of the American Live-Stock Transportation Company, are so constructed as to permit of the carriage of coal, which is the principal business of the respondent, when not loaded with live-stock; and that in consideration of the special contract the defendant agreed to use the cars upon its road, and pay mileage therefor, as if such cars were furnished by a connecting company; and it also alleges that, after entering into such agreement, the respondent and several other trunk line railroad companies entered into an agreement to discontinue hauling private stock-cars, except for horses, for reasons which are particularly set forth. The re-

lators have demurred to this return, and move for a peremptory *mandamus*, insisting that the return does not allege facts which justify the refusal of the respondent to transport the cattle of Morris in the cars of the American Live-Stock Transportation Company.

The jurisdiction of this court, conferred by the interstate commerce act, to compel by *mandamus* the observance by common carriers of the provisions of the act, is restricted exclusively to the prevention of unjust discrimination by such carriers. The question for consideration consequently is whether, if the facts alleged in the return are true, the respondent has been guilty of any unjust discrimination between Morris and the shippers for whom it carries cattle in the cars of the Lackawanna Live-Stock Express Company. Unjust discrimination is prohibited by sections 2 and 3 of the interstate commerce act. What constitutes unjust discrimination may be ascertained from the language of these sections, as well as of the section which authorizes the circuit court to redress it by *mandamus*. By section 2 it consists in charging one person a different compensation than is charged another for doing "the like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." By section 3 it consists in giving "any undue or unreasonable preference or advantage" to any particular shipper, or subjecting him to any undue or unreasonable prejudice or disadvantage "in any respect whatever." The former relates to unjust discrimination in rates. The latter is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service; and such is the judicial construction in England of the term "undue or unreasonable preference or advantage," as used in the English "railway and canal traffic act," (17 & 18 Vict. c. 31, § 2.) It is provided in section 3 that all the common carriers subject to the provisions of the act "shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." This provision refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers; and the term "facilities" does not embrace car equipment for the transportation of freight over the carrier's own road. *Scofield v. Railroad Co.*, 2 Int. St. Com. R. 90, 116.

These sections, by declaring the specified acts of discrimination unlawful, qualify materially in some respects the common-law rights and obligations of the carriers mentioned. By the common law, although public carriers are not permitted to make unreasonable discrimination in performing the services which they undertake between those whom it is their duty to serve, the discrimination which is unreasonable is such

only as inures to the undue advantage of one person or class of persons in consequence of some injustice inflicted upon another. The carrier is not obliged to treat all who patronize him with absolute equality. Thus it is his privilege to charge less than fair compensation to one person, or to a class of persons; and others cannot justly complain so long as he carries on reasonable terms for them. *Menacho v. Ward*, 27 Fed. Rep. 530. That privilege can no longer be exercised under the interstate commerce act by the carriers subjected to its provisions in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Again, it is no part of the common-law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike; and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in, they may nevertheless chose their own appropriate means of carriage. This was the doctrine of the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628, in which it was held by the supreme court that railroad companies are not required by usage or by the common law to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled. But the interstate commerce act requires them to treat all impartially; and if one shipper is subjected to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road, their right to choose their own appropriate means of carriage is to that extent curtailed.

It is unnecessary to decide in the present case whether the respondent would be guilty of unjust discrimination towards the American Live-Stock Transportation Company, or indirectly towards Morris, if it should refuse to enter into such an arrangement with that company as it has made with the Lackawanna Live-Stock Express Company. The respondent does not prevent either relator from transporting cattle over its road in the cars furnished to it by the Lackawanna Live-Stock Express Company; and, if the facts set forth in the return are true, the cars belonging to the Lackawanna Live-Stock Express Company differ so in construction from those of the American Live-Stock Transportation Company, as well as from those of ordinary private stock-cars, that the respondent can use them more profitably and conveniently than the others, because they can be used for its ordinary coal traffic when not in use for carrying cattle. So, also, if the facts in the return are true, the contract made with the Lackawanna Express Company secures to the respondent the advantage of having a definite number of cars always at its disposal for use in its general business,—an advantage which it could not have by using the cars of the American Live-Stock Express Company, or the cars of any other shipper, in the absence of such a contract. Thus there are reciprocal rights and obligations arising from the contract between the respondent and the Lackawanna Live-Stock Express Company, and special circumstances in their relations affecting the question of compensation, which are not present in the conditions of the service which the relators demand. In short, there is no unjust discrimination towards the relators as to rates, because

the respondent does not refuse to carry traffic for them under substantially similar circumstances and conditions to those of its service for the Lackawanna Live-Stock Express Company; and for the same reason it does not give the latter any unreasonable preference or advantage over the relators, but only such a preference or advantage as it may fairly give because of the difference in cost, expense, and the exceptional character of the service. The case of *Car Co. v. Railroad Co.*, 1 Int. St. Com. R. 132, is instructive upon this point. See, also, *Nicholson v. Railway Co.*, 5 C. B. (N.S.) 366; *Cooper v. Railroad Co.*, 4 C. B. (N.S.) 738; *Oxlade v. Railroad Co.*, 1 C. B. (N.S.) 454.

The section which authorizes the court to grant a *mandamus* confers the discretionary power, when any question of fact as to the proper compensation of the carrier is raised by the pleadings, to issue the writ, "notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into court, or otherwise as the court may think proper, pending the determination of the question of fact." Relying upon this language of the section, the relators insist that the peremptory *mandamus* should be allowed, and the question of proper compensation for the respondent be reserved. This contention ignores the consideration that until a case of unjust discrimination is shown to exist the court is not authorized to award any relief whatever. If it were shown that the respondent refuses to receive traffic in the cars of the American Live-Stock Transportation Company, while receiving it for another in substantially the same way, then it might be competent to decide that the relators are prevented from having their traffic moved upon like favorable terms or conditions, and the question of compensation might be determined at a later stage in the case. Until this is shown, however, they do not make out a case for the intervention of the court. For these reasons the return is held to be sufficient.

FARMERS' LOAN & TRUST CO. v. SAN DIEGO STREET-CAR CO.

(Circuit Court, S. D. California. October 3, 1889.)

MORTGAGE—FORECLOSURE—RIGHT TO INTERVENE.

To a bill to foreclose a mortgage on the property and franchises of a street-railroad company, which mortgage covered after-acquired property, intervenors filed a cross-bill, alleging that a certain portion of the after-acquired property had been acquired by funds furnished by the intervenors under contracts by which the company was to construct and operate that portion of its line for a certain time and in a certain manner; that the bondholders and the corporation had conspired together to file the bill for foreclosure, and by the sale to deprive the intervenors of their rights in the property; that accordingly a receiver had been appointed, who refused to operate that portion of the line, whereby intervenors had been deprived of the advantages provided for in the said contracts; and that the contracts provided that, upon the failure of the company to operate the line, a conveyance of it was to be made to intervenors. The prayer was for such conveyance. *Held* that, as the claim of the intervenors was adverse to the parties to the bill, the cross-bill should be dismissed.

In Equity. Bill to foreclose mortgage. On motion to strike answers from the files and demurrers to cross-bill.

Turner, McClure & Rolston and Myrick & Deering, for complainant.

Brunson, Wilson & Lamme, for defendant.

Parrish, Mossholder & Lewis and Wells, Guthrie & Lee, for intervenors.

Ross, J. Without noticing the technical objections urged to the answer and cross-bill filed by the intervenors, I think the more substantial objections thereto well taken. The bill was filed for the foreclosure of a certain mortgage, executed on the 2d day of April, 1888, by the defendant, the San Diego Street-Car Company, to the complainant as trustee, to secure the payment of 250 first mortgage bonds of \$1,000 each, alleged to have been issued on that day by the said street-car company, payable on the 1st day of April, 1908, with interest at the rate of 6 per cent. per annum, payable semi-annually, on the 1st days of April and October of each year, such interest payments being further evidenced by coupons attached to the bonds. The property thus mortgaged was the line of street railway then owned by the defendant company in the city of San Diego, Cal., its franchises, and all property of every kind used or in any way connected therewith, and also all franchises and property that might thereafter be acquired by the defendant corporation for the purpose of its line of railway, and all branch lines, extensions, side tracks, and switches that might be thereafter constructed. The mortgage contained a provision that, in the event default should be made by the mortgagor company in the payment of any installment of interest, and such default should continue for 60 days, the principal sums of the bonds should, at the election of the holders of 126 of them, become due and immediately payable; and in such case the complainant, as trustee, might institute suit in any court of competent jurisdiction for the foreclosure of the mortgage, and might prosecute such suit to a final decree and sale. The bill alleges that the mortgagor company failed to pay the interest due on the 1st day of October, 1888, on the bonds issued and then outstanding, and that such default in the payment of said interest has continued for 60 days and more, and that the holders of 126 of said bonds, and more, have elected that the principal sum secured by all the bonds issued and outstanding under the said mortgage has become and is due and immediately payable; and that the holders and owners of more than 126 of said bonds have requested, in writing, the complainant to commence this suit and foreclose the said mortgage.

With respect to the answer of the intervenors, who are A. Klauber, S. Steiner, F. L. Castle, and D. Choate, it is sufficient to say that, as neither of them has ever been made a defendant to the suit, either by the original bill or otherwise, there are no allegations calling for an answer on their part. The answer of the intervenors to the bill has, therefore, no place in the records, and should be expunged.

The cross-bill filed by the intervenors against the complainant and the defendant in substance sets up this state of facts: The defendant corporation had constructed and was operating a street-car line from the busi-

ness and central portions of the city of San Diego in the direction of certain real estate owned by the intervenors, which line was a part of the property included in the mortgage to complainant. For the purpose of enhancing the value of their said real estate, the intervenors were desirous of having the street railroad extended, and accordingly contracted with the defendant corporation for such extension. Three separate contracts were made between the intervenors and the street-car company, respecting that matter,—the first, on the 30th day of September, 1887; the second, on the 2d day of April, 1888; and the third, on the 3d day of December, 1888. By the contract of September 30th the street-car company agreed to extend its line from its then terminus, on D street, to a point to be designated by the intervenors in their tract of land, called the "Steiner, Klauber, Choate, and Castle's Addition to the City of San Diego," upon these, among other, conditions: (1) The intervenors to secure the right of way for such extension free of charge to the company; (2) the intervenors to pay to the company \$6,000 for each mile of such extension, exclusive of the cost of bridges and culverts; (3) the intervenors to pay the cost of all bridges and culverts necessary to be constructed on the line of such extension; (4) payment to be made by the intervenors at the rate of 80 per cent. for each mile of road as completed, and the balance to be paid on the completion of the entire line. It was further agreed that the street-car company should run a car on such extension "not less than three times per day; the fare to be not exceeding ten cents for the entire distance each way."

The contract of April 2, 1888, refers to that of September 30, 1887; recites the fact that pursuant to it the street-car company partially constructed the line of railway therein contemplated and provided for along the route designated by the intervenors, and that the intervenors had procured the passage of ordinances of the city granting them a franchise for the construction and maintenance of the road as contemplated in and by the contract of September 30th; and then proceeds that "whereas, matters of controversy have arisen in the construction of the terms of said contract, [of September 30, 1887,] and as to the meaning thereof, and it being deemed to the best interest of all parties that said road should be completed at the earliest possible moment, in the most economical manner, and to the greatest advantage of each of the parties thereto, now, therefore, this contract [that of April 2, 1888] is made and entered into for the purposes hereinafter set forth by this instrument, each waiving all rights and privileges hereafter accruing under the said contract of September 30th, and covenanting the one with the other to the following effect, to-wit:" (1) The street-car company to complete the line of road in accordance with certain plans and specifications annexed to the contract, and to construct it between certain points marked, respectively, "Station A" and "Station B" on a certain exhibit attached to the contract and made a part of it. (2) All expenses incurred by reason of a change of the road provided for by the contract to be borne by the company, but the intervenors to pay the company \$2,000 as compensation for making the change. (3) The intervenors to obtain the

right of way for the road between stations A and B at their own cost, and without expense to the company. (4) The intervenors to pay for all trestles, culverts, and bridges necessary for the road. (5) The company to complete the road within 90 days from April 1, 1888, provided the bridges be completed within six weeks from the date of the contract; but in any event the road to be completed within four months from that date. (6) That portion of the road constructed between stations A and B to be operated before the completion of the entire road, provided the contractors therefor agree. (7) The intervenors to pay the company six thousand dollars for each mile of the road constructed, exclusive of the cost of bridges, trestles, and culverts, fifteen thousand of which to be paid on the execution of the contract, and seventeen thousand of which is therein acknowledged to have been theretofore received by the company; the balance to be paid upon the completion of the road, in negotiable paper acceptable to the Bank of California, and payable four months after date thereof. (8) An acknowledgment by the intervenors of the execution of an assignment of even date to the street-car company of all of the franchises granted to the intervenors by the city of San Diego, and of all their right, title, and interest in and to said railroad, including all trestles, culverts, and bridges, which assignment was at the same time placed in escrow with the First National Bank of San Diego, to be delivered to the company when the road should be completed and in operation, as provided by the contract. (9) Upon the delivery of the assignment the street-car company to operate the road as a belt road for five years through the said Klauber, Steiner, Choate, and Castle addition, and in said operation to run not less than three regular trains per day, unavoidable delays and accidents alone excepted. For a violation of which covenants, or any of them, and as a penalty inuring to the benefit of the intervenors, "a forfeiture thereupon shall ensue of all franchises, bridges, trestles, culverts, ties, rails, and road-bed, built as aforesaid in accordance with the terms hereof," to the intervenors.

By the contract entered into between the intervenors and the defendant street-car company on the 3d day of December, 1888, the contract of April 2, 1888, was so changed, in consideration of \$12,695.88, paid to the company by the intervenors, as to provide that the company should operate the whole of the line of road from the intersection of D and Twelfth streets in the city of San Diego, up Switzer canon, through the Klauber, Steiner, Choate, and Castle addition to the intersection of Pacific avenue with Steiner street, in said addition, for a period of 10 years from December 3, 1888, and in such operation to run not less than three regular passenger trains over the entire length of said road each and every day during said term, unavoidable delays and accidents alone excepted; and further agreeing that, if the company should at any time within said 10 years fail to run the trains as stipulated, then, as a penalty for such failure, to forfeit to the intervenors all of said road from said intersection of D and Twelfth streets to said intersection of Pacific avenue and Steiner streets, together with all the franchises, bridges, trestles, culverts, ties, rails, road-bed, and right of way of said road between

said intersections, and thereupon the said street-car company would execute an instrument in writing, conveying to the intervenors all of said property. There are other provisions and stipulations contained in the agreement of December 3d not necessary to be stated.

The cross-bill alleges that the defendant street-car company constructed and equipped the line of railroad provided for by the contracts, but solely with funds paid by the intervenors thereunder, and that the intervenors procured and transferred to the company the franchises and rights of way, and made the payments as they agreed, aggregating in amount \$73,695.88, all of which the defendant company received under and in pursuance of the contracts. It is further alleged in the cross-bill that the defendant company operated the said road in accordance with its said agreements until on or about the 25th day of February, 1889, which was a date subsequent to the commencement of this suit, the bill herein having been filed February 18, 1889. And it is averred "that said intervenors have been informed, and upon such information and belief allege, that prior to February 18, 1889, some of the bondholders represented by the plaintiff and the defendant corporation, conspiring and confederating together, agreed between themselves to file a bill of complaint in the United States circuit court of the southern district of California, asking for a foreclosure of a mortgage of two hundred and fifty thousand dollars, alleged to have been given by the defendant to the plaintiff, and that the entire property of the defendant, the San Diego Street-Car Company, should be sold by virtue of proceedings to be had thereunder, and that by such sale thereof to deprive these intervenors of their rights obtained by virtue of these contracts, and to agree to appoint the president of the defendant corporation the receiver, and thereby secure to themselves the aforesaid rights, franchises, privileges, and so forth, belonging to the aforesaid railroad extension as their property, and to operate said road according to their own advantages, and deprive the intervenors herein of all interest in said extension and the use of the same; and that, acting in furtherance of said conspiracy and fraudulent combination aforesaid, after Milton Santee had been appointed receiver, he, the said receiver, stopped the running of trains over the extension of said road constructed with the money furnished by the intervenors herein for the purpose of depreciating, and does thereby so depreciate, the value of said extension, and will, if continued, entirely ruin the same, and cause the same to become entirely worthless; since which time the defendant and the receiver appointed by this honorable court to take charge of and operate said road have wholly neglected and refused to run any trains over said line of road or any part thereof, and the said defendant and its receiver still refuse to operate said line of road, whereby, and by reason of said failure and refusal of said company to operate the entire line of said road as in said contracts provided, the advantages of said contracts have been wholly lost to the intervenors, and since which time they have been, and are now, deprived of the advantages provided for in said agreements; and the right to have and demand a conveyance from said defendant of the entire line of the extension of

said road from the intersection of D and Twelfth streets to and through the intervenor's land to a point where Steiner street intersects Pacific avenue, including franchises, rights of way, bridges, culverts, trestles, ties, rails, and road-bed, has accrued to said intervenors." The cross-bill further alleges that by reason of certain stated provisions of the charter, and of an ordinance of the city of San Diego, the franchises granted to the intervenors and by them assigned to the defendant company are in danger of becoming forfeited by reason of the non-operation of that portion of the road constructed under the aforesaid contracts, and upon information and belief alleges that the defendant company has not "sold and disposed of two hundred and fifty thousand dollars of bonds provided for, and secured by said alleged mortgage, for the uses and purposes of said street-car company, or any considerable portion thereof." The prayer of the cross-bill is that the defendant company be required to furnish a list of the bonds issued, and show to whom they were sold, for what consideration, and what was done with the proceeds; that the receiver appointed by this court be required to execute to the intervenors a deed conveying to them the entire line of road as constructed from the intersection of D and Twelfth streets to the intersection of Steiner street with Pacific avenue, in the Steiner, Klauber, Choate and Castle addition to the city of San Diego, together with the franchises and rights of way therefor; that it be decreed that the mortgage in question does not embrace any portion of the road constructed under the contracts made between intervenors and the defendant company, nor any of the franchises or rights of way aforesaid; that, pending the determination of this suit, the receiver be directed to operate the said portion of said road in accordance with the terms of said contracts, etc.

From this statement it is very clear that the claim set up by the intervenors to the property referred to in the cross-bill is adverse to the complainant as well as the defendant to the suit. They not only allege that that portion of the road which was constructed under the contracts set up in the cross-bill, with the franchises and rights of way therefor, was not covered by the mortgage, but assert title in themselves as against both complainant and defendant by reason of the alleged failure of the receiver to operate such portion of the road, and ask that he be decreed to execute a conveyance thereof to them. It is well settled that such adverse claims cannot be litigated and settled in a foreclosure proceeding. *Dial v. Reynolds*, 96 U. S. 340; *McComb v. Spangler*, 71 Cal. 423, 12 Pac. Rep. 347. Of course, under the decree of foreclosure no greater interest can be sold than the mortgagor had at the time of the execution of the mortgage, or subsequently acquired. Rights superior to his are in no wise affected; and where property is subsequently acquired by the mortgagor, which is embraced by the terms of the mortgage, if it is acquired subject to conditions, a purchaser at a judicial sale under the mortgage would undoubtedly take subject to the same conditions. But while, in my opinion, the questions sought to be raised by the intervenors cannot be litigated and determined in this proceeding, I think it proper to direct the attention of counsel for the complainant and the de-

pendant to the suit, at whose joint request the president of the defendant company was appointed receiver, to the question as to whether this court ought not to order the receiver to operate that portion of the road referred to in the cross-bill, in accordance with the terms of the contracts under which it was constructed. It is ordered that the amended answer of the intervenors be stricken from the files, and that the demurrers to the cross-bill be sustained, and the cross-bill be dismissed.

TEXAS & P. RY. CO. v. CITY OF NEW ORLEANS.

(Circuit Court, E. D. Louisiana. August 24, 1889.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—WHARVES—OBSTRUCTIONS.

By ordinance of the city of New Orleans, the right was conferred on complainant railroad company to inclose and occupy * * * that portion of the levee, batture, and wharves in the city in front of its riparian property, acquired or to be acquired, between certain streets, and to erect and maintain thereon such ferry facilities, wharves, piers, warehouses, tracks, depots, etc., as should be necessary and convenient for the transfer of cars, engines, passengers, and freight, and in the transaction of its business. *Held*, that the right to erect these improvements was confined to so much of the levee and wharf of the city as lay in front of the riparian property of the complainant, and did not extend beyond the wharf line; and the ordinance did not authorize the placing of piles, or any other structure, outside of the line of the city wharf.

2. SAME—INJUNCTION.

An injunction *pendente lite*, restraining the city from interfering with complainant in the erection and maintenance of such structures as it was authorized to erect and maintain under the authority of the ordinance, did not protect complainant in the erection of the pilings, or other structures, outside the wharf line of the city.

3. NAVIGABLE WATERS—POWERS OF COURTS—INJUNCTION.

The Mississippi river, being a navigable stream, is within the exclusive control of congress, and neither the city of New Orleans nor the state of Louisiana can authorize any obstruction of its navigation; nor can the courts extend the injunction so as to protect complainant in the erection of structures outside the wharf line of the city.

In Equity.

Howe & Prentiss, for complainant.

Carleton Hunt, for defendant.

HILL, J. The questions now to be decided arise upon the motion of the defendant to modify or construe the scope and effect of an injunction *pendente lite*, heretofore granted in this cause, and upon the motion of complainant to grant an additional injunction *pendente lite*. Each motion is supported by affidavits. The supplemental and amended bill upon which the injunction *pendente lite* was granted, which it is asked shall be continued and modified, in substance alleges that heretofore, by virtue of certain ordinances made and promulgated by the council of the city of New Orleans, the New Orleans, Texas & Pacific Railway Company, of which the complainant is the successor, was authorized and empowered, under certain conditions therein stated, to establish and maintain for its use and benefit, upon the river front of the Mississippi river, within the corporate limits of said city, and within certain pre-

scribed limits, all necessary ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds, and other structures as shall be necessary and convenient for transfer of cars, engines, passengers, and freights, and in the transaction of its business. That the complainant was proceeding to construct the improvements and facilities authorized by said ordinances, when the mayor of said city placed upon said works, so being about to be erected, a policeman, to prevent the same from being done, and threatened to prevent by force the prosecution and completion of the work and structures necessary for the convenience and use of said complainant, and authorized by said ordinance. The restraining order made by the district judge, and afterwards ordered by the circuit judge to stand as an injunction *pendente lite*, is in substance as follows: That said city of New Orleans, its mayor, agents, servants, and employes, are commanded and strictly enjoined, under the penalty of the law, from interfering with the Texas & Pacific Railway Company or its receivers in the exercise of any of the rights granted to the New Orleans, Texas & Pacific Railway Company, and its assigns the said Texas & Pacific Railway Company, by the ordinances set forth in the bill herein, as ordinances Nos. 6732, 6938, and 7946, administration series, copies of which are filed herein, and from executing the ordinances Nos. 685 and 1828, council series, and from granting to any other person or corporation the rights attempted to be taken away or impaired by said ordinances Nos. 685 and 1828, council series, and from interfering in any way, whether by the use of policemen or otherwise, with the said Texas & Pacific Railway Company, or its assigns, in the work of building a spur track to connect the track above the transfer inclosure between Thalia and Terpsichore streets, on which the track of said railway is now laid in Pelia and Water streets, and along the river front, as delineated in the Exhibit P, filed herein as part of the supplemental bill, in any wise, with the work of driving piles so as to reach said wharf of the railway with said spur and track, whether by policemen or otherwise, and from in any way hindering or delaying any work provided for in said ordinances Nos. 6690, 6732, 6938, and 7646, administration series. It is alleged and proven that the complainant has driven clusters of piles, some 25 feet out from the end of the incline track, and from the wharf line into the river, for the purpose of staying or holding the transfer steam-boat in its place, and that planks are nailed to these piles, which, it is alleged by defendant, diverts the stream or current in the river from the bank on the east side to the opposite side, and thereby causes an eddy in front of the levee and wharves, both above and below these pilings outside the wharf line, resulting in the formation of shoals, and leaving the water so shallow as to prevent vessels from approaching the wharves, and discharging and receiving freights, and which, if continued to remain, will injure or ruin the wharves of the city. It is insisted on the part of the complainant that the clusters of piles complained of, though not specifically mentioned in the ordinance or in the injunction, are impliedly embraced therein, for the reason that they are necessary to the enjoyment of the rights and privileges specifically granted; that these

clusters of piles are necessary to enable the transfer vessel to land at the end of the incline track, and to hold it in position; that without them there will be great danger in making the proper connection between the end of the incline track and the track on the transfer vessel, and for the want of which there will be great danger of the cars being thrown in the river, and of loss of life and property.

There have been a large number of affidavits read on both sides to prove and disprove the respective positions stated, all of which have been carefully read by me, but which, under the view I take of the questions arising upon motions before the court, are irrelevant, and need not be considered. The only questions presented are—*First*, was the right conferred upon the complainant to place these piles outside the wharf line conferred upon the complainant by either of the ordinances referred to in the bill? and, *secondly*, if so, is the complainant protected in placing and maintaining them there, by the *pendente lite* injunction granted heretofore, and which the court is asked to modify.

Section 4 of ordinance No. 6938, administration series, under which it is claimed the authority is conferred to erect and maintain these structures, etc., including those of which complaint is made, reads as follows:

“That the New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred, for the term of its charter, and from and after the existing leases of city wharves, to inclose and occupy for its uses and purposes that portion of the levee, batture, and wharves in the city of New Orleans in front of its riparian property, acquired or to be acquired between Thalia and Tersichore streets, and to erect and maintain thereon, at its own expense, such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds, and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers, and freight, and in the transaction of its business.”

By reference to the provisions of the above ordinance, it will be seen that the right to erect these improvements and structures is confined to so much of the levee, batture, and wharf of the city as lay in front of the riparian property then acquired, or thereafter to be acquired, by the New Orleans Pacific Railway Company, its successors or assigns, between Thalia and Tersichore streets, and did not extend beyond the wharf line as fixed by the authority of the city, and existing at that time, and such extension of the wharf line as thereafter might be established. By reference to the injunction *pendente lite*, it will be seen that the complainant is only protected in the erection and maintenance of such structures, etc., as it was authorized to erect and maintain under the authority conferred by the ordinances of the city mentioned in the injunction, and no other. I am therefore satisfied that these ordinances do not authorize the placing of the piles or any other structure outside of the line of the city wharf, and that the obstruction complained of was not intended to be, and is not, protected by the injunction *pendente lite*, and that no modification of it is necessary.

The next question is, has this court the power to extend the injunction so as to protect the complainant in the erection and maintenance of these or any other pilings or structures outside of the wharf line of the

city? The Mississippi river is one of the principal navigable streams in the United States, and, as such, is within the exclusive control of the congress of the United States; and, such being the case, neither the city of New Orleans nor the state of Louisiana can authorize any obstruction that will interfere with its navigation. In aid of navigation and commerce, congress authorizes cities and towns and other corporate bodies, and sometimes individuals, to erect and maintain levees and warehouses, etc., on the banks of navigable streams, and, in aid of commerce and transportation, authorizes the construction of bridges over navigable streams, under such restrictions as will not hinder or delay the navigation on such rivers. But this power is invested in congress, the law-making power, and not in the courts, the judicial department of the government. Therefore the motion of complainant to extend the injunction must be denied. A decree will be entered in accordance with the above conclusions.

UNITED STATES *v.* DALLES MILITARY ROAD CO. *et al.*

(Circuit Court, D. Oregon. October 7, 1889.)

1. PUBLIC LANDS—GRANTS—DALLES MILITARY ROAD.

The Act Cong. Feb. 25, 1867, (14 St. 409,) granted to the state of Oregon lands to aid in the construction of a military wagon road from Dalles City to Fort Boise. Section 8 of the act provides that "said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such special manner as the state of Oregon may prescribe." By an act passed October 20, 1868, the state of Oregon transferred the grant to the Dalles Military Road Company, but prescribed no "special manner" for constructing the road. *Held*, that these two acts formed the entire statutory contract with the road company, and that the statute of Or. Oct. 14, 1862, relative to the construction of roads by private corporations, which had no reference to this specific road or grant, did not affect the question between the United States and the road company as to whether the latter had constructed the road in the manner and within the time as prescribed by the act of congress.

2. SAME.

There being nothing in either act requiring the road company, or any one claiming under it, to maintain the road after it had been once completed and accepted by the government in accordance with the provisions of the acts, without any such fraud as to vitiate the acceptance, its right to the lands against the United States vested irrevocably upon such acceptance.

Bill in Equity to forfeit lands under the act of congress, approved March 2, 1889, entitled "An act providing in certain cases for the forfeiture of wagon road grants in the state of Oregon." 25 St. 850. On exceptions to portions of the bill for impertinence.

L. L. McArthur, U. S. Atty., and *W. C. Johnson*, for plaintiff.

James K. Kelly, *C. S. Ward*, and *Dolph & Bellinger*, for defendants.

Before *SAWYER*, Circuit Judge.

SAWYER, J. The first paragraph of the bill sets out the substance of the act of congress passed February 25, 1867, entitled "An act granting lands to the state of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia river, to Fort Boise, on

the Snake river," found in 14 U. S. St. 409. The second paragraph in like manner sets out the substance of the statute of Oregon, passed October 20, 1868, entitled "An act donating certain lands to Dalles Military Road Company," found in the statutes of Oregon for 1868, p. 3. Notwithstanding these allegations in the second paragraph it is alleged in the third, "that the state of Oregon never, at any time, passed any laws whatsoever, for the specific purpose of carrying the act of congress into effect," meaning only, it must be presumed, in view of the preceding allegations of the bill, that it never passed any law other than that set out, or any law prescribing any "other special manner" of constructing the road than that prescribed in the said act of congress, as it was authorized to do by section 3 of that act. The bill then proceeds to aver: "But long before the passage of the act of congress" the state legislature did pass "An act providing for private corporations, and the appropriation of private property therefor," which act provided, that any road constructed by such corporation, should be constructed in a certain manner, of a certain width, etc., fully described in the act; also, for bridging and ferrying streams, with many other particulars, and that said act has been in force, at all times, since its passage on October 14, 1862. This passage is excepted to as impertinent, the said statute being, as contended, inapplicable, and having no relation to the road as constructed, or required to be constructed by defendant—the Dalles Company, under and in pursuance of the congressional grant to the state of Oregon, and the statute of Oregon, set out in the bill transferring the said grant to the Dalles Company upon the same "conditions and limitations" as in the act of congress prescribed, and no others. I am satisfied, that this exception must be sustained. Section 3 of the act of congress provides, "that said road shall be constructed with such width, gradation, and bridges, as to permit of its regular use as a wagon road, and in such special manner, as the state of Oregon may prescribe." Congress was providing for the construction of this particular road, and made no reference to any other road, or to any existing statute of Oregon. It does not say, in "such special manner," as the statutes of Oregon have heretofore provided "for roads constructed under its authority and laws," or "in such 'special manner' as the laws of Oregon now provide for the construction of roads, toll or otherwise, by corporations or private parties," but in such other "special manner, as the state of Oregon may prescribe." That is to say, may hereafter prescribe, when regranting the lands to aid in the construction of the road, or in hereafter, contracting with parties to construct the road, either for the lands, or for a money consideration, to be paid in whole, or in part, out of the proceeds of the lands. The act of congress, evidently, contemplates future, not past action—such "other special manner" as the state may prescribe for this particular road—not such as it has already, heretofore prescribed for other roads, toll or otherwise. This is the only limitation prescribed by congress in this particular.

Upon examining the statute of Oregon, transferring the congressional grant to the Dalles Military Road Company, it will be seen that no "spe-

cial manner" of constructing the road was therein prescribed, and the Dalles Company was not limited to any description of road to be constructed, other than that found in the act of congress itself. The statute is a special, independent act, limited to the very object named in and contemplated by the act of congress, and referring to no other road or object. In the preamble it recites the act of congress *verbatim* in full, and then provides "that there is hereby granted to Dalles Military Road Company incorporated * * * all lands, right of way, rights, privileges and immunities heretofore granted or pledged to this state by the act of congress in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described in said act of congress, upon the conditions and limitations therein prescribed." Laws 1868, p. 5. There is no reference to any prior statute of Oregon, and no description at all of the road to be constructed by the defendant; no "special manner" prescribed, nothing except the description in the act of congress itself. It simply adopts the provisions of that statute, and by that act the rights of the Dalles Company, so far as governing the land grant under the act of congress is concerned, are entitled to be judged. This is special legislation relating to a single specific subject-matter, and we are not to import into it other conditions which the legislature has itself omitted to incorporate. As the state of Oregon, in transferring the congressional grant of land to the defendant, in consideration of its building the road, did not prescribe any "special manner" in which it should be built, or any manner other than that prescribed by congress itself, when the conditions prescribed by the act of congress were performed within the time limited, the right to the lands became fully and irrevocably vested. The terms of the statutory contract between the state and the Dalles Company are found in the two acts—the act of congress granting the lands to the state on the conditions alone prescribed in it, and the state act in express terms granting them to the Dalles Company upon precisely the same conditions and limitations, no others having been inserted. The act of the state of Oregon without other conditions therein than those prescribed in the act of congress, operated as a transfer or assignment to the company of the congressional grant without restriction, and it was only necessary for the company to perform those conditions, in order to become entitled to the lands. Prior legislation, therefore, upon a subject-matter, having no reference to this specific road, or this specific land grant, cannot affect the question between the United States and these defendants as to whether the road was constructed by the Dalles Company in the manner and within the time prescribed in the act of congress, and the statute of Oregon strictly following the provisions of the act of congress, without prescribing any future conditions. It may have been necessary for the Dalles Company to perform conditions enjoined by the statutes of Oregon, other than those prescribed by the acts now in question, in order to entitle it to enjoy other rights under other laws of Oregon. But if so, those conditions, and the independent rights acquired by their performance, are wholly outside of and foreign to this investigation, and with which we now have no concern. Our in-

quiry is limited to the requirements of the statutory contract set out. The first exception must, therefore, be sustained, the matter excepted to being impertinent to this inquiry.

The next exception is to the allegation relating to maintaining the road after construction, in case it was constructed in accordance with the act. The allegation is that the road "was not and never has been maintained as a public highway by either or any of the defendants herein, or any person or persons claiming any interest in the lands embraced within the limits provided for by the said act of congress." And the other exceptions all relate to similar allegations as to "maintaining the road" after construction, not to a failure to construct the road in accordance with the contract. It is contended that these allegations are impertinent, because the defendants, under the terms of the contract, embodied in the act of congress and the act of the legislature of the state of Oregon, set out in the bill, were not under any obligation to maintain the road after it had been once constructed in accordance with the terms of the contract. And this view appears to me to be correct, so far as the vesting of the right of the defendant to the lands is concerned. I can find nothing in either act that requires the Dalles Company, or anybody holding under it, to maintain the road, after it has been once completed, in accordance with the terms of the statutory contract, and been approved and accepted by the government, through its agent, for that purpose duly appointed by the statute and contract, the parties acting in good faith, and there being no such fraud as should vitiate such approval and acceptance. The lands were granted in the words of the statute, "to aid in the construction" of the road. "The lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose." After the completion of 10 miles a quantity of land "not to exceed 30 sections, may be sold, and so on from time to time until said road shall be completed." There is nothing said in either act about maintaining the road after its completion. When the road has been completed, honestly approved, and accepted in accordance with the provisions of these two statutes, the contract has been fully executed on the part of the Dalles Company, and the contract having been fully performed, its right to the lands has irrevocably vested. The grant is *in presenti* and there is no provision for forfeiture in case the road is not afterwards maintained. It is provided that if the road is not "completed" within the time prescribed, no more lands shall be sold and those "unsold shall revert to the United States." But no provision is made for their forfeiture for not maintaining the road after completed. The contracting party, after completing the road in pursuance of the terms of the statute, might then abandon it and leave it to the state or the government, or whoever else may have an interest in it, either to take care of it or allow it to go to destruction, so far as any rights or liabilities under these two statutes are concerned. As well might one who has contracted with a builder for the erection of a house upon certain specifications for a specified price, after the completion of the structure in accordance with the contract, and acceptance of the house require the builder to ever after maintain it in repair.

It must be remembered that we are now, in this suit, dealing with the rights only of these parties—the United States and these defendants—arising out of this statutory contract for the construction of the road in question. If the Dalles Military Road Company, or any of these defendants, after the full performance of this statutory contract, and after their right to the land had fully vested under it, assumed to own and control this road, keep it as a toll-road as to all parties other than the United States, or exercised any other rights under other statutes of the state of Oregon, or if any liabilities accrued to the United States, the state of Oregon, or to private parties, arising under other statutes or laws of either the United States or the state of Oregon, that is a matter wholly foreign to the inquiry now before the court. We are to deal simply with this statutory contract, and even in relation to that, which is the only thing we could under any circumstances, deal with, we are limited in our inquiry by the statute under which the suit is brought to three points:

1. We are to determine the question of seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part—not according to the terms of other acts, state or national.

2. The legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads and the right of resumption of said granted lands by the United States.

3. And we must determine these questions in a manner “saving and preserving the rights of *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration.” 25 U. S. St. 851.

There is nothing here said about “maintaining” the roads after construction. Manifestly, congress in passing this act had no idea that the Dalles Company were required by either or both of the acts in question to maintain the road after completion, in accordance with the statutory contract. We are only to deal with the statutory contract for constructing the roads and ascertain whether the contract in that particular has been performed wholly or in part, and if not fully performed, what are the rights of the parties under the governors’ certificates, notwithstanding the failure to wholly or in part comply with the contract; and what are the rights of *bona fide* purchasers if these certificates can be successfully assailed and disregarded so far as participants in the fraud are concerned?

The case of *Schutz v. Road Co.*, 7 Or. 264, has been confidently cited, as establishing a view different from that now adopted. In that case the question now under consideration was not necessarily, or at all involved, and there was no occasion to determine, whether the statutory contract was performed in such sense as to entitle the Dalles Company to the lands in question, or whether under the two acts now in question, considered by themselves, said company was required to maintain the road after completion in accordance with these statutes alone. The instruction under discussion, in that case, may have been entirely correct, under the other general laws of Oregon, requiring parties who assume to

own, or, at least, control and operate a public road for tolls collected or other proper consideration. Liabilities may well accrue against such parties in favor of the United States, the state of Oregon or private parties for their neglects or violations of duty. But if so, the liability in question did not result alone from a breach of the statutory contract, now under consideration, nor did the court so decide. The plaintiff was a private party, carrying the United States mail under a contract with the government. He did not sue on this statutory contract for a breach either as an original party or as assignee of the United States. The United States were in no sense parties to the suit. The suit was for a breach of duty to maintain the road under the laws of Oregon, and the statutes in question were drawn in to show a right to use the road without charge. But if the court intended to assert, which I do not think it did—that this statutory contract alone required the Dalles Company to maintain this road after it had been completed according to the contract, and accepted then I cannot concur in that view. That case might have been, indeed should have been, and it doubtless was, disposed of upon entirely different considerations—upon the rights of the parties arising out of an assumption on the part of the company to own and control the road, and to collect tolls thereon under other laws of Oregon. The right to collect tolls is a franchise granted only by the state. There was no such franchise granted by the acts in question. The case shows that it was decided in 1879 and arose many years after the road was required to be completed by the act of congress of 1867 in question; that the defendant therein was a corporation organized under the laws of Oregon “for the purpose of constructing and maintaining” the road “and collecting tolls thereon;” (7 Or. 259;) “that it neglected to construct or maintain the road in accordance with the said acts of congress and of the legislature of Oregon,” (Id. 260;) and the answer admits the incorporation to build the road and collect tolls, (Id. 261.) Manifestly, then, the corporation was in the exercise and enjoyment of other franchises and different rights, than those derived under the acts of congress and legislation of Oregon now in question, for neither of these acts makes any reference whatever to any such franchise or rights, and other laws of Oregon were properly before the court for consideration in that case, and doubtless it was upon those laws that the opinion of the court was predicated. There seems to be some confusion of ideas in the theory upon which that case was presented. The two acts now under consideration, constituting a statutory contract for the construction of this road, have no necessary connection with that case except so far as to exempt the United States from tolls, unless by virtue of other statutes in no wise affecting the contract with which we are dealing, and the rights of the United States, and these defendants under it. That road might just as well have been constructed under the acts in question by any other corporation, or private individual, had the grant been assigned to them, and having been completed and accepted, and the contractor having afterwards withdrawn, the Dalles Military Road Company might then have taken possession of the completed road, under other statutes of Oregon,

and kept and maintained it as a toll-road, in the management of which many obligations and liabilities might have arisen, having no relation whatever to the acts and statutory contract for the mere construction of the road. There is no necessary connection whatever between this statutory contract and its performance, or non-performance, and the maintaining and operating of this road, as a toll-road after its completion and acceptance, either by the parties constructing it or others; and the rights of the United States and the defendants under these specific statutes, cannot in any way be affected by the arrangement between the state and the Dalles Company and its grantees made under other statutes, having no special reference to the construction of the road under the acts in question. The rights resting upon different statutes must stand or fall upon the statutes applicable to the specific subject-matter, and can neither be aided nor impaired by other acts having no relation to them. The one class should not be confounded with the other. Undoubtedly, this road, having been constructed under the act of congress, the state could not impose or authorize others to impose tolls or other charges upon the United States, or prevent its use free from tolls or other charges by the government for the transportation of any property, troops, or mails. The supreme court of Oregon, therefore, might very properly have affirmed the correctness of the charge given in the case cited upon other statutes of Oregon, either alone or in conjunction with the act of congress in question, without at all considering the questions now before the court, as to what is required to be done by the Dalles Company, by the statutory contract now under consideration unaffected by other statutes. The questions in the two cases are entirely distinct, and should not be confounded.

Upon the views expressed all the exceptions to the bill for impertinence must be sustained, and it is so ordered.

UNITED STATES v. OREGON CENT. MILITARY ROAD Co. *et al.*

(Circuit Court, D. Oregon. October 7, 1889.)

PER CURIAM. Similar questions are presented in this case, and the exceptions must be sustained upon the same grounds.

MANNING v. CLARK.

(Circuit Court, D. New Jersey. August 10, 1889.)

ATTORNEY AND CLIENT—COMPENSATION—CONTRACT—RESCISSION.

An attorney entered into a written contract to collect certain claims for a client, an elderly woman, in consideration of which the latter agreed to pay him a certain per cent. of the amounts collected. On collecting a claim, the attorney refused to pay the amount over until an increased compensation was paid him, alleging that the client had subsequently orally agreed to pay him the increased fees. This the client denied, but, being unable to obtain the money collected without a lawsuit, after trying to effect a settlement for six months on the basis of the written contract, finally paid the amount demanded. The attorney's testimony as to the amount of compensation to be allowed by the alleged oral agreement was inconsistent with an affidavit made by him. *Held*, that the client was justified in rescinding the written contract, and in employing another attorney to collect the remaining claims.

At Law. Action on contract by Jerome F. Manning against George Clark, administrator *d. b. n.* of Thomas Clark, deceased.

John Linn, for plaintiff.

Malcolm W. Nevyn, for defendant.

WALES, J. This action has been brought to recover damages for the breach of a contract alleged to have been entered into between the plaintiff and R. M. Corwine & Son, of the one part, and Ellen Clark, the administratrix of Thomas Clark, of the other part. By the terms of the contract the plaintiff and the Corwines were to take the exclusive charge and control of certain claims, known as "Alabama Claims," which Mrs. Clark, as the representative of her deceased husband's estate, held against the United States for the capture and bonding of the schooner Howard by the Confederate cruiser Florida, and for the subsequent capture and destruction of the said schooner by the Confederate cruiser Tallahassee, and to prosecute the same before any of the courts of the United States, government departments, committees of congress, or commission specially authorized to take cognizance of such claims. In consideration of their services in this behalf Mrs. Clark agreed to pay them a sum equal to 10 per cent. of the amount which might be allowed on said claims, or either of them, and the payment of the 10 per cent. was made a lien on said claims, and on any draft, money, or evidence of indebtedness which might be paid or issued thereon. This agreement was not to be affected by any services performed by the claimant, or by any other agents or attorneys employed by her. All expenses of printing, costs of court, and commissioner's fees for taking testimony, were to be charged to the parties of the first part; and Mrs. Clark further agreed to execute, from time to time, such powers of attorney as should be necessary or convenient for the prosecution and collection of the claims. This contract was dated March 27, 1876. A few days after its execution R. M. Corwine died, and on the 12th of April, 1876, Mrs. Clark executed a power of attorney to Jerome F. Manning and Quinton Corwine, authorizing them, or either of them, to prosecute the claims, and to receive whatever should be awarded on account thereof, and give

proper acquittances therefor. In pursuance of this agreement, the plaintiff and Quinton Corwine began proceedings before the court of commissioners of Alabama claims for the recovery of damages for the capture and bonding of the Howard. The court at first dismissed the claimant's petition, for what reason is not stated, but afterwards allowed it to be reinstated, and awarded her the sum of \$2,101.87, for which amount a treasury draft, dated January 24, 1877, payable to the order of Ellen Clark, was issued, and on the same day mailed to the plaintiff, at Worcester, Mass. On receiving this draft, or soon thereafter, the plaintiff sent to Mrs. Clark his account for services rendered and money expended in attending to her business up to that time; but, as his demand exceeded the 10 per cent. limit stipulated for in the written contract, she refused to pay it, tendering him, however, the 10 per cent. commissions, and requesting a delivery to her of the draft. The plaintiff retained possession of the draft, alleging that, in the interim, between the dismissal of Mrs. Clark's petition and its reinstatement, she had made a new agreement as to the quantum of fees to be paid to her attorneys, on the representation being made to her by the plaintiff that, unless an increased compensation were allowed, he would decline to proceed any further in the business. This new agreement was an oral one, including both of the claims, and rests on the unsupported testimony of the plaintiff. His account, as presented to Mrs. Clark, for services in the first case, was stated as follows:

Twenty-five per cent on judgment,	-	-	-	-	-	\$525	45
Interest on same for over three months,	-	-	-	-	-	9	00
Amount paid for printing brief,	-	-	-	-	-	7	70
For professional services in Washington, as given in a previous letter,	-	-	-	-	-	50	00
							<hr/>
							\$592 15

Mrs. Clark never admitted the new agreement. By her conduct and acts she uniformly denied and repudiated it. She tried to settle with the plaintiff on the basis of 10 per cent., but was finally compelled, by his refusal to surrender the draft, to yield to his demands. Manning acknowledged the payment of his bill, on June 27, 1877, showing that he had kept the draft for nearly six months, during the whole of which period efforts were made by Mrs. Clark and her son to effect a settlement with him according to the terms of the contract of March 27, 1876. Mrs. Clark applied to the treasury department for a duplicate draft, on the ground that the plaintiff refused to give up the original until his demand for fees had been paid, and was informed that the plaintiff had filed an affidavit setting up the new agreement, and that the question of disputed facts would have to be settled elsewhere. In addition to this, Manning wrote to Assistant Secretary French that "the pretended written agreement they have is void and of no effect, by reason of a subsequent agreement in reference to it." Manning also threatened to "trustee" the draft if his account was not paid. Under these circumstances, with no other recourse but a lawsuit to establish her rights, Mrs. Clark paid Man-

ning's bill, and received the draft, and, from that time forward, there was no communication, oral or written, between the parties until August 4, 1882, when the plaintiff addressed a letter to Mrs. Clark, as follows:

"DEAR MADAM: I shall be ready now very soon to take testimony in the matter of the schooner Howard. Will you or your son be kind enough to come in and see me in reference to it. You recollect that I recovered your other claim, and took a contract from you with a power of attorney. I have succeeded, after several years' contest in congress, in securing the passage of a law which provided for the payment of the claim in about two years, but we must begin immediately to prepare the case."

This was followed by other letters from the plaintiff, under the respective dates of January 8 and 10, and December 26, 1883, in each of which he notified Mrs. Clark of his readiness to proceed with the prosecution of the second claim, and advising her that he should hold her responsible for a breach of their contract in case she employed other counsel. She made no response to these requests of the plaintiff, except, on one occasion, to send her son to Mr. Manning with an offer to allow the case to be carried on in the name of Manning and Corwine, provided they would give security for the delivery of the draft that might be issued thereon, or, to use the words of the witness, George Clark:

"I wanted an order from them for the draft to be delivered to my mother personally, and I was to deposit the amount of their claim, or give them sufficient security as to the payment of their fees, which was declined by Mr. Manning. My reason for so doing was that I did not wish to take the chances of their taking what they pleased out of the draft."

Acting on her judgment of what would be best for the interests of her deceased husband's estate and her own, Mrs. Clark employed other counsel to collect the second claim, and on February 9, 1885, received the sum of \$18,292.42, which was awarded to her as administratrix, for damages for the total loss of the Howard. These are the material facts on which the plaintiff's action rests; and for Mrs. Clark's refusal to permit him to take charge of and conduct the second case, and the substitution of other counsel, the plaintiff claims to be paid 10 per cent. of the amount of the second award, to-wit, \$1,829.24, by virtue of the original contract, with interest from February 9, 1885, together with damages by reason of the breach of the said contract. These constitute his own standard for the measure of the damages. The present action was begun against Ellen Clark, administratrix of Thomas Clark, deceased, but on her death, and before the taking of any testimony, George Clark, her son, was substituted as administrator *de bonis non* of his father's estate.

It would seem that Quinton Corwine had never taken a very active part in prosecuting the first claim, although he had done something, and claimed a share of the commissions; but Manning claimed the whole of it, and, by letter of January 24, 1877, requested Mrs. Clark to settle with him, and not with Corwine. On November 4, 1878, Corwine ad-

dressed a letter to Manning informing him, but without stating the reasons, that he had withdrawn from "any and all claims * * * so far as relates to any contracts, powers of attorney, or agreements, theretofore executed, in which your name was associated as attorney with that of R. M. Corwine & Son, or with that of Quinton Corwine, individually," and concluding as follows: "I decline to have my name associated with yours in any capacity whatever. I hereby forbid you the use of my name, under the penalty of the law, in soliciting or obtaining business of any kind or character whatever." Manning's affidavit, above referred to, states that in the latter part of July, 1877, he met Mrs. Ellen Clark at Hoboken, and she then "promised and agreed to pay me for services and expenses in case No. 1,945, on the docket of the court of Alabama claims, in which she was complainant, such sum as I might deem reasonable for said services and expenses. Said agreement was after said case had been dismissed from said docket by order of said court."

The death of Mrs. Clark, and the consequent loss of her testimony, subjects the present defendant to the disadvantage of being unable to furnish a direct contradiction to the plaintiff's statements in reference to the new agreement for fees,—that agreement, it is alleged, having been made with Mrs. Clark by the plaintiff when no other person was present,—unless the plaintiff's testimony can be ruled out under the proviso of section 858 of the Revised Statutes of the United States. That proviso prohibits either party, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, from testifying against the other as to any transaction with or statement by the testator, intestate, or ward, except in special cases. The plaintiff contends that this proviso does not apply here, because he never had any dealings with Thomas Clark, the decedent, and the owner of the vessel. A literal construction of the statute would, perhaps, sustain the plaintiff's contention; but it is very apparent that to admit his testimony would give him a decided advantage over the defendant, and would impair, if not destroy, that equal footing between the parties to an action, as witnesses in their own behalf, which it was the manifest purpose of the act to preserve. The spirit of the law would seem to render the plaintiff incompetent to testify as to the conversations between Mrs. Clark and himself. Before the passage of the statutes which enable parties to the record to give testimony in their own favor, the plaintiff would not have been a competent witness, under like circumstances, and it is very questionable whether, under the proviso contained in section 858, he should now be admitted to prove, by his own testimony only, an oral contract with a deceased person who, when making the alleged agreement, was acting as the representative of an intestate whose estate would be seriously affected by a judgment in favor of the plaintiff. In *Texas v. Chiles*, 21 Wall. 488, the court held the statute to be remedial in its character, and that it should be construed in a liberal spirit. In *Eslava v. Mazange*, 1 Woods, 623, Mr. Justice BRADLEY, in delivering the opinion of the court, said:

"If the law were to allow a man to wait until his antagonist were dead, and then to sue his heirs, and put himself upon the witness stand and give his version of the affair, with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law as to allow a man to be judge in his own cause."

It is true that the plaintiff began this action in the life-time of Mrs. Clark; but it is none the less true that to permit him now, after her death, to testify to conversations with and to statements made by her, with no accessible evidence to refute or explain them, would practically bring about the same result which is so emphatically denounced in the opinion just cited. The question is a new and interesting one, and not free from difficulty. It will be unnecessary, however, in the view I have taken of the facts of this case, to pass upon it definitively at this time.

A contract between attorney and client is governed by the same rules which apply to contracts in general, except, owing to the confidential character of the relation between them, an attorney is often held to a stricter accountability in the discharge of his professional duty than is required of a layman. As an officer of the court, he must exercise the utmost good faith towards his client, and, being frequently the trusted depositary and adviser of the ignorant and inexperienced, he must carefully avoid any and every course of conduct calculated to excite the suspicion that he is more bent on securing his own profit than on protecting their interests. On the other hand, it is the duty of the client to confide in and assist his attorney until he has good and sufficient reason for ceasing to do so. It is well settled that an attorney has a lien for his services on money or papers in his possession belonging to his client,—a lien which is enforceable in all proper cases; nor is there any doubt that a client has the right to change his attorney and employ other counsel, being responsible always for a breach of his contract. Whether, in dismissing his attorney, the client is liable for damages will depend upon the circumstances of the particular case. *In re Paschal*, 10 Wall. 496. The question for solution here is whether Mrs. Clark was justified in rescinding her contract of March 27, 1876, in discharging the plaintiff, and in employing another attorney. After a careful consideration of the history of this case, of the conduct of the parties, and their relation to each other, I am of the opinion that Mrs. Clark acted rightly in refusing to retain the plaintiff as her attorney, after what had occurred on the settlement of his account for collecting the money awarded on the first claim. There is a want of satisfactory proof that Mrs. Clark ever knew that she had made a new agreement by which she consented to pay the plaintiff a large additional compensation. Her conduct, as we have seen, was inconsistent with the possession of any such knowledge on her part, and the plaintiff's testimony must be closely scrutinized before his statements on that subject can be accepted as true. He may have understood Mrs. Clark to assent to his proposition for the allowance of increased commissions, but it is evident that she did not so understand it. Alteration of the terms of a written contract may be proved by parol, but the proof should be clear and free from doubt, especially where one of the con-

tracting parties is an able and experienced lawyer, and the change is in his favor, and the other party is an elderly woman, who is presumably ignorant of business affairs. The plaintiff testifies that his compensation under the new agreement was to be 25 per cent., while in his affidavit he says that he was to be paid such sum as he might deem reasonable; which is a wide difference. Mr. Manning was a stranger to her, and it is hardly probable that she would leave herself at his mercy in fixing the value of his services. For his own protection, as well as in justice to his client, he should have put the new agreement into writing, and all this controversy might have been avoided. He had repudiated the contract of March, 1876; Corwine had quarreled with and refused to be longer associated with him; he had compelled Mrs. Clark to pay his account, or begin a lawsuit for the recovery of the draft; and it is not surprising, after all this, that she refused to longer recognize him as her attorney. The only wonder is that he should have persisted in the attempt to act in that capacity in the face of her opposition and protest. His right to recover damages depends entirely on the existence of the amended agreement, of which there is not adequate and sufficient proof. Judgment will be entered for the defendant.

THOMAS *et al.* v. WABASH, ST. L. & P. RY. CO. *et al.*

(Circuit Court, S. D. Illinois. October 15, 1889.)

1. CONSTITUTIONAL LAW—ILLINOIS WATER-CRAFT ACT—TITLES OF LAWS.

Act Ill. May 24, 1877, entitled "An act to facilitate the carriage and transfer of passengers and property by railroad companies," authorized all railroad companies having a terminus on any navigable river bordering on the state to own for their own use any water-craft necessary in carrying across such river any property or passengers transferred on their lines, and provided "that no right shall exist under this act to condemn any real estate for a landing for such water-craft, or for any other purpose," and that the act should apply only to "such railroad companies as own the landing for such water-craft." *Held*, that the title was misleading, and not sufficiently broad to include the proviso, under the constitutional provision (article 4, § 13) that no act should embrace more than one subject, which should be expressed in the title.

2. SAME—SPECIAL LAWS.

Under the general incorporation act of Illinois all railroad corporations whose lines terminated on bordering navigable streams had power to condemn lands at their terminus in order to reach ferries. *Held*, that the proviso in the act of 1877, limiting the right to own and use boats to carry freight and passengers to "such railroad companies as own the landing for such water-craft," was within the prohibition of Const. Ill. art. 4, § 22, forbidding the passage of special laws for granting special or exclusive privileges to any corporation, and could not be upheld on the ground that it classified railroad companies whose roads terminated on bordering rivers into such as then owned a landing place and such as did not.

At Law. Condemnation proceedings.

Intervening petition by the St. Louis & Cairo Railroad Company and the Mobile & Ohio Railroad Company for the condemnation of certain lands, for an incline, and transfer-boat landing.

E. L. Russell, H. S. Greene, and Lansden & Leek, for petitioners.

John M. Butler and S. P. Wheeler, for receivers.

ALLEN, J. This case has been before the court, in one form and another, for nearly two years. The intervening petitioners instituted proceedings in the circuit court of Alexander county, Ill., to condemn one acre and a fraction of land, situated between the bank of the Ohio river and the water for the purpose of building thereon an incline, to be used for the transportation of cars down to the river, and thus, by means of transfer-boats, form an unbroken connection with railroads on the other side, for the benefit of their through freight and passengers. The strip of land sought to be condemned, being in the possession of Thomas & Tracy, receivers, appointed by the court, of the Cairo & Vincennes Railroad, and claimed by them as the property of that corporation, the case was transferred to this court, and afterwards a hearing was had before the district judge and a jury, resulting in a holding by the court¹ that the strip of land was subject to condemnation for the purposes set forth in the intervening petition, and the assessment by the jury of damages, to be paid by the St. Louis & Cairo and the Mobile & Ohio Railroad Companies, in the sum of \$5,000. Subsequently, upon argument before the circuit and district judges, a rehearing was granted in the case, upon the distinct ground that the act of the Illinois legislature, entitled "An act to facilitate the carriage and transfer of passengers and property by railroad companies," approved May 24, 1877, presented an insuperable barrier to such condemnation. 34 Fed. Rep. 774. Afterwards, upon further argument, the matter was postponed, pending the suggestion of the court that the receivers sell to the intervening petitioners for a fair price, to be agreed upon, so much of the ground as might be necessary for the purposes of their incline. The St. Louis & Cairo and their lessees, the Mobile & Ohio Railroad Company, having, as they report, wholly failed, after repeated efforts, to purchase from the receivers the land for their incline, asked that the constitutionality of the act of the legislature before referred to, and popularly known as the "Water-Craft Act," be set down for argument. There being no serious contention that any other difficulty to the condemnation than this water-craft act existed, and its constitutionality being challenged by attorneys for intervening petitioners, the court set down the question for argument, and it was ably and elaborately argued, by eminent counsel, representing the receivers, as well as the St. Louis & Cairo Railroad Company and its lessees, the Mobile & Ohio, before the district judge. So much of the act in question as is here necessary to be considered is as follows:

"An act to facilitate the carriage and transfer of passengers and property by railroad companies.

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that all railroad companies incorporated under the laws of this state, having a terminus upon any navigable river bordering on this state, shall have power to own for their own use any water-craft neces-

¹Not reported.

sary in carrying across such river any cars, property, or passengers transported over their lines, or transported over any railroad terminating on the opposite side of such river to be transported over their lines: provided, that no right shall exist under this act to condemn any real estate for landing for such water-craft, or for any other purpose. And this act shall only apply to such railroad companies as own the landing for such water-craft."

The validity of this act is denied, and the counsel questioning its constitutionality contend—*First*, that it is in conflict with the thirteenth section of the fourth article of the constitution of Illinois, which is in the following language:

"Every bill shall be read at large on three different days in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage, and every bill having passed both houses shall be signed by the speakers thereof. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act."

And, *second*, that it is in conflict with section 22 of the same article, which provides:

"The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, * * * for granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever."

Third, that it is in conflict with article 11, § 14, of the state constitution of 1870, which reads as follows:

"The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity, the same as of individuals."

In addition to these objections, it is contended that the act is also repugnant to the spirit and import of the state and federal constitutions, intended to secure equality of rights to every citizen, natural and corporate. Grave and important constitutional questions are thus brought before the court, and its decision upon them demanded.

It is with extreme unwillingness that a federal court will assume to hold as void the acts of the legislature of a state, especially when such acts have not been passed upon by the state court. And if any well-grounded doubt exists as to their constitutionality, whenever by any system of fair reasoning any possible construction that is consistent with reason can be given by which the courts can hold them constitutional, and give such interpretation to the statutes as to make them valid, they will always do so. But courts, however unpleasant the duty, will always, when properly called upon, considerately review the acts of a co-ordinate branch, and, while hesitating to hold them void for unconstitutionality, yet, when they find them in bold defiance of the constitution, seeking to override some valuable right or privilege of the citizen

or of the public, will not shrink from the performance of the high duty imposed upon them by the law.

The first objection argued to the validity of a portion of the water-craft act, namely, that it embraced subjects not expressed in the title, must be tested and disposed of by the decisions and their analogies of the supreme court of Illinois; this thirteenth section of the fourth article of the state constitution having repeatedly been before that tribunal for exposition and interpretation. The object of the constitutional provision was praiseworthy. Its evident purpose was to prevent fraudulent and vicious legislation, by requiring the title to give a fair indication of the substance of the act,—such a certain indication as would notify members of the legislature, the public at large, and more particularly all persons having an interest in the matter, of the contents of the act, so as to put them on their guard. Whenever the title of the act has a scope so clear as to indicate its general purpose, then its more specific purposes may be left to the body of the act itself. The title of this act is: "To facilitate the carriage and transfer of passengers and property by railroad companies." This title, it must be confessed, is at once captivating and delusive. The entire public would most likely unite, and the desire become a common one, to facilitate the carriage and transfer of passengers and property by railroad companies, but not the slightest intimation is given as to the means to be employed whereby this transfer is to be facilitated. Indeed, it would seem difficult, by any combination of words, to make a title to any act more general. The body of the act authorizes all railroad companies, having a terminus upon any navigable river bordering on the state of Illinois, to own for their own use any water-craft necessary in carrying across such river any cars, property, or passengers transported over their lines, or transported over any railroad terminating on the opposite side of such river, to be transported over their lines, with a proviso that no right shall exist under the act to condemn any real estate for a landing for such water-craft, or for any other purpose, and that the act itself shall only apply to such railroad companies as own the landing for such water-craft. It is assumed, that this act confers a new power on railroad companies,—that of using and owning water-craft to transfer freight and passengers across the river; and it may be assumed that it also takes away from certain railroad corporations rights with which they had become vested under the general incorporation law of the state, particularly the power to make such terminal enlargements, and variations of their terminal privileges, not constituting a new enterprise, as the commerce of the country and the traffic of their roads require. It cannot be well questioned that railroads, whose lines terminated on the bank of one of the navigable rivers bordering on this state, where their business required it, had the power, prior to the water-craft act of 1877, to extend their tracks, or build side tracks, to the edge of the water, and condemn land subject to condemnation for that purpose. Under this act railroad companies cannot condemn land at all, however necessary it may be, to reach the water. After such examination and reflection as I have been enabled to bestow on the question, I am una-

ble to reach the conclusion that the title of this act fairly or sufficiently gives notice or information of the scope and substance in the body, or indicates with reasonable certainty the purposes intended to be effected; but, on the contrary, I am clearly of opinion that the title is misleading, and not as broad as the act. This view is supported by the following authorities: *People v. Mellen*, 32 Ill. 182; *Lockport v. Gaylord*, 61 Ill. 276; *People v. Wright*, 70 Ill. 388; *People v. Deaconesses*, 71 Ill. 229; *Middleport v. Insurance Co.*, 82 Ill. 565; *People v. Hazelwood*, 116 Ill. 327, 6 N. E. Rep. 480; *Leach v. People*, 122 Ill. 421, 12 N. E. Rep. 726; *Dolse v. Pierce*, 124 Ill. 140, 16 N. E. Rep. 218; *Cooley*, Const. Lim. 147-151.

The second point argued in connection with the alleged invalidity of the legislative act presents a most important question: Does the water-craft act grant, and was it intended to grant, any special or exclusive privilege, immunity, or franchise whatever to any corporation? If it does, it is special legislation, prohibited by the constitution. The fundamental idea of the authors of the constitution, expressed in a declaration clear and explicit, was doubtless to secure some reasonable degree of equality and uniformity of right and privilege between the different railroads in the state, which are required to perform important services to the public. In the first part of the act under consideration no principle of uniformity of right or privilege is violated. All railroad companies incorporated under the laws of the state, having a terminus on any of the navigable rivers on its borders, are given power to own for their own use water-craft necessary in carrying across such river cars, property, or passengers transported over their lines, or transported over any railroad terminating on the opposite side of such river, to be transported over their lines. It has already been mentioned that the concession seems to have been made, on the argument, of the grant of a new power to the class of Illinois railroads terminating on bordering navigable waters. Up to the approval of the act in question, these railroads, by the general incorporation act, with the view of merely enlarging their terminal facilities, had the undoubted right of going to the water,—to transports or ferry-boats. It was because they did not possess the power to own and use such transports or ferry-boats back and forward between terminal points on opposite sides of these rivers that the legislature was appealed to, and the new power given. The legislature, in answering this appeal, did a wise thing, in the first clause of the act, by granting to these railroad corporations the privilege of ferrying,—carrying goods and passengers through, on through cars, putting them on boats and transferring them across the river, and expediting railroad business and accommodating the public by simplifying the number of intervening agencies. The act, however, seems to have gone much further than the interests of commerce or of the public demanded. The parties seeking this legislative aid,—a ferry franchise,—in addition to a railroad franchise, were not satisfied with a general grant of power to all railroads having the same terminus, but sought to accomplish the double purpose of getting this new power for themselves, and keeping everybody

else from getting it, as far as they could. By providing that no railroad company should be given power to condemn land for a landing for such water-craft, and that the act should only apply to such companies as own the landing for such water-craft, the objectionable and vicious features of this legislation clearly appear. The new power enabled railroad companies owning land for a landing to own and use water-craft necessary in ferrying passengers and property across a river, but disabled companies not owning such land from exercising this most important franchise or privilege. I have had occasion before to state that, under the general incorporation act, railroad corporations, whose lines terminated on a bordering navigable stream, had the power to go to ferries, when they did so by merely enlarging their terminal facilities; but the portion of the act now being considered takes away an existing power, by declaring that they shall not exercise the power of eminent domain to the extent of getting down to a ferry-boat; that they can neither use a transfer-boat nor get to a landing. The additional power, or enlarged franchise, to own and use boats to carry freight and passengers across the river is limited "to such railroad companies as own the landing for such water-craft." Corporations not fortunate enough to own the land, it may be, in consequence of a refusal by rival corporations to sell what they do not need for their own purposes, are denied alike the privilege of owning water-craft and of condemning land to reach a ferry-boat which may be used or owned by others. It cannot be denied that the operation of this part of the act is partial and unequal.

Here are two railroad companies,—the Cairo & Vincennes, represented by the receivers, Thomas & Tracy, and the St. Louis & Cairo, by intervening petitioners,—both terminating on the bank of the Ohio river at Cairo. They owe a common duty to the public, and this duty grows correspondingly with the demands of commerce, and public necessity and convenience. The Cairo & Vincennes answers the demand of the public for boats transferring across the river cars, freight, and passengers connecting on the opposite side with other railroad lines, and thus securing unbroken transportation. The St. Louis & Cairo, when called on for a similar service, is unable to respond. It avows its willingness to do so, and its anxiety to discharge its duty to the public, but it does not own the land for a landing for transfer-boats. The owner of this land, the Cairo & Vincennes, will not sell it, and this water-craft act prohibits its condemnation. Is it not perfectly manifest that the Cairo & Vincennes, under this act, enjoys a special privilege or immunity over the St. Louis & Cairo? Or, to put it differently, are not all the railroads not owning land for a landing, and unable to purchase the same, discriminated against, and a special privilege granted to such, and such only, as own the landing? If in this controversy only these two railroad companies were interested,—if it were a contest of mere private right between them,—different considerations might arise. But they are both "railroad companies, incorporated under the laws of this state," enjoying franchises to be used in the interests of the public. The one owning the landing would in all probability promise the public to serve it efficiently, faith-

fully, and cheaply; but the public, unwilling to accept such assurances, very properly demand that all the avenues for the transaction of the commerce of the country be kept open, and that no agency be crippled which has for its object the promotion of the public interests.

In the discussion of this question, counsel for the receivers emphasized the argument that the legislative act could be upheld upon the ground that railroad companies terminating on a river bordering on a state, and owning a landing for water-craft, constitute a class; that the legislature intended to classify railroads terminating on navigable bordering streams into such as owned land for a landing for water-craft and such as did not, and that a railroad corporation not owning a landing for water-craft can only claim such privilege, immunity, or franchise as belongs to any other company or corporation in that class. A number of authorities were cited to sustain this view; among others, *Railroad Co. v. Iowa*, 94 U. S. 155. This position cannot be sustained, nor do the authorities referred to support it. There is but one classification of railroad companies under the act, and that is such as have "a terminus upon any navigable river bordering on this state." The supreme court, in 94 U. S., *supra*, quote approvingly, an Iowa case being under consideration, from *McAunich v. Railroad Co.*, 20 Iowa, 343, wherein it is said:

"These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person, who is brought within the relations and circumstances provided for, is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." "The statute," (of Iowa,) says Chief Justice WAITE, "divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires."

It seems probable that the authors of the act under consideration prepared it with reference to this doctrine of classification. But it gives them no support. Every privilege, immunity, or franchise enjoyed or used by one railroad company terminating on the Ohio river at Cairo should be extended to every other railroad terminating there. It is impossible, by any fair reasoning, or upon any principle of justice to the public, to sustain the contention that one of these railroad corporations loses an almost invaluable privilege of serving the public because only of not being able to purchase land for a transfer or ferry landing. All the incorporated railroad companies terminating at Cairo exercise their franchises by virtue of grants from the sovereign power. The state, in granting the charters, necessarily in every instance reserved the right to regulate and control the corporations in the public interest. No one or more of these companies can be permitted, under the semblance of a state grant or authority, to exercise rights and privileges in connection with facilitating the commerce of the country which are denied to others. And if the exercise of such power and authority by the one or more is rightful, the denial of the same immunities and privileges to others is

illegal and oppressive; and any act pretending to confer authority for such discrimination is void. The water-craft act, therefore, has not only a false and deceitful title, but its purpose was to confer special privileges upon certain corporations, and to deny to others of the same class the exercise of the same rights. The following authorities are referred to in support of this view, that the act is in conflict with the twenty-second section of the fourth article of the constitution of Illinois: *Frye v. Partridge*, 82 Ill. 273; *People v. Cooper*, 83 Ill. 586; *People v. Meech*, 101 Ill. 200; *Millett v. People*, 117 Ill. 305, 7 N. E. Rep. 631; *Cooley*, Const. Lim. 389-396.

The views already expressed and the conclusions reached render it unnecessary to consider the fourteenth section of article 11 of the constitution of 1870, or the second section of the fourth article of the constitution of the United States, both of which have been referred to as authority against the validity of the act in question. They were cited to sustain the position that a statute is unconstitutional which selects particular persons, natural or corporate, from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt. This position is so nearly self-evident as not to require authority to support it. In my view, the provisions of the water-craft act, limiting the right to own and use boats and water-craft to such railroad companies as own the real estate for a landing, and withholding the right from companies not owning the land for a landing, are obnoxious to both objections urged against its constitutionality, and cannot be upheld as valid or binding. Of course this conclusion in no manner affects provisions of the act which are constitutional. The constitutional and unconstitutional provisions of this act are perfectly distinct and separable, so that the first may stand, though the latter fall. The salutary and useful provision permitting all Illinois railroad companies terminating on any navigable river bordering on the state to own and use water-craft as a means of increasing their capacity to serve the public is unexceptionable; but the proviso restricting the use of this additional franchise to companies owning land for a landing is void.

WALKER *et al.* v. CRONKITE *et al.*

(Circuit Court, D. Kansas. October 28, 1889.)

1. JUDGMENT—COLLATERAL ATTACK.

Where land has been sold on execution under a domestic judgment the judgment debtor cannot, in a collateral proceeding, and against a *bona fide* purchaser, seek to impeach the sheriff's return of service of summons in the original action and the recitations of the judgment.

2. SAME—LIMITATION OF ACTIONS.

Under Code Civil Proc. Kan. § 16, subd. 1, which provides that a suit for the recovery of land sold under execution must be brought by the execution debtor within

five years after the recording of the deed, an execution debtor cannot collaterally attack the validity of a sale ten years after the deed was recorded, where the record shows jurisdiction of the person and the subject-matter.

At Law. Action of ejectment.

J. A. Smith and Johnson, Martin & Keeler, for plaintiffs.

Kellogg & Sedgwick and C. N. Sterry, for defendants.

FOSTER, J. The plaintiffs bring their action of ejectment against said defendants to recover certain real estate situate in Lyon county. The plaintiff Walker claims in his petition that he is the owner, and entitled to the possession of said land. This the defendants deny, and allege that in the month of September, 1875, one A. S. Kimball recovered a judgment in the district court of said Lyon county, Kan., wherein said Thaddeus H. Walker and others were defendants, and wherein it was considered and adjudged by said court that said Kimball and others (defendants in said suit) had recovered judgments against said Walker in several different counties of this state at different times and for different amounts. That said several judgment creditors had filed copies of their judgments in Lyon county, and some of said creditors had levied execution on the lands of said Walker in said county; and the court then declared said judgments to be valid liens on said real estate,—the land in controversy, with others,—and adjudicated and settled the priorities of the said several judgments, said Kimball's judgment being first, and ordered a sale of said real estate in satisfaction of said judgments in the order of their priority. Defendant further avers that said Thaddeus H. Walker was a party defendant to said proceedings; that he was duly served with the process of the court, and is bound by said record. By reference to the proceedings in that case, it appears from the return of the sheriff of Shawnee county that he served the said summons on said defendant Thaddeus H. Walker by leaving a true copy thereof, with all the indorsements thereon, at the usual place of residence of said defendant Walker. In the judgment it is recited that the court finds "that said Thaddeus H. Walker was duly served with a summons in said cause on the 2d day of March, A. D. 1875, by the sheriff of Shawnee county, Kan., by leaving a copy thereof at his usual place of residence in said county." The defendant further alleges that in pursuance of said judgment an order of sale of said land was duly issued to the sheriff of Lyon county, who, after appraising and advertising the same according to law, sold the same to said A. S. Kimball, at public auction, he being the highest bidder therefor, which sale was duly confirmed by the court, and a sheriff's deed made to said Kimball, July 24, 1877, and the same was duly recorded in the office of the register of deeds in said county on the 26th day of July, 1877. That this defendant holds title to said land through several intermediate conveyances from said A. S. Kimball. Defendant, for further defense, invokes the statute of limitations. To this answer the plaintiff makes reply, denying that he was ever served with summons in said case, or that he had any place of residence in said state, and avers that he had no notice of said suit until after judgment

had been rendered. He makes several other objections to said judgment, all of which have heretofore been considered and adjudicated by this court. To this reply the defendant files a demurrer.

There are two questions presented: (1) Can Thaddeus H. Walker, in a collateral proceeding, and against a *bona fide* purchaser of said real estate under said judgment, be heard to contradict and impeach the sheriff's return, and the recitations of said judgment? (2) Is he barred by the five-years statute of limitation? Section 16, Code Civil Proc.

It is an elemental rule of law that a personal judgment, rendered without jurisdiction of the person is void, and it has been held that in an action on a foreign judgment the defendant may deny jurisdiction of the court over the person, although such defense impeached the truth of the record. *D'Arcy v. Ketchum*, 11 How. 165; *Amsbaugh v. Bank*, 33 Kan. 101, 5 Pac. Rep. 584; *Borden v. Fitch*, 15 Johns. 139; *Crepps v. Durden*, 1 Smith, Lead. Cas. 844. The question at issue here is quite a different one. Here is the record of a domestic judgment, showing service of summons on the defendant. Under that judgment, and in pursuance of its decree, real estate has been sold under the forms of law, and title passed through several parties, relying on the verity of the record, and the adjudication of a court of general jurisdiction. Can it be that the defendant to such a record may treat it as an absolute nullity, and falsify it by extrinsic evidence, when it is invoked by the purchaser in a collateral proceeding in defense of his title? If so, the stability of titles to realty, based on judicial sales, has but little foundation to rest upon. My attention has been called by defendant's counsel to many cases holding that this record cannot be thus contradicted. *Ferguson v. Crawford*, 70 N. Y. 253; *Grignon's Lessee v. Astor*, 2 How. 319; *Crepps v. Durden*, 1 Smith, Lead. Cas. 823, 842, and authorities cited. Also a late case (May 16, 1889) in the court of appeals of Kentucky, (*Thomas v. Ireland*, 11 S. W. Rep. 653,) is very much in point. Again, it is urged by defendants with some force of reason, that the judgment in question was, so far as Walker was concerned, a proceeding *in rem*, to which he was not a necessary party. But, supposing it is true, as claimed by plaintiff, that he may contradict this record by extrinsic evidence in a collateral proceeding, what logical reason can be given why the legislature of the state cannot say, in the interest of repose of titles, that his right to do so shall be limited to five years after recording the deed on a sale made under the judgment? If the record was silent, or showed on its face a want of jurisdiction, the argument of plaintiff's counsel against the application of the statute would have greater force. The statute reads as follows:

"Sec. 16. Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter.

"(1) An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him by title acquired after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale."

In my opinion this case comes clearly within the terms and intent of this statute. The record shows jurisdiction of the person and subject-matter. The sale was made according to law, and the sheriff's deed was made and recorded more than 10 years before this suit was commenced, and the execution debtor now comes too late to question its validity. The following authorities abundantly sustain this conclusion: *Vancleave v. Milliken*, 13 Ind. 105; *Brown v. Maher*, 68 Ind. 14; *Harlan v. Peck*, 33 Cal. 515; *Cunningham v. Ashley*, 45 Cal. 485; *Pillow v. Roberts*, 13 How. 472; *Meeks v. Olpherts*, 100 U. S. 564; *Holmes v. Beal*, 9 Cush. 223; *Scott v. Hickox*, 7 Ohio St. 90; *Cheesebrough v. Parker*, 25 Kan. 566; *Young v. Walker*, 26 Kan. 242.

The argument that plaintiff is deprived of his property without having his day in court has no force, for it is the very essence of all statutes of limitation that the party shall lose his rights, and his property, unless he shall assert those rights within a certain fixed time. Nor does it relieve the case from the statute because the plaintiff asserts that the judgment is void for want of jurisdiction. The property was sold on execution, on a judgment legal on its face; and the debtor is barred from asserting or showing by evidence *aliunde* that the judgment is void or voidable after the period fixed by the statute. The authorities before cited fully discuss this question, and hold that the statute protects sales under judgments, whether void or voidable. The demurrer to plaintiff's reply must be sustained.

UNITED STATES v. PAXTON.

(Circuit Court, N. D. Florida. October 11, 1889.)

JURY COMMISSIONERS—MEMBER OF POLITICAL PARTY—EVIDENCE.

One who has always advocated the principles and voted the state and national tickets of the Democratic party, but who at one time organized a Democratic movement in his county in opposition to that part of his party then in power, nominated a legislative ticket, and was himself elected thereon by the aid of Republican votes, acting, while in the legislature, with the Democrats, and proclaiming himself a Democrat, is a "well-known member" of that political party, within the meaning of act Cong. June 30, 1879, providing that a jury commissioner appointed by the judge shall be "a well-known member of the principal political party in the district" opposed to that to which the clerk may belong.

On Motion to Quash *Venire*.

Jos. B. Christie, and *C. M. Cooper*, for defendant.

The United States District Attorney, for the United States.

SWAYNE, J. This is a motion by the defendant, Owen K. Paxton, to quash the *venire* of grand jurors, and challenge the array, for the reason set out therein. The motion is as follows:

"IN CIRCUIT COURT OF UNITED STATES, NORTHERN DISTRICT OF FLORIDA.

"Now comes Owen K. Paxton, who is held to answer this term of said court on the charge of conspiring to prevent by force and intimidation one C. L.

Morrison from holding an office of trust under the United States, and challenges the array of grand jurors summoned herein, and moves to quash the *venire* for said grand jurors on the ground that said grand jurors have not been selected, drawn, and summoned in accordance with law, in that the person who acted as jury commissioner in selecting and drawing said jurors, to-wit, J. O. Farnell, is not, and was not when appointed, such jury commissioner, and was not, when acting as such jury commissioner in selecting and drawing said jurors, a well-known member of the Democratic party in said district; that being the principal political party in said district, opposed to the Republican party, to which latter party the clerk of said court, Phillip Walter, belongs.

JOS. B. CHRISTIE,

"C. M. COOPER,

"Attorneys for Paxton."

To this motion the United States, by the district attorney, joined issue, and argument was had upon affidavits presented by both parties, and upon the law as applicable thereto, in open court. The defendant cited the act of congress of June 30, 1879, in reference to the matter, which is as follows:

"* * * And that all jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing at the time of each drawing the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which said court is held, and a well-known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong; the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliation, until the whole number required shall be placed therein."

The contention of the defendant, Paxton, is that the said J. O. Farnell, the jury commissioner, was not at the time of his appointment, nor at the time of the performance of his duties as such commissioner, a well-known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong, or that he was not a well-known member of the Democratic party; the said clerk, Philip Walter, being shown by affidavit filed, as was well known, to be a member of the Republican party. Numerous affidavits were filed in support of the motion, but they followed the language of the act of congress so closely as to make the testimony largely a matter of opinion, and to make the affiants swear to a conclusion of law. The facts contained by these said affidavits in support of the opinions were meager and unsatisfactory. They alleged that the said J. O. Farnell, the jury commissioner, "ran for the office of member of the house of representatives of the legislature of the state of Florida with the nomination or indorsement of the Republican party in Columbia county;" whereas it appears from the abundant testimony of the government that he never received the nomination of the Republican party in Columbia county, a fact which affiants for the motion must have known, but was simply indorsed by the Republicans, which indorsement was unsought by him;

and their further testimony, that they did not know "if the said J. O. Farnell did anything in support of the state or national Democratic ticket in the campaign of 1888," does not commend itself to the favorable consideration of the court, in the light of all the testimony in the cause and the argument had thereon.

The facts in this case, as shown by the testimony submitted, are as follows: That J. O. Farnell, more than 60 years of age, has been for many years a Democrat, and at every election since the late war has advocated the principles and voted the tickets of the state and national Democratic party. But that in 1886 a portion of the Democracy of Columbia county in this state, himself among the number, organized a Democratic movement in that county in opposition to that part of his party then in power, nominated a ticket for the legislature, and elected it by this division of his own party and the assistance of Republican votes. He was elected to the legislature on this ticket, proclaiming himself a Democrat all the time, and while in the legislature attended the Democratic caucus, abided by its decision, and acted with that party. This action of his in Columbia county occasioned much harsh feeling and acrimonious discussion, and, among other things, his enemies sought to hurt his standing and prospects by calling him a Republican. It has been truly said "that earth hath no hate like love to anger turned," and politics as often illustrates this sentiment as domestic infelicity. But the broad allegation made by several of the affiants for the motion, that J. O. Farnell is a Republican, has not been and cannot be sustained. Counsel for the motion did not attempt it. But it is charged, and I think truly, that he is not a "dyed-in-the-wool" Democrat, as the junior counsel for the motion very tersely put it. He will not always follow the behests of his party in local matters when he thinks them wrong, but he will object; he will get another ticket of Democrats nominated, and have them elected by a portion of his party by the help of Republican votes, if he can. He is probably very properly termed an "Independent Democrat" in local matters, while advocating and voting for the state and national Democratic tickets.

And this brings us to the pivotal question of this case. Is such a man, with such a record, politically, as this, eligible to the office of jury commissioner of this court under the act of congress of June 30, 1879? In other words, will that act permit the court to exercise its discretion, and appoint any well-known member of the Democratic party, though he may be classed as an Independent Democrat in local matters, or must the court appoint a "dyed-in-the-wool" Democrat,—to use the language again of the counsel for the motion? Let us turn again to the language of the act. It says, "a well-known member of the principal political party," etc. If organizing a separate ticket, "stumping" the county, being elected, and going to the legislature does not make a man well known politically in his vicinity in this state, nothing will. But, says the senior counsel for the motion, he may be a Democrat, and he may be well known, but he is "not" a member of his party; and with great ability and astuteness he proceeded to urge this view, and cited as examples

memberships in a church, or some other such body. But we know that political parties have no definite line bounding their periphery; they have no distinguishing badge marking their members; they are of no fixed and definite number, but from season to season they increase or diminish, as the tide of public opinion ebbs and flows; they are generally ready and willing to accept as members all those who will enlist, even temporarily, under their respective banners. The membership of a church or lyceum, a lodge or social club, is definite, and can at any time be certainly known; but how would it be possible to apply the same rule to a test of membership to either of the great political parties of the country? It is true that political parties have organizations with officers and members, but surely it cannot be maintained that those are only members whose names appear upon the record of such party organizations. I think it must be admitted that it has always been understood that those who have acted with a political party, voted its ticket, maintained its doctrines, and attended its meetings were members of the party. The court is of the opinion that a well-known Democrat is a well-known member of the Democratic party, and equally eligible under the act of congress. The court feels that, in coming to this conclusion on this point, it is following the suggestions of the senior counsel for the motion, so eloquently made, to carry out the spirit as well as the letter of the act. The act of congress names no other requirement on this subject than that he shall be "a well-known member," leaving to the court the discretion of selecting any well-known member, no matter how much he may differ in many important things from other well-known members of the same party. The court holds that it has been established beyond question that the said J. O. Farnell is a well-known Democrat, and is therefore a well-known member of the principal political party in this district opposing that to which the clerk belongs.

As this disposes of the only objection made in the case to the array of grand jurors, there being no other charge whatever against the commissioner, or the manner in which the said grand jury was selected, drawn, and summoned, the motion must be and is hereby overruled.

POINIER v. UNITED STATES.

(District Court, E. D. South Carolina. October 19, 1889.)

1. ELECTIONS—FEES OF SUPERVISORS.

Under Rev. St. U. S. § 2031, allowing each chief supervisor of elections a fee of 15 cents per folio for entering and indexing the records of his office, he is entitled to that compensation for recording and indexing each appointment of a supervisor, and he should be allowed pay for two folios in each appointment.

2. SAME.

For drawing instructions to supervisors, as required by section 2026, he is entitled to 15 cents per folio, and for each copy furnished a supervisor, 10 cents per folio.

3. SAME.

The fee for administering oaths to supervisors is not chargeable to the United States.

4. SAME.

The clause of section 2031 limiting the time of actual service for which a supervisor may receive compensation to 10 days does not apply to the chief supervisor, who is entitled to compensation for all the time spent in attendance on the circuit court when sitting for the purpose of preserving order at the elections in the circuit, as provided by section 2011. As he is appointed chief supervisor because he is a United States commissioner, and the latter receives the fees of a clerk for services similar to those rendered by a clerk, the fee of a clerk for attendance at court—five dollars per day, and mileage at the rate of five cents per mile traveled—should be allowed the chief supervisor for his attendance.

5. SAME.

He should be allowed for the stationery used in his office, the printed blanks, books, etc., and copies of orders of court appointing supervisors, etc., but this does not include blank applications for the appointment of supervisors.

6. SAME.

The fees of 15 cents per folio for recording and indexing documents, and of 10 cents for filing and caring for papers required to be filed, apply to papers furnished the court containing information respecting supervisors, to information furnished to him by the supervisors themselves.

At Law.

Plaintiff, Samuel T. Poinier, a commissioner of the circuit court of the United States for South Carolina, was appointed chief supervisor. He resided at Spartanburg, S. C., and there kept his office. At the opening of the circuit court, according to law, on October 5, 1888, he left Spartanburg, and went to Charleston, where the court was in session, and attended it *de die in diem*, discharging his duties as chief supervisor. When the election was over, and the votes were counted, he prepared and submitted his accounts, which were examined and approved by the district attorney and the judge. When they reached the department of the treasury in Washington, certain items were disallowed by the first comptroller of the treasury. Thereupon the plaintiff brought suit in this court against the United States. In his petition he sets out all necessary facts, and produces his entire account, including the items disallowed. The United States file an answer insisting on the disallowances. At the hearing all the items of the accounts disallowed were proved. The questions submitted were questions of law, under a construction of sections of the Revised Statutes.

John Wingate, for plaintiff.

Abiel Lathrop, U. S. Dist. Atty., and H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. The officer known as "chief supervisor of elections" is a commissioner detailed as such on special duty involving new responsibilities and duties. These, however, do not exclude services as commissioner; on the contrary, they include them, and are superinduced on his duties as commissioner. Rev. St. U. S. §§ 2025, 2031. He is required, as chief supervisor, to prepare certain blanks and other papers, and to perform some other specified duties. Section 2026. His compensation in the discharge of these duties is fixed by section 2031, but this compensation is apart from, and is in addition to, the fees allowed by law for any duty performed by him as commissioner. Id. §§ 847, 2031; *In re Conrad*, 15 Fed. Rep. 641; *Gayer v. U. S.*, 33 Fed. Rep. 625. When he performs his specified duties of chief supervisor he gets a compensation provided in the act for these specified duties. If in the

discharge of the duties of chief supervisor he performs services analogous to or the same as those of commissioner, for which no specified compensation is provided in the title 26, he must look for his compensation to the statute relating to the fees of the commissioner. It is always to be presumed that when special duties are imposed on an officer of the government, when such officer is wholly dependent on the fees of his office, and has no fixed salary, gratuitous service is not to be implied. See *Gratiot v. U. S.*, 15 Pet. 336. Let us examine the charges that have been disallowed.

First. Recording and indexing the appointments of 1,008 supervisors. It is manifest, in order to discharge his duties in connection with supervisors; instructing them from time to time, obtaining information from and of them, that the chief supervisor must have in his office a list of the supervisors who have been appointed, and the evidence of their appointments. Besides this, each supervisor must be put in possession of some certificate of his appointment, and such certificate should be recorded by the chief supervisor, and, when filed, they should be indexed. Each of these papers forms two folios. Under section 2031 he gets for entering and indexing every record of his office 15 cents per folio, which is charged here, and is allowed.

Second. Drawing instructions to supervisors, 16 folios, at 15 cents, \$2.40; copies for 1,008 supervisors, each 16 folios, at 10 cents. The duty of instructing supervisors, responsible and important as it is, is devolved on the chief supervisor. It is not simply a clerical act of the character of those mentioned in section 2031, but one more analogous to his duties as commissioner, and more judicial in its character. For like duties as commissioner he is allowed 15 cents per folio for preparing papers, and 10 cents per folio for each copy of the paper so prepared. Let him have this allowance.

Third. Administering oaths to supervisors, 26, at 10 cents each. In the case of *Gayer v. U. S.* I allowed a charge like this. Upon re-examination I cannot find any provision of law which puts upon the government the cost for swearing supervisors. The supervisors necessarily take an oath, but, as they are not compelled to serve, their act is voluntary. The first comptroller of the treasury has good reason for not allowing this charge. The expense of taking the oath must be paid by the supervisors themselves. This item is disallowed.

Fourth. *Per diem* for attendance on court. The circuit court was open by order of the circuit judge, under section 2011, on 5th day of October. Section 2026 required the chief supervisor to attend upon the opening of court. He did attend, and day by day discharged his duties as required by law. The provision limiting the pay of supervisors cannot apply to him. His duties are entirely distinct from, and in no way resemble, the duties of supervisors. He is not a supervisor. He directs and controls supervisors. Here, then, we have a commissioner of this court appointed chief supervisor, and eligible to his office only because he is a commissioner called upon to perform certain duties. The first of these was to attend in person the special term of the circuit court

provided for by statute, and *de die in diem* present business to that court, and furnish information for its action. This requires his personal presence before the court. No provision is made for his compensation for these duties in section 2031, and no specific provision is made in section 847, but section 847 declares "that issuing any warrant or writ, and for any other service, the commissioner shall receive the same compensation as is allowed to clerks for like service." An ingenious argument was made on behalf of the defendant that the words "for any other service" meant issuing any paper requiring service; this word being used in its narrowest technical sense. But the compensation is for service. The clerk never serves writs and warrants and such like papers. The words must be taken in their natural meaning, and this conveys an idea of the performance of duties similar to those performed by a clerk. Section 828 gives to a clerk, for traveling from the office of the clerk where he is required to reside to the place of holding any court required by law to be held, five cents a mile for going and five cents a mile for returning, and five dollars a day for attendance on court while actually in session. The plaintiff was required to keep his office in Spartanburg. When he was delegated as chief supervisor it became necessary that he should travel from his office in Spartanburg to Charleston, where the court was held according to law. Let him have his mileage and *per diem*.

Fifth. Items of bill of stationery, printed blanks of oaths, \$4.75; printed certificate of service, \$1.50; blank application for supervisors. Section 2026 directs the chief supervisor to prepare and furnish all necessary books, forms, and instructions. As the number of supervisors is very great, the chief supervisor saves time, trouble, and expense by printing. He should be reimbursed for printing all necessary blanks emanating from his office, made necessary for the proper discharge of their duties by supervisors. Among these are the oaths to be taken by the supervisors in order to secure accuracy and uniformity, and for the same reason the form of certificate they must use in order to obtain pay. So, also, the orders made by the court appointing supervisors should be printed, and the disbursements for printing them be allowed to the chief supervisor. The same necessity does not exist for application of supervisors. Section 2026 does not make it his duty to prepare these applications. See *Gayer v. U. S.*, *supra*. The item for these applications is not allowed, —\$5.50.

Sixth. Recording and indexing 105 informations, 2 folios each, at 15 cents. Section 2026 requires the chief supervisor to furnish to the court information in respect to supervisors appointed by the court, and also it requires certain information from supervisors of elections themselves. He is also allowed for filing and caring for every return, report, record, document, and other papers, 10 cents. It appears in this case that these informations were papers of a character required by law. It was his duty to file them, and he is entitled to compensation for them. Let this item be allowed. An order will be taken carrying out the conclusions of this opinion.

SIMS v. SCHULT *et al.*

(Circuit Court, E. D. Missouri, E. D. October 31, 1889.)

1. WITNESS—ATTENDANCE—MILEAGE.

Witnesses residing in the district, who attend court in obedience to a subpoena, are entitled to mileage fees for the whole distance necessarily traveled in going to and returning from the place where the court is held, though it exceeds 100 miles.

2. SAME—TAXATION OF COSTS.

Where the case has been continued at plaintiff's request and at his costs, mileage fees to be paid defendants' witnesses, who have been subpoenaed, and have come more than 100 miles, will not be taxed against plaintiff until the trial of the cause, and until the necessity of the witnesses' personal attendance, in lieu of taking their depositions, may be determined.

At Law. Motion to tax witness fees.

Hough, Overall & Judson, for plaintiff.

Alexander Martin, for defendants.

THAYER, J. This case was recently continued on application of the plaintiff, and at his cost. Three witnesses appeared in obedience to subpoena, who reside in Pemiscot county, in this district, at a distance of 320 miles from St. Louis, Mo., by the route usually traveled to reach the latter city. A fourth witness attended in obedience to subpoena who resides in Mississippi county, also in this district, and who was compelled to travel 178 miles to reach the place of holding court, in St. Louis, Mo. A motion is filed to compel the clerk to tax the mileage fees and *per diem* of these witnesses against the plaintiff, at whose instance the continuance was granted. The motion is resisted on the ground that, as the witnesses resided more than 100 miles from the place of holding court, mileage fees are not allowable for a distance exceeding 100 miles. The witnesses in question, having been duly subpoenaed, and having reported in obedience to such process, are clearly entitled to mileage fees for the whole distance necessarily traveled in going to and returning from the place of holding court, although it exceeds 100 miles. The circuit judge of this circuit so held in *Holmes v. Sheridan*, see note *In re Thomas*, 1 Dill. 421. The rule so announced is reasonable. Witnesses who reside in the district, no matter at what distance from the place of holding court, who obey its process and report, ought not to be compelled to pay their own traveling fees. That would be offering an inducement to parties to disobey legal process. If it is wrong to issue subpoenas for witnesses residing more than 100 miles from the place of holding court, the costs thus wrongfully incurred should be taxed against the party who occasions them. Witnesses should not bear the burden of a fault committed by a party in wrongfully compelling their personal attendance. The clerk will accordingly allow the witnesses who have claimed mileage in this case for the full distance traveled in coming from and in returning to their several homes.

Whether the fees so allowed should be taxed against the plaintiff as a part of the costs of the continuance, or against the defendant who sum-

moned them, as costs unnecessarily and wrongfully incurred, is a different question. In the case of *Manufacturing Co. v. Saliers*, decided by Judge DILLON in this circuit, and reported in 6 Cent. Law J., at page 82, the learned judge held that in some cases it might be proper to secure the personal attendance of witnesses who resided in the district, but at a greater distance than 100 miles from the place of trial. In that case a general direction was given to the clerk not to tax mileage fees of witnesses against the losing party for a distance in excess of 100 miles, without a special order of court. That direction has ever since been observed in this district, and will still be observed. As the present case has not yet been tried, and as the court is not fully advised of the character of the issues to be tried, or of the propriety of the defendants' action in suing out a subpoena to secure the personal attendance of those witnesses in lieu of taking their depositions, an order will not be made at present taxing the fees in question as a part of the costs of the continuance. Such an order may appear to be proper after the final hearing of the cause, depending, of course, upon the character of the facts that the witnesses in question were called to establish.

The motion is sustained in so far as it calls upon the clerk to tax and allow in favor of the witnesses the mileage fees and *per diem* claimed by them. It is overruled, without prejudice, in so far as it calls upon the clerk at this time to tax the fees in question against the plaintiff as a part of the costs of the continuance.

UNITED STATES v. WALLACE.

(District Court, E. D. South Carolina. October 13, 1889.)

1. UNITED STATES MARSHAL—ILLEGAL FEES—INDICTMENT.

Rev. St. U. S. § 5438, makes it criminal for any person to make or cause to be made, or present or cause to be presented, for payment or approval, to any person or officer in the government service, any claim against the government, knowing the same to be false or fictitious, or to cause to be made or used any false receipt, voucher, account, affidavit, etc., knowing the same to be false, with intent to defraud, etc. An indictment charged that defendant, a deputy marshal, having a warrant for the arrest of a violator of the United States statutes, served the same, and, for the purpose of obtaining approval and payment of a false and fictitious claim against the government, caused to be made a false and fictitious account, affidavit, and voucher as to the number of miles traveled by him, and as to the employment of a guard in such service, and as to the number of meals furnished the prisoner. The account was set out in full, as were also the guard's receipt for fees, and the receipt of the person furnishing the meals. The account was alleged to be false, and the fictitious items were designated specifically, and it was alleged that defendant knew them to be false. *Held*, that the specific acts constituting the offense of making the false account were set out with sufficient particularity.

2. SAME.

The omission to allege the name of any officer to whom the account was to be presented is a fatal defect to such an indictment.

3. SAME.

It is insufficient to allege that an account due from the United States to C., the United States marshal, was presented to C., as the marshal could not audit or pay a claim against the government, due to himself.

On Demurrer to Indictment.

Abiel Lathrop, U. S. Dist. Atty., and *H. A. De Saussure*, Asst. U. S. Dist. Atty.

J. P. K. Bryan, for defendant.

SIMONTON, J. The defendant is indicted for violating section 5438, Rev. St. The indictment contains two counts. The first is for making and using false receipts, vouchers, accounts, and so forth, for the purpose of obtaining payment or approval of a false, fictitious, and fraudulent claim against the United States. The second is for presenting a false, fictitious, and fraudulent claim for payment to G. I. Cunningham, marshal of the United States for the district of South Carolina. The defendant demurs to the indictment. This necessitates an examination of the language of the indictment. The indictment is brought under the first clauses of section 5438, which are in these words:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

The first count, after reciting that the defendant, a deputy-marshal, was intrusted with the service of a warrant against one John Brooks, charged with violating section 5438, Rev. St., issued by a commissioner of this court, served said warrant, and arrested Brooks, and for the purpose of obtaining approval and payment of a false, fictitious, and fraudulent claim against the government of the United States, did then and there make and cause to be made a certain false, fictitious, and fraudulent account, affidavit, certificate, and voucher as to the number of miles traveled by him, the said L. W. Wallace, deputy-marshal, as aforesaid; and as to the employment of one J. H. Williamson as guard over the said John Brooks; and as to the number of miles traveled by the said L. W. Wallace, deputy-marshal, his guard, and said Brooks, in transporting Brooks from the alleged place of arrest at Elloree, Orangeburg county, to Charleston, S. C., and as to two meals furnished said Brooks, and to the employment of a guard over Brooks; setting out the account in full, headed: "United States of America to G. I. Cunningham, United States Marshal, by Deputy L. W. Wallace, Dr.." accompanied by copy of receipt of J. H. Williamson, a guard, and of John Lewis for meals, with an affidavit before J. Wesley Smith, United States commissioner, of the truth of the items. The count goes on to charge the falsity of the account, and specifying the items, concluding with the allegation that defendant knew that they were false. The second count charges that the defendant, a deputy-marshal, did present for payment to George I. Cunningham, he being an officer in the civil service of the United States,—that is, being United States marshal in and for the district of South Carolina,—a claim

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against the government of the United States in the words and figures of the account in the first count, set out, however, in this count, which is charged to be false, fraudulent, and fictitious in certain particulars set out in detail.

The specific grounds of demurrer to the first count are: (1) That it sets out the charge in general terms, and does not state the specific charge,—does not descend to particulars; that is to say, “for the purpose of obtaining approval and payment of a false, fraudulent, and fictitious claim against the government of the United States,” without specifying the nature and details of the false, fraudulent, and fictitious claim, nor the name of the person or officer to whom presented. (2) That it charges a false affidavit, and the copy of the affidavit in the count shows that it was made before a United States commissioner, who had no authority to administer such an oath. So it is not an affidavit.

Let us examine these. “The object of the indictment is: *First*, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution of the same cause; and, *second*, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had; for these facts should be stated, and not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.” Again; “The accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he must prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statutes.” *U. S. v. Hess*, 124 U. S. 487, 8 Sup. Ct. Rep. 571. This case is quoted at length, because it is relied upon by the defendant, and because it is recognized as controlling authority. Let us apply it to this case. We inquire, what is the offense charged in this first count? Next, in what manner is the charge made? The first count charges the making and causing to be made by the defendant of a certain false, fictitious, and fraudulent account, affidavit, certificate, and voucher; then states the particular items of these, and declares each of them in detail to be false, fictitious, and fraudulent, and made for the purpose of obtaining payment by the government of the United States of a false, fictitious, and fraudulent claim; that is to say, charging him with a crime, the count recites in detail the facts which it designates to be criminal, and charges the intent, which fixes the criminality. It is not, as seems to be supposed, a charge that he presented a false, etc., claim. Were it so, the species—the details—of the claim must be given. But the charge is that he made and used a certain false account, voucher, etc., for the purpose of obtaining payment or approval of the claim so made up. And in making this charge the specific acts are set out in detail, with the account prepared upon the false, fictitious, and fraudulent assertion of these facts. It seems to me that this apprises the defendant with reasonable

certainty of the nature of the accusation against him. He can prepare his defense to it, and if at any time hereafter he be called to account for these same acts, (voucher, account, etc.,) he can plead the result of a trial on this indictment for his defense

It is further contended that the name of no person or officer in the service of the United States is stated in the count, to whom this claim was to be presented. Is this necessary? The first clause forbids the making or presenting for payment or approval "to or by any person or officer in the civil, military, or naval service of the United States" any claim against the government of the United States, etc., which is known to be false, fraudulent, and fictitious. The second clause forbids the making or using of any false bill, account, etc., for the purpose of obtaining the payment or approval "of any such claim;" that is to say, any claim so presented or to be presented to any officer in the civil, military, and naval service of the United States, and known to be false, fraudulent, and fictitious. This being so, the omission to state the person to whom the claim was, or was to be, presented is fatal. The preparation of a claim against the government, however false, fraudulent, and fictitious the claim may be, is not a crime. It must be prepared for the purpose of being presented. Not only so, as the government of the United States is impersonal, acting and acted upon by and through its agents, such claim must be presented or be prepared for presentation to an agent of the United States, and he must be the proper agent. The presentation of a claim for munitions of war furnished to the United States to the postmaster at Charleston, or for naval stores to the internal revenue collector, or for carrying the mails to the district attorney, however fictitious, false, and fraudulent either of them may be, would not violate this section. To complete the offense, therefore, it must be proved that the false vouchers, etc., were prepared for the purpose of presenting the false claim for payment or approval to or by any person or officer in the service of the United States authorized to approve, audit, or pay the same; and if this is to be proved, it must be alleged. *U. S. v. Glover*, 32 Fed. Rep. 142.

With regard to the alleged affidavit, without deciding the question whether a commissioner can administer such an oath, it is enough to say that the count charges the use of a false, fictitious, and fraudulent account, certificate, and voucher, as well as affidavit, and the account, whether sworn to or not, set out in the count, will sustain this charge.

Second Count. The indictment charges the presenting for payment of a claim against the United States to George I. Cunningham, marshal, etc. The account set out in the count is "United States of America to George I. Cunningham, United States Marshal, Dr." Surely this was not presenting a claim against the United States, or any department or officer thereof, to a person in the civil, military, or naval service of the United States. Mr. Cunningham could not pay for the government his own claim against the government, nor was he the proper agent of the government to approve, audit, or pay this claim. This makes it unnecessary to discuss any other ground of demurrer to the count. Demurrers are sustained.

*In re DOHRENDORF et al.**(Circuit Court, D. Kansas. February 21, 1889.)*

DESERTION FROM MILITARY SERVICE—SOLDIERS—MINORS.

One who remains in the military service of the United States for more than two years after attaining his majority, receiving pay therefor, is within the meaning of Rev. St. U. S. p. 234, art. 47, providing that "any * * * soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall * * * suffer * * * any punishment * * * which a court-martial may direct," and the court-martial's finding cannot be reviewed on *habeas corpus*, though his enlistment was void because of his minority.

On Petition for *Habeas Corpus*.

C. W. F. Dassler, for petitioners.

Arthur Murray, Acting Judge Advocate, and *W. C. Perry*, U. S. Dist. Atty., for respondent.

BREWER, J. The petitioner August W. Dohrendorf is in the military prison, under sentence of a court-martial, for the crime of desertion. The single question is as to the jurisdiction of that court. He enlisted November 23, 1884, being then a minor, aged 20 years and 9 months. His parents were living, and did not consent to his enlistment. He continued in the service until October, 1887, when he deserted. This petition for his discharge is brought by his mother and himself. Questions of the right of a party to a discharge from the military service, who enlisted as a minor between the ages of 16 and 21, without the consent of his parents or guardians, have been frequently before the courts, and some very careful and elaborate opinions prepared thereon. I shall therefore enter into no discussion of the question here presented, but simply state my conclusions. Article 47 of the rules and articles of war (Rev. St. U. S. p. 234) provides that—

"Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment excepting death, which a court-martial may direct."

Assuming that the contract of enlistment was void, and that he or his parents could at any time have avoided it, yet, three months after his enlistment, he became of age, and from that time the control of his parents and their right to his services ceased. He was his own master. He continued in the service for more than two years thereafter, receiving pay for his services. He comes, therefore, within the letter of the article, as a soldier who had received pay. As such he was amenable to the jurisdiction of the court-martial, and its judgment cannot be thus collaterally questioned. *In re Zimmerman*, 30 Fed. Rep. 176, and cases cited in the opinion; *In re Hearn*, 32 Fed. Rep. 141; *In re Spencer*, post, 149, (district court of Kansas, opinion recently filed by FOSTER, J.,) and cases cited therein. The petition will be denied, and the prisoner remanded.

In re SPENCER.

(District Court, D. Kansas. January 30, 1889.)

DESERTION FROM MILITARY SERVICE—JURISDICTION—MINORS.

As enlistment of a minor in the military service of the United States is voidable only, and not void, a court-martial has jurisdiction to try him for desertion, and its finding cannot be reviewed by the civil courts.

On Petition for *Habeas Corpus*.

William F. Linn, for petitioner.

W. C. Perry, U.S. Dist. Atty., and *Arthur Murray*, Acting Judge Advocate, for respondent.

FOSTER, J., (*orally*.) This is a *habeas corpus* proceeding, instituted by Charles E. Spencer, alleging in his complaint that he is unlawfully restrained of his liberty, and held in custody at the military prison at Fort Leavenworth by Capt. J. W. Pope, United States army. The complainant charges that he is illegally restrained of his liberty, and further charges that he is held in custody by virtue of the sentence of a court-martial held at Fort Keogh, Mont., in the month of June in the year 1888, and by sentence of which court he was ordered confined in the military prison for the period of four years. He further alleges in his complaint that said court-martial had no jurisdiction to try him for the offense for which he was tried,—that is, the offense of being a deserter; and that the sentence of that court is absolutely null and void for this reason: that at the time of his enlistment he was a minor, being under the age of 21 years, and that he was enlisted against the wishes and consent of his parents. The return of Capt. Pope to this writ shows substantially the following facts: That the complainant, Charles E. Spencer, was enlisted on the 27th day of July, 1885, for a period of five years. That at the time of his enlistment he took the oath required by the military regulations as to his age, and therein stated that he was over the age of 21 years. On the descriptive list he is carried as being at that time 22 years. That he remained in the military service under this enlistment until the 11th day of April, 1888, at which time he deserted the military service. That he was arrested on the 11th day of May following, and appeared before the court-martial aforesaid upon the charge of desertion. That he was found guilty of such charge, and was sentenced to be dishonorably discharged the service of the United States, and that he be confined in the military prison at Fort Leavenworth, Kan., for the period of four years; and that the respondent, as the commandant of said prison, and in pursuance and by virtue of the sentence of this court-martial, now holds the complainant in his custody and control. The respondent contends that this court can only go so far in determining this question as to decide whether the court-martial acted within the scope of its powers and its jurisdiction. In fact, substantially all that is claimed for this court by counsel for the complainant is that

this court has the power and authority, in the investigation of this case, to determine the question whether the court-martial did act within the exercise of its power and jurisdiction in trying this man for desertion, and imposing the sentence it did. It has been repeatedly adjudicated, and is well decided, that courts-martial are tribunals having their own powers and jurisdiction, and that, while acting within the scope of their jurisdiction and powers, their judgments and decrees cannot be reviewed by the civil courts. If the courts-martial act entirely without jurisdiction, the civil courts do inquire into the cause of the imprisonment of the party held under sentence of the court, and do adjudicate and decide whether these courts have acted within the scope of their power and jurisdiction; and if the court finds that they have not acted within the scope of their power and jurisdiction in imposing their sentence, then the civil courts will discharge the parties held by virtue of such sentence and orders.

Assuming it to be a fact that this complainant when he was enlisted was under the age of 21 years, that he deserted the service as has been stated, that he was arrested and brought before the court-martial for that desertion, the question presented to this court is this: Did the court-martial have jurisdiction to try the complainant on that charge, and pass the sentence it did? It is contended on the part of the complainant here that, inasmuch as he enlisted when he was under 21 years of age, his enlistment was absolutely void; that he never in reality entered into the military service of the United States; that he never became a part of the military service or establishment of the United States, and the court was entirely without power and jurisdiction. I do not think that position can be maintained. The authorities which have been read to me seem to establish very conclusively this rule: that the enlistment of a minor is voidable, not necessarily void; and that he does really become by such enlistment, although under age, engaged in the service of the United States, and subject to the power and jurisdiction of the military authorities; and, such being the case, the court-martial had jurisdiction to arrest and try him for the charge of desertion. The following authorities sustain this position: *In re Bogart*, 2 Sawy. 397; *In re White*, 17 Fed. Rep. 723; *In re Davison*, 21 Fed. Rep. 618; *In re Wall*, 8 Fed. Rep. 85; *In re McVey*, 23 Fed. Rep. 878; *Ex parte Anderson*, 16 Iowa, 595; *McConologue's Case*, 107 Mass. 154; *Ex parte Reed*, 100 U. S. 13; *Wales v. Whitney*, 114 U. S. 564-570, 5 Sup. Ct. Rep. 1050; *Smith v. Whitney*, 116 U. S. 177, 6 Sup. Ct. Rep. 570. Further than that, in this case the complainant offers to show that he would not have become 21 years of age until the 5th day of October, 1887. If that fact was made to appear, still he was over 21 years of age at the time of his desertion, which, to my mind, would raise another serious question. Even if the position of the complainant was otherwise well taken, whether or not a party who remains in the service without objection until after he is 21 years of age, and then deserts, the offense of desertion being committed after he has attained his majority, could then question his amenability to the jurisdiction of the court-martial, presents, to my mind, a serious question.

However that may be, the authorities which I have before recited virtually decide that a court-martial in cases of this kind has jurisdiction to try the soldier for desertion, and that its finding cannot be reviewed by the civil courts. Both on reason and authority this case presents quite a different question from that where the parents of a minor make application for his release from the military service on the ground of his minority. The complainant in this case will be remanded to the custody of Capt. Pope.

UNITED STATES v. MALLARD.

(District Court, D. South Carolina. October 7, 1889.)

PERJURY—OATH.

Defendant was indicted for perjury. The evidence showed that he made a verbal statement before a United States commissioner, and charged one B. with violating the revenue law. The commissioner reduced his statement to writing, beginning with the words, M., "being duly sworn," etc., and ending with the jurat. On being told, "If you swear to this statement, put your mark here," defendant made his mark. *Held*, that this was an oath.

Indictment for Perjury. On motion to instruct jury to acquit.

H. A. De Saussure, Asst. U. S. Atty.

Samuel J. Lee, for defendant.

SIMONTON, J. The indictment is for perjury in taking an affidavit before a commissioner. The case for the prosecution is this: The defendant went before Commissioner Lathrop, and made a verbal statement charging one Benbow with violating section 3242, Rev. St. The commissioner reduced the statement to writing, beginning with the words, "Personally appeared before me Warren Mallard, who, being duly sworn, deposes," etc., and ending with the jurat, "Sworn to before me." He then read the statement over to the defendant, asking if he could write. Upon the answer of the defendant that he could not write, the commissioner said to him, "If you swear to this statement, put your mark here." The defendant put his mark. The indictment charges that the defendant was "duly sworn." Does this evidence sustain the charge? There is no form prescribed in this state in which an oath must or may be administered; nor do the acts of congress lay down any rule on this subject. The oath may be administered on the Book, or with uplifted hand, or in any mode peculiar to the religious belief of the person sworn, or in any form binding on his conscience. 1 Greenl. Ev. § 371. The underlying principle evidently is that whenever the attention of the person who comes up to swear is called to the fact that the statement is not a mere asseveration, but must be sworn to, and, in recognition of this, he is asked to do some corporal act, and does it, this is a statement under oath. And this, without kissing any book, or raising his hand, or doing any religious act. Compare *United States v. Baer*, 18 Blatchf. 493,

6 Fed. Rep. 42. In the case at bar the commissioner, after reducing to writing the verbal statement of the defendant, read it over to him, with the preface and conclusion, both stating that it was sworn to. He then said to defendant, "If you swear to the truth of this statement, put your mark." Defendant put his mark. This was an oath. Motion overruled.

BOYD v. STEDMAN et al.

(Circuit Court, D. Massachusetts. October 5, 1889.)

PATENTS FOR INVENTIONS—PRIOR STATE OF THE ART.

In letters patent No. 236,766, dated January 18, 1881, for improved machinery for winding yarn, the fifth claim was for a movable carrier with a detector lever to stop the winding of a particular spool when the thread breaks, and with a combination which pushes the detector lever out of the way of the cam-shaft. *Held*, that as the English patent of Muir and McIlwham (1866) showed devices for pushing the detector lever away from the cam, of which complainant's combination was only an improvement, it is not infringed by an invention effecting the same purpose, but by a different structural arrangement.

In Equity.

John Boyd sued William L. Stedman and others to restrain infringement of patent.

Hovson & Hovson and *T. L. Livermore*, for complainant.

Browne & Browne, for defendants.

COLT, J. This bill charges infringement of complainant's patent No. 236,766, dated January 18, 1881, for improvements in machinery for doubling and winding yarns. This suit relates to the mechanism employed in such machines for stopping the winding action of any particular spool when a thread which is being wound upon it breaks or fails. In devices of this class, the yarn is passed through an eye or hook at the upper end of what is called a "detector lever," which is mounted upon a movable carrier. So long as the yarn is unbroken, the detector is suspended in a raised position. If, however, the yarn breaks, the detector drops, and its lower end comes in contact with a rotating cam-shaft. The effect of this action is to release "catch" mechanism, which causes, through the action of other mechanisms, the rotation of the particular bobbin to stop. The efficiency of devices of this kind seems to depend upon the firm hold of the catch mechanism so long as the yarn is unbroken, and on the quick release of that mechanism, with the least possible friction, when a thread breaks. The fifth claim of the patent, which is alleged to be infringed, relates to a combination of devices constituting an improvement in "stop motions." The claim is as follows:

"The combination of a bracket and movable carrier, having a catch with a detector lever on said carrier, a weighted catch-lever, 39, and rotating cam-shaft, 48, adapted to act directly on the end of the detector lever when the latter falls into its path, and release the lever, 39, the descent of which pushes the carrier inward to take the detector lever clear of said cam-shaft."

It is necessary in these machines that the detector lever should be moved out of range of the revolving cam-shaft; and it is this result, accomplished by the co-action of the weighted catch-lever and the detector carrier, which constitutes the chief value of the combination contained in the fifth claim. If Boyd had been the first inventor in this class of machines to push the detector lever out of range of the cam-shaft by means of catches and weighted levers, I think this claim should receive a broad construction. But an examination of the prior state of the art seems to forbid this, and to narrow the claim to the particular means by which Boyd accomplished this result. The English patent of Muir and McIlwham, of 1866, shows catch devices in connection with weighted levers which push the detector lever away from the revolving cam. I am aware that the English device has two weighted levers, instead of one, which is found in the Boyd apparatus, and that, consequently, in the English device the essential elements of the combination are five, instead of four; but this is no more than saying that the Boyd combination is more simple and compact, and is therefore an improvement upon the Muir and McIlwham machine. In both devices, however, a revolving cam, striking the end of the detector lever, releases catch mechanism, which causes a weighted lever to fall, and to move, in its descent, the detector carrier away from the revolving cam. The important feature which Boyd says constitutes the chief value of his fifth claim is undoubtedly found in the English device. In their fundamental features, and in the result accomplished, the two machines do not differ. I do not, therefore, see how I can give this claim of the Boyd patent the broad construction contended for. In view of the prior state of the art, this claim must be limited to the improved form of devices therein described. The defendants' machine differs in important particulars from Boyd's. The structural arrangement of its parts is not the same. The catch mechanism and other portions of the machine are quite different from those found in the Boyd apparatus. I do not deem it necessary to enter into a particular comparison of the two machines, because it is apparent upon examination that, if Boyd is limited to his improved form of devices, the defendants' machine does not infringe. No infringement being shown in this case, it follows that the bill must be dismissed.

HAT-SWEAT MANUF'G CO. v. DAVIS S. M. CO.

(Circuit Court, N. D. New York. October 11, 1889.)

PATENTS FOR INVENTIONS—WANT OF NOVELTY.

A hat-sweat which is new only in uniting the tacking slip to the leather band by a turn-over seam instead of by the ordinary seam, in which the stitches perforate the outer face of the band, is not patentable for want of novelty.

In Equity. Bill for an infringement of patent.

For opinion on motion to set aside service of summons, see 31 Fed. Rep. 294; on motion for preliminary injunction, see 32 Fed. Rep. 401.

John R. Bennett, for complainant.

Edmund Wetmore and William A. Jenner, for defendant.

WALLACE, J. The question which arises at the outset of this case is whether there is any patentable novelty in the hat-sweat of the first claim of the patent. The claim is:

"A sweat for hats or caps of any kind, having a cord, reed, or spring-rod attached to the body of the sweat or band by means of a covering lapping over the reed, and secured to the band by a row of stitches passing through the lapped portion of the covering and through the band at a distance from its edges, substantially as shown and described."

This claim is for a sweat leather, (a plain leather band) secured to a tacking slip (generally made of oil-silk or glazed muslin) inclosing a reed or cord. The parts are secured together as follows: The tacking slip is folded around the reed and laid sufficiently over the edge of the leather band to allow the two to be united by either zigzag or straight stitches which pass down close to the reed and through the tacking slip a short distance within the edge of the leather band, and after the parts have been thus united, the tacking slip is brought around parallel with the back face of the leather band, thus folding the edge of the band back upon itself, and concealing the stitches completely on the outer face. The hat-sweat, as thus prepared, is ready to be attached to the hat by stitching the tacking slip to the hat body. It may be shortly described as consisting of a tacking slip folded over a reed or cord, and a leather band, the parts being united by an ordinary turn-over seam. If the stitches perforated the outer face of the leather band they would come in contact with the head of the wearer of the hat, and furnish channels for conducting perspiration to the body of the hat, thus discoloring and soiling the exterior. In the prior state of the art hat-sweats were variously prepared and attached to the hats. In some instances a plain band of leather was sewed or whipped directly to the body of the hat; in others, cloth inclosing a reed was stitched to the leather band, and the band was sewed to the hat-body; in others, the tacking slip of cloth inclosing the reed was first sewed to the hat-body near the junction of the brim, and then the leather band was sewed to the tacking slip by over and over stitches inclosing the reed; and again, the tacking slip, with its inclosed reed, was stitched to the leather band by over and over stitches securing

the reed. A prior patent to Bigelow shows a hat-sweat in which an independent tacking slip is secured to the leather band by stitches which pass over and inclose the reed of the tacking slip, or by a straight line of stitches; and when this tacking slip is stitched to the hat-body, and the leather band folded to its place, the stitches over the reed are on the back face of the band, out of contact with the head of the wearer. It is apparent that the hat-sweat of the claim is only new in the feature which consists in uniting the tacking slip to the leather band by a turn-over seam instead of by the ordinary seam, in which the stitches perforate the outer face of the band. This is not invention, not only because the turn-over seam was an old and well-known substitute for the ordinary seam in making garments, but also because that seam had been used in hat-sweats, as shown in the patent to Baldwin, as a substitute for the ordinary seam, and for the purpose of protecting the hat from the perspiration liable to pass through the needle perforations. The bill is dismissed, with costs.

MAGIN v. CARLE.

SAME v. LEHMAN.

(Circuit Court, N. D. New York. October 28, 1882.)

PATENTS FOR INVENTIONS—ANTICIPATION.

Letters patent No. 248,646, were granted to Charles Gordon October 25, 1881, for improved apparatus for cooling and drawing beer. The specifications claimed as inventions the surrounding the faucet with a cold-air passage, an upper ice-box connected with the cold-air passage, by means of which the air cooled in the ice-box and the water produced by the melting ice cools the liquid in the supply-pipe connected with the faucet, and the surrounding the outer pipe with a non-conducting jacket. Claim 1 was the combination of the ice-box, supply-pipe, faucet, and cold-air passage. Claim 4 was the combination of the ice-box, supply-pipe, faucet, lower chamber, and cold-air passage communicating between the ice-box and lower chamber. *Held*, that claims 1 and 4 were anticipated by an apparatus invented and put in use by one Meinhard in 1877, and used for four years, embodying the same principles as the Gordon invention, except the non-conducting jacket surrounding the air passage. This jacket was simply a space filled with non-conducting material, to prevent the absorption of heat by the air in the cold-air passage. This addition was common knowledge and not invention.

In Equity. Bills for infringement of patent.

For statement of the claims of the patent, and opinion on former hearing as to its validity, see 24 Fed. Rep. 743.

John R. Bennett and George B. Selden, for plaintiff.

Josiah Sullivan, for defendants.

BLATCHFORD, Justice. These are two suits in equity, brought for the infringement of letters patent No. 248,646, granted to Charles Gordon, October 25, 1881, for an "improvement in apparatus for cooling and drawing beer." It is the same patent which was involved in the suits of *Magin v. McKay* and *Magin v. Welker*, 24 Fed. Rep. 743, (decided by

me in this court August 20, 1885.) In the opinion in those cases the material parts of the specification and the four claims are set forth and the operation of the apparatus is described. It was there held that, so far as claims 1 and 4 were concerned, the invention was anticipated by an apparatus put in use by one Meinhard, in Rochester, N. Y., in the summer of 1877, and which was continued in use about four years. A description was given of that apparatus, and it was held, on the evidence, that it was practical and successful, and embodied the same principle as that of Gordon; that it was continued in use for nearly two years after Gordon obtained his patent; and that, although it did not contain the non-conducting jacket surrounding the outer wall of the cold-air passage, which was a feature in claim 3 of the patent, there was no patentable invention in adding a non-conducting jacket to the elements found in claim 1, or to those found in claim 4. Infringement of claim 2 was not alleged in those cases. The bills were dismissed on the ground of the prior existence of the Meinhard apparatus. In the present suits infringement is alleged in each of them of claims 1 and 4 of the Gordon patent. The testimony on both sides taken in the McKay and Welker suits in regard to the Meinhard apparatus is introduced in evidence in the present cases, and voluminous proofs in addition have been taken by both parties in regard to that apparatus. A careful examination of all the evidence, with the aid of exhaustive briefs for the respective parties, confirms me in the conclusion at which I arrived in the *McKay and Welker Cases*,—that the invention embodied in claims 1 and 4 of the Gordon patent existed in the Meinhard apparatus prior to the time when the invention was made by Gordon, and that that apparatus was practical and successful. The bill in each case must therefore be dismissed, with costs.

SCHULTZ BELTING Co. v. WILLEMSSEN BELTING Co.

(Circuit Court, E. D. Missouri, E. D. October 30, 1889.)

PATENTS FOR INVENTIONS—ANTICIPATION.

Letters patent granted to one Schultz, April 19, 1876, for "a new article of manufacture,—leather having tanned surfaces and an interior of pliable raw hide,"—are void as similar leather has been made by the same process in various parts of the country before the letters issued, and the only discovery, if any, is that leather imperfectly tanned is for some uses preferable to perfectly tanned leather, and no such discovery is claimed.

In Equity. Bill to restrain infringement of patent.

C. H. Krum and W. H. Thurston, for complainant.

Taylor & Pollard and Lubke & Muench, for defendant.

THAYER, J. The specification in this case describes an alleged improvement in the method of manufacturing leather. The patentee says, in substance, that heretofore, in making leather, it has been customary

"to tan the hide through and through, the hide for that purpose being immersed in tan liquor for several months, and even years;" that by the old process the interior of the hide is tanned equally with the surface, the effect being to diminish the strength of the leather so produced as compared with raw hide. He further states that if the raw hide is not immersed in tan liquor at all, but is merely "fulled, curried, and stuffed," while the hide becomes pliable, and its tensile strength is increased, yet it is not durable, and will lack body and finish. To combine the advantages of raw hide and fully tanned leather, the patentee then describes a process of manufacturing leather that differs from the old process admitted to be in vogue, only in the respect, that the hide is immersed in tan liquor for a much shorter period,—say, from 8 to 10 days,—the result being that the outer surfaces of the hide are tanned, while the interior stratum is only partially tanned, and retains all the qualities, including the strength, of fulled and stuffed raw hide, but is not subject to decomposition. Having described the process and the merits of the product, the claim of the patentee is as follows: "As a new article of manufacture, leather having tanned surfaces and an interior of pliable raw hide, substantially as described." It thus appears that the patent in this case covers an alleged new product, the same being the result of a new or improved process; and it is not denied that such a product may be the subject-matter of a valid patent. *Smith v. Vulcanite Co.*, 93 U. S. 489; *Vulcanite Co. v. Smith*, 1 Holmes, 354. The contention is, however, that neither the process described, nor the product claimed in this patent, was new; and to this point the evidence for defendant, as well as for the complainant, was chiefly directed.

It will suffice to say that the testimony in the case shows to my entire satisfaction that prior to the granting of the Schultz patent on April 19, 1876, a very considerable amount of leather had been produced and sold at Louisville, Ky., Cincinnati, Ohio, and St. Louis, Mo., and probably at other points in the United States, having tanned surfaces and an interior stratum of pliable raw hide. The testimony of all the witnesses supports that conclusion, and the fact is not seriously controverted by complainant's counsel. I have no doubt, however, that very much of the leather of the kind last mentioned, that is shown to have been in the market prior to the date of complainant's patent, was what was regarded at the time as imperfectly tanned leather. The leather in question in many instances no doubt was withdrawn from the tanning vats before it was tanned through and through, owing to the great demand for leather, and the desire of manufacturers to get their product on the market as soon as possible. Probably the manufacturers of such leather and the dealers therein did not regard it as being either as serviceable or valuable as perfectly tanned leather. But these concessions do not aid the complainant's case. The fact remains that the product claimed as the result of an improved process was not new. The same article had been produced before, and manufacturers knew very well how to produce it before Schultz filed his specification. If he made any discovery it consisted in his finding out that leather imperfectly tanned—which every

tanner knew how to make, and many of them had made—was preferable for some uses (notably for belting) to perfectly tanned leather. But that discovery, even if it could be patented, has not been claimed. And I may further add in this connection, that the greater tensile strength of leather imperfectly tanned (which is the chief merit claimed for complainant's leather when used for belting purposes) was a fact well known to tanners long before the date of complainant's patent. It was well understood among tanners that raw hide had greater tensile strength than leather thoroughly tanned, and hence that a strip of leather with an interior stratum of raw hide between tanned surfaces was necessarily stronger than a strip of leather of the same dimensions tanned through and through. It will be understood, of course, that in deciding this case the court does not impugn the doctrine that the accidental discovery of a new compound or new article of manufacture by a person who did not have or retain sufficient knowledge of the process to reproduce the compound, or explain how it was produced, will not invalidate a patent granted to another person who subsequently makes the same compound or article, and explains the method of production. *Ransom v. Mayor*, 1 Fish. Pat. Cas. 265; *Tilgham v. Proctor*, 102 U. S. 711. That doctrine has no application to this case, for the reason that tanners have long known how to make the new article of manufacture described in the patent; and when such article has heretofore been made, its production was not accidental, but intentional.

With reference to the contention of complainant's counsel that the patent in controversy should be upheld on the strength of the decision in *Smith v. Vulcanite Co.*, *supra*, and that no distinction can be drawn between the two cases, it will suffice to say, that in the case cited the patent was upheld on the ground that a new product had resulted from the described process, that differed from all that had preceded it in degree of usefulness and in kind, and that had new uses and properties. In the case at bar the alleged new product is conclusively shown to be old, and the process by which it is produced is also old. For want of patentable novelty the patent is adjudged to be void, and the bill is accordingly dismissed.

ROYER v. SCHULTZ BELTING Co. et al.

(Circuit Court, E. D. Missouri, E. D. October 14, 1889.)

PATENTS FOR INVENTIONS—EXTENT OF CLAIM—TREATMENT OF HIDES FOR BELTING LEATHER.

The claim of letters patent No. 149,954, issued to Herman Royer, April 21, 1874, was for "the treatment of the prepared raw hide in the manner and for the purposes set forth." The method of treatment described was (1) the removal of the hair from the hide by sweating; (2) drying the hide perfectly hard; (3) inserting it in water for 10 or 15 minutes; (4) fulling or softening it by mechanical means; (5) spreading on it a certain mixture; (6) fulling this mixture into it in a suitable machine; (7) moistening it 4 or 5 times a day; (8) stretching it, and cutting it into suitable pieces. The specification refers to the patentee's "mode of preparing

hides," and says that it is necessary to make use of a preparation substantially as described, in order to render raw hide fit for use. The claim was amended so as to conform to above on suggestion from the patent-office that a claim for preparing raw hides by the fulling and bending operation and the preserving mixture was not patentable. *Held*, that the claim must be limited to the whole process described, and the patent was not infringed by a variation in the method of making belting leather; as, by liming, instead of sweating, green hides. Following *Royer v. Coupe*, 38 Fed. Rep. 113.

In Equity. On bill for infringement of patent.

Broadhead & Haussler, Wm. M. Eccles, and M. A. Wheaton, for complainant.

C. H. Krum, for defendants.

THAYER, J. The testimony in this case does not sustain the charge of infringement, unless the claim of Royer's patent, No. 149,954, be construed as covering broadly the method of making belting leather out of prepared raw hide, by stuffing the hide, by means of a fulling-machine, with a mixture composed of tallow, wood-tar, and resin. In the case of *Royer v. Coupe*, 38 Fed. Rep. 113, it was held that the claim did not admit of such a liberal interpretation; that, if the claim was given such a broad scope, the patent would necessarily fall in view of the prior state of the art of tanning, and hence that the claim in question must be limited to the entire process described in the specification, consisting of (8) successive steps, whereby raw or green hides are first denuded of their hair by means of a "sweating process," then "dried hard," and subsequently stuffed in a fulling-machine, with a preserving mixture consisting of tallow, wood-tar, and resin. In that case it was held that the patent was not infringed, unless the process was used in its entirety; and, inasmuch as the defendant in that case removed the hair from green hides by a liming process, instead of by sweating, the bill was dismissed.

In the case at bar the testimony shows that the sweating process mentioned in the Royer patent is not used by the defendants. It also appears that by the defendants' method of treatment the hides are "limed" and "bated," and that they are also partially tanned. In each of these respects defendants' process varies from the Royer process, and the patent is not infringed, unless this court gives a broader scope to the claim than was accorded to it in *Royer v. Coupe*. This the court must decline to do. The specification and claim of Royer's patent is so worded, as was well shown by Judge COLT, as to leave it in a great measure uncertain whether the patentee intended to claim the entire process described, of removing the hair from green hides by sweating, and subsequently drying them, and then stuffing them, by means of a fulling-machine, with a preserving mixture, or whether he intended to claim only those steps of the process by which a particular preserving mixture was worked into the fiber of prepared raw hide, by means of a fulling-machine. The doubt which arises from the language of the specification as to the proper construction of the claim is in itself sufficient to warrant the court in adopting the construction already given to it, after full consideration, in the first circuit, on the ground of comity. But, in addition to that view of the matter,

it is proper to add that Judge COLT states as one of the grounds of his decision, that the file-wrapper in the patent-office shows that when Royer's application for a patent was pending, the patentee modified his original claim, which as drawn, was so worded as to cover the stuffing process with a preserving mixture, and cast the claim in its present form solely in view of a communication from the patent-office to the effect that the whole method described in his specification of making belting leather out of green hides might be patentable, whereas that portion of the process which consisted merely in stuffing prepared raw hide with a preserving mixture such as was described, by means of a fulling-machine, was not patentable. The fact thus adverted to, that Royer cast his claim in its present form in compliance with a suggestion from the patent-office that the whole process by him described was perhaps patentable, while a part of it was not, ought to settle the construction of the claim, no matter what view might otherwise be taken of the same. Admitting the rule to be that a claim in a patent is to be construed with reference to the specification, yet, when the claim, considered with reference to the specification, is ambiguous, special significance should be attached to correspondence between the patentee and the officials of the patent-office, showing how the latter construed it, and what was the extent of the monopoly intended to be granted. This court accordingly adopts the construction given in *Royer v. Coupe*, holding that Royer's claim must be limited to the whole process described in his specification, and that the patent is not infringed by one who varies the method of making belting leather in a material respect, as by liming green hides to remove the hair, in place of sweating them. The bill is accordingly dismissed.

ROYER v. SCHULTZ BELTING Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. October 26, 1889.)

PATENTS FOR INVENTIONS—BELT-SHIFTING DEVICE.

The claim of certain letters-patent granted to Herman Royer was, "in combination with the drum of a raw-hide fulling-machine operating to twist the leather alternately in one direction and the other, a shifting device for the purpose of making the operation automatic and continuous." The belt-shifting device had long before been used in combination with the roller of a washing-machine for the same purpose, and could obviously be used in combination with many machines, to impart reverse motion. It appeared that it was first applied to the patentee's machine by a mechanic, who was not shown to have worked under the patentee's direction. *Held*, that the combination was not patentable, and, if it was, that the patentee was not a sole inventor. Following *Royer v. Manufacturing Co.*, 20 Fed. Rep. 853.

In Equity. On bill for infringement of patents.

Broadhead & Haessler, William M. Eccles, and M. A. Wheaton, for complainant.

Chester H. Krum, for defendants.

THAYER, J. The patent involved in this case was held to be invalid in the case of *Royer v. Manufacturing Co.*, 20 Fed. Rep. 853. In the case

at bar it is strenuously insisted that the learned judge who decided that case, overlooked the fact that the patent in question was for a combination of a belt-shifting device, with the drum of a raw-hide fulling-machine, and that he erroneously decided the case upon the theory that the patent only covered the shifting device, and was void because that device was old, or because the patentee had merely applied such old device to a new use. There is some language in the decision that no doubt furnishes ground for such contention, but in view of all that was said it appears, I think, that the court in fact held the patent to be void, on the ground that the combination described and claimed was not a patentable combination, in view of the state of the art; and in that view I concur.

The single claim contained in this patent is no doubt a combination claim. "I claim," says the patentee, "in combination with the drum of a raw-hide fulling-machine operating to twist the leather alternately in one direction and the other, a shifting device, for the purpose of making the operation automatic and continuous, substantially as described." In the case at bar the testimony shows without contradiction that long prior to the time that the patentee claims to have combined the belt-shifting device with the drum of a fulling-machine, it had been used in combination with the roller of a washing-machine, that was designed to turn first in one direction and then in the other, for the purpose of making that operation automatic. The same proof seems to have been tendered in the case above cited, decided by Judge DRUMMOND. The belt-shifting device in question is nothing more than a device to shift a driving-belt from one pulley to another, the two pulleys being located side by side or in close proximity to each other, and being keyed to different driving-shafts. Motion is communicated to the belt-shifter by a belt passing over a pulley keyed to a revolving shaft, and, when thus set in motion, it operates automatically to push the driving-belt of a machine from one pulley to another by a species of mechanism not necessary to be described, because not involved in this case; and in this manner, by giving the driving-shafts to which the pulleys are keyed a bearing on opposite sides of a wheel or roller to be turned, its motion is reversed at intervals. From the brief description here given it is obvious that the belt-shifting device in question is susceptible of being used in combination with a great many machines, for the purpose of imparting reverse motion; and it is admitted to be an old device. Complainant claims to have placed it in combination with the drum of a fulling-machine, to make it revolve in different directions at intervals, and upon this claim his patent is based. Prior to that time, however, Peter F. Clerc combined it with the roller of a washing-machine, to reverse the motion of the roller periodically; and it goes without saying that it might be combined with the driving wheel or shaft of any machine in such manner as to reverse its motion automatically, and that each particular combination could be claimed as patentable, if complainant's patent is valid. The application or adaptation of the belt-shifting device to a fulling-machine appears to the court to have involved merely an exercise of ordi-

nary mechanical skill, considering the fact that the belt-shifting device was old, and that Clerc had already placed it in combination with the roller of a washing-machine for the purpose of making its action automatic. This view is strongly enforced by the testimony showing how the alleged patentable combination happened to be made. It appears that R  yer, the alleged inventor, was referred to Clerc as a person who knew how to make "reversers," as the belt-shifting device was then termed; that he applied to Clerc to make a reverser for his fulling-machine, and gave him a plan of the same, and that Clerc accordingly made one adapted to the fulling-machine in question, and that it worked well the first time it was tried, and was the same device that Clerc had previously applied to a washing-machine. It does not appear that R  yer gave Clerc any directions as to the construction of the reverser, or mode of application to a fulling-machine, or that the latter worked under R  yer's supervision. Clerc was applied to as a mechanic who knew how to make reversers, and who understood how to adapt them to machines of any description, for the purpose of imparting reverse action automatically. In the light of this testimony it appears to the court that the combination of the belt-shifter with the drum of a fulling-machine was not a patentable combination, and that, if it was, the alleged patentee is not solely entitled to the credit of the invention, but that Clerc was at least a joint inventor. The bill in either event must be dismissed; and it is so ordered.

MCBRIDE v. GRAND DE TOUR PLOW Co. *et al.*

(Circuit Court, S. D. Iowa. October 18, 1889.)

1. FEDERAL COURTS—JURISDICTION—WAIVER.

A corporation of another state, defendant in a suit in a federal court which has jurisdiction of the subject-matter, by appearing, filing answer, and taking testimony, waives its right to insist on the hearing that it can be sued in the district of its residence only.

2. PATENTS FOR INVENTIONS—RIDING PLOWS—NOVELTY.

Letters patent No. 284,036, issued to John H. McBride, for a "riding attachment for plows" were for a combination enabling the driver of a plow, while seated on it, to regulate the width and depth of furrow. It appeared on bill for infringement thereof that prior patents had been granted for similar inventions, but it was not clear that complainant's combination was not new. *Held*, that the *prima facie* case of validity of the patent arising from its issue was not overcome.

3. SAME—INFRINGEMENT.

Complainant's patent is not infringed by plows manufactured under letters patent No. 353,294, issued to Charles S. Ruef, November 28, 1886, which attains the same objects, but by a different combination of the parts, as complainant's patent does not apply to the independent parts, they having been previously used.

In Equity. Bill for infringement of patent.

Cole, McVey & Clark, for complainant.

John G. Mannahan, for defendants.

SHIRAS, J. The first question for determination in this cause is that of jurisdiction over the Grand de Tour Plow Company, a corporation created under the laws of the state of Illinois. The company appeared in the cause, filed an answer to the merits, has taken testimony, and now, upon the final hearing, not by a plea to the jurisdiction, but by a mere suggestion of counsel, seeks to question the jurisdiction of the court upon the theory that it cannot be sued in a district other than that of its residence. Counsel cites authorities in support of the well-recognized principle that consent of parties cannot confer jurisdiction upon the courts of the United States, when such jurisdiction does not in fact exist. It appears from the record, not only that the controversy arises under the patent laws of the United States, but also that the complainant, when the suit was brought, was and continues to be a citizen of the state of Iowa, and the defendant company was and is a corporation created under the laws of the state of Illinois. The case, therefore, is one within the jurisdiction of the United States courts, and the question really presented is whether the company can waive the right of insisting that it can be sued only in the district of its residence. Had the company, when it first appeared to the action, presented this question by motion, plea, or other proper method, it may be that its contention would have been sustained. It did not do so, however, but joined issue on the merits, and it cannot be now permitted by mere suggestion to raise the question at the present time. In cases of this character I do not think the act of 1888 has changed the rule recognized under the judiciary act of 1789 and subsequent statutes, that questions of jurisdiction, in the sense of the proper place or district for the bringing of the suit, should be raised by proper motion or plea, and, if not thus presented, are deemed to be waived.

The questions presented by the pleadings of the parties are as to the validity of letters patent No. 284,036, issued to complainant for a "riding attachment for plows," and as to infringement thereof by the plows manufactured by the defendant corporation, and sold by the other defendants as its agents. The invention sought to be covered by the patent to complainant is practically upon a combination having two main objects in view, *i. e.*, the enabling the driver of the plow, while seated upon the driver's seat at the rear end of the plow, to raise and lower the point of the plow when in operation, so as to lessen or increase the depth of the furrow; and, secondly, to regulate the width of the furrow while maintaining the plow in such a position as that it will operate steadily. For the accomplishment of these purposes the complainant devised a combination at the front end of the plow-beam, a clevis, rack, frame, caster-wheel, a lever and link combined with each other, and a plow-beam, and at the rear an axle-frame, driver's seat, a rack, a wheel-bearer, two wheels and lever, combined with a plow-beam and plow. It is impossible, without the aid of drawings, to fully describe the relation and workings of these several parts of the combination, and also of other portions of the machines as exhibited in the drawings attached to the patent, and it will not be attempted. It appears from the evidence in the case that plows constructed according to the combinations shown in com-

plainant's patent are of practical value, and that the driver upon the plow, by the use of the machinery provided, is enabled to regulate the operations of the plow in a convenient manner. The combination thereof has a value sufficient to sustain the patent if it was novel when patented. A large number of patents of date prior to that of complainant have been introduced for the purpose of showing the state of the art, and thus seeking to sustain the defense of want of novelty. It cannot be questioned that it appears therefrom that complainant is not a pioneer in this field of invention. Broadly stated, it is apparent that in all devices of any practical value intended to combine a riding attachment to a plow, the main object to be provided for is enabling the driver, when in his seat, to control the operation of the plow proper; for, unless the driver can, as necessity arises, control the depth and width of the furrow, and the steady movement of the plow, the addition of the riding attachment would have little value. Without going into a statement in detail of the various devices shown in the several patents introduced in evidence, it is sufficient to repeat what has already been said, that it appears therefrom that complainant is not a pioneer in this line of invention, either as to the result sought to be accomplished or the means used to bring about the result. On the other hand, it has not been made clear that his combination is not novel as such, and it cannot be held, therefore, that the *prima facie* case in his favor, arising from the fact that he holds a patent duly issued, has been successfully met. The defense, therefore, of invalidity of complainant's patent, cannot be sustained.

Upon the question of infringement greater difficulty arises. It is admitted that the defendant corporation has been manufacturing and selling plows constructed according to the specifications and drawings attached to letters patent No. 353,234, issued to Charles S. Ruef under date of November 23, 1886; and the contention of complainant is that they are in fact an infringement. In substance, the purposes arrived at in the several combinations shown in the McBride and Ruef patents are identical, and it is to be expected that many of the several parts in the different machines should be found to be absolutely identical. As complainant is not the inventor, however, of any of such independent parts, the mere use thereof by the defendants does not constitute an infringement. In many respects the construction of the two machines is substantially the same, and generally it may be said that, if the McBride machine was the first of its kind in its entirety, the Ruef machine would certainly infringe it in several particulars. But McBride is not the inventor of the several co-acting parts of his machine, and it was therefore open to others to use these several parts, or any number thereof, and by new combinations thereof work out the same results accomplished in whole or in part by complainant. Of course it is not meant by this that the consequences of infringement could be escaped by slight changes in the combination, or by changing the mere position of some of the parts; but, if the differences were such that a new combination was the result, it would not then be an infringement. While the question is not by any means entirely clear nor free from doubt, yet the conclusion reached

is that the specific forms of combination found in the McBride machine are not repeated in the Ruef machine, and therefore the charge of infringement is not sustained. The bill of complainant must therefore be dismissed, at his costs.

RICHARDS v. MICHIGAN CENT. R. Co. *et al.*, (three cases.)

(Circuit Court, N. D. Illinois, N. D. October 21, 1889.)

PATENTS FOR INVENTIONS—GRAIN-TRANSFERRING APPARATUS.

Letters patent granted November 18, 1884, to Edward S. Richards, for a "grain-transferring apparatus," covered a combination of (1) a stationary building; (2) two railway tracks passing into or on opposite sides of such building; (3) elevating apparatus; (4) an elevated hopper-scale, with a valve in the bottom; and (5) a discharge-spout, for discharging the grain from the bottom of the hopper into the car on the opposite side from the car from which it was taken. *Held*, that the combination was not patentable, as it was but an aggregation of old parts, with nothing done by either which it did not do when acting separately.

In Equity. On bills for infringement of patent.

W. A. Gardner and Armstrong, Reed & Dyche, for complainant.

G. Payson and Sidney Smith, for defendants.

BLODGETT, J. These are bills in equity, charging the respective defendants with the infringement of a patent granted to complainant, November 18, 1884, for a "grain-transferring apparatus," and praying an injunction and accounting. The apparatus described in and covered by the patent consists of a stationary elevator building, with two railroad tracks passing into or along-side the building on opposite sides, (I see no reason why the device would not operate equally as well if the tracks passed along-side the building as if they passed into it,) so that ordinary grain-carrying railway cars can stand on each track opposite, or nearly opposite, to each other; an elevating apparatus, so arranged as to elevate grain from the chute, or pit, into which it is shoveled or dumped from the cars to a scale-hopper in the upper part of the building; and a spout leading from the bottom of the hopper, so as to carry the grain, after it is weighed, to the car on the opposite track. The patent contains two claims:

"(1) The combination of a fixed or stationary building, the tracks, F and G, an elevator apparatus, and elevated hopper-scales, having a fixed or stationary hopper, provided with a valve or slide in its bottom, and a discharge spout, P, adapted and arranged for discharging the grain directly from the said hopper into a car, substantially as specified, and for the purposes set forth. (2) The combination of a fixed or stationary building, the tracks, F and G, two or more elevating apparatus, a series of two or more elevated hopper-scales, having fixed or stationary hoppers, each having a valve or slide in its bottom, the discharge spouts, P, P, adapted and arranged for discharging the grain directly from the said hoppers, respectively, into a correspondingly arranged car, a horizontal conveyer, the chutes, J, J, having therein the doors or valves, K and L, and the slides or doors, O, O, all arranged, substantially as shown and described, with relation to each other, and for the purposes set forth."

Defendants have demurred to the bill on the ground that the patent does not show a patentable combination, but only shows an aggregation of old parts, none of which perform any new function in the combination from what they did when operating separately. As the claims of this patent are only combination claims, and none of the parts combined are claimed as new, it may be presumed that the parts or elements so combined are all old. *Gould v. Rees*, 15 Wall. 191. *Brown v. Selby*, 23 Wall. 224. The patentee does not claim to have invented an elevator building, nor a grain-elevating apparatus, nor a hopper-scale, nor a spout to empty the hopper, nor railroad tracks, nor railroad cars. The court will assume from common knowledge that it was old at the date of this patent to construct buildings with railroad tracks running into or alongside of them, and with apparatus in such buildings for elevating into the upper part thereof grain brought in cars upon such tracks; and that it was old to elevate the grain into a hopper-scale, where it was weighed, and from whence it was run into bins by a spout. It was also old to load cars by running grain into them from a bin in an elevator building by means of a spout.

The claims in the patent in question are for a combination of the following elements or parts: (1) A stationary building; (2) two railway tracks which must pass into, or on the opposite sides of, such building; (3) elevating apparatus; (4) an elevated hopper-scale, with a valve or slide in the bottom; (5) a discharge spout, adapted for discharging the grain directly from the bottom of the hopper into the car on the opposite side of the building from the car from which the grain was taken. The conveyer and additional chute and additional delivery spout of the second claim being only used when the car to be unloaded does not stand directly opposite to the one into which its contents are to be transferred, hence there is a provision for duplicating some of the operative parts, and adding the conveyer. Now, it is evident that none of the parts or elements of this combination perform any different function in the combination than they respectively did when operating separately; and it is equally clear that the result of the operation of these elements as combined is the same, and no more, than the sum of the results of these elements when operating separately. The railroad tracks bring the cars to the building; the building supports the elevating apparatus; the elevating apparatus elevates the grain to the hopper of the hopper-scale; and the discharge spout delivers the grain to the car opposite to that from which it is taken, instead of delivering it into a bin; the receiving car being nothing more than a substitute for the bin located in the elevator building, and resting on the railway track, instead of resting on some part of the building, as the bin does. It therefore seems to me that the combination described in the patent and covered by the claims is nothing but an aggregation of old parts, with nothing done by either of the parts or by all when combined which was not done by them when acting separately.

The specifications of the patent seem to assume that the combination of the building, the elevating apparatus, the hopper-scale, and the dis-

charge spouts from the bottom of the hopper were old, and that the only new element introduced into combination with them was the railroad tracks; but it is obvious that the railroad tracks in this combination perform no function which would not be performed by an ordinary wagon road, upon which a wagon loaded with grain could come into or along-side the elevator building, so that its load of grain might be shoveled into the chute in the same manner as the grain from a car is shoveled or dumped into the chute, from whence it could be elevated to the hopper of the hopper-scale, and from thence delivered by a spout into a wagon standing on a road-way on the opposite side of the building. The railroad track is a mere way upon which the car runs, as the road is the way upon which the wagons might run; and in this combination the railroad track, which allows a car loaded with grain to be run into or along-side the elevator building, and from which the grain is taken, performs no function and produces no result which it did not do when it brought the car to the elevator building, so that the grain it contained could be elevated to the hopper-scale; and thence discharged into a bin; and the railroad track, which carries the car which receives the grain from the hopper, performs no different function than it does when it furnishes the way for the car which receives the grain from the bins, in an elevator building. Indeed, I do not see how the device covered by this patent and claims in any essential sense differs from the ordinary grain elevator buildings located along-side of a navigable stream, as they have been for many years past, with a railroad track on one side, and the navigable stream on the other side. The tracks allow the car to bring the grain into or along-side the elevator building; the elevating apparatus takes the grain from the cars into bins, weighing it as it is delivered into the bins; and from the bins it is run by delivery spouts into ships in the water, perhaps weighing it again in its passage to the ship from the bins. And I cannot see that the car to be loaded, or the track on which the car stands, performs any function different from the warehouse bins, or the ship, or a car standing on a railroad track and loaded from bins in an elevator.

The former order overruling the demurrer in these cases is set aside, the demurrer sustained, and the bills dismissed for want of equity.

BOSTON WOVEN HOSE CO. v. STAR RUBBER CO. *et al.*

(Circuit Court, D. New Jersey. June 19, 1889.)

INFRINGEMENT OF PATENTS—PARTIES.

On bill for infringement of patents, where an individual defendant has no interest in the machines alleged to be infringements except as an officer of a defendant corporation, and there is no evidence that he as an individual has violated any of complainant's rights, or that defendant corporation is insolvent, or that a decree against it would not protect complainant, the bill will be dismissed as to him.

In Equity. Bill for infringement of patent.

Livermore & Fish, for complainant.

Wm. B. H. Dowse, for defendants.

WALES, J. The plea of the defendant, Bell, sets forth that at and before the bringing of this suit, and before the date of the letters patent, No. 361,994, he then was, and now is, the secretary of the Star Rubber Company, and also an officer of the New York Woven Hose Company, and that in such official capacity he then performed and now performs the duties of those offices; that he personally neither owned nor owns, had or has, any interest in the machines described as "circular looms," which are alleged to infringe said letters patent, either in making, selling, or using them, only in so far as he is an officer of the Star Rubber Company, or of the New York Woven Hose Company; and that all his acts in relation to the alleged infringing machines have been in his official capacity as an officer of one or the other of those companies. The form of the plea being unobjectionable, the plaintiff having set it down for argument, the facts, being well pleaded, are admitted, and the only question is as to its sufficiency. There is no evidence that the defendant corporation is insolvent, or that Bell, as an individual, has violated any rights of the complainant; nor does there appear to be any just ground for believing that a decree against the Star Rubber Company alone would not fully protect the complainant in the use of its patent, as far as that object can be obtained by the prosecution of this suit. Under these circumstances, to compel Bell to make a separate answer and defense, would only harass him, and unnecessarily increase the costs, without producing any substantial advantage to complainant. A decree for an injunction against the Star Rubber Company would bind its officers and agents, without making them personally parties to the bill, and so also a decree for an account could be made fully operative without their being joined individually as defendants. *Howard v. Plow Works*, 35 Fed. Rep. 745. See, also, *Nickel Co. v. Worthington*, 13 Fed. Rep. 392; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. Rep. 556; *Lewis v. Machinery Co.*, 21 Blatchf. 184, 19 Fed. Rep. 826. The plea is therefore sustained. Let a decree be entered dismissing the bill as to the defendant Bell.

FALE v. GAST LITH. & ENG. Co., Limited.

(Circuit Court, S. D. New York. September 25, 1889.)

1. COPYRIGHT—ACTION FOR INFRINGEMENT—PROOF OF PUBLICATION OF NOTICE.

Rev. St. U. S. § 4962, declares that no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof (in the case of a photograph) by inscribing upon some portion of the face or front of the several copies the words, "Entered according to act of congress," etc. Held that, though compliance with this requirement must be pleaded and proved as a prerequisite, complainant is not required to furnish separate, distinct, and specific proof as to each copy which he may have published. Affidavits of those in charge of the preparation of all the copies he has published are sufficient to make out a *prima facie* case.

2. SAME.

The *prima facie* case thus made is not overthrown by affidavits that defendants produced their lithograph from one of complainant's photographs, mounted upon a card, without any notice of copyright, but similar in all respects to the cards used by complainant, in the absence of any proof as to the identity of the individual from whom defendant purchased the copy.

In Equity. Bill for injunction against infringement of copyright.

Isaac N. Falk, for complainant.

Chas. C. Gill, for defendant.

LACOMBE, J. The statute provides (section 4962, Rev. St.) that no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof (in the case of a photograph) by inscribing upon some portion of the face or front of the several copies published, or on the face of the substance upon which they are mounted, the words, "Entered according to act of congress," etc. Compliance with this requirement must be pleaded and proved as a prerequisite to the maintenance of complainant's action; but it would lay an unreasonable burden upon him to require separate, distinct, and specific proof as to each one of the copies—in some cases, perhaps, thousands in number—which he may have published. General testimony is sufficient to establish a *prima facie* case. Complainant has presented the affidavits of those of his employes who have had charge of the preparation of all the copies he has published, and their testimony shows compliance with the statute.

The only question left for consideration is whether the case made by the defendant is sufficiently strong to break down this *prima facie* proof. All that appears by the answering affidavits is that defendants produced their lithograph from one of complainant's photographs, mounted upon a card, without the name of the subject, nor any notice of copyright, but similar in all respects to cards (or mounts) used by complainant. In the absence of any proof as to the identity of the individual from whom defendant purchased the copy, this evidence is not sufficient to warrant a finding, at this stage of the case, that the particular copy was published by complainant in the condition in which defendant saw it; and to require complainant to supplement his general testimony as to the copies published by him, with specific evidence as to the one in question, would be unreasonable, in view of the fact that such copy is not produced. The motion for injunction is granted.

WILFRED *et al.* v. MYERS *et al.*

(District Court, E. D. Virginia. October 24, 1889.)

SHIPPING—AGREEMENT TO CHARTER—WARRANTY.

Brokers tendered to defendants a vessel for charter of a certain registered tonnage. Defendants, being unable to find the cubical capacity of the vessel described in any of the published ratings of vessels at that port, made inquiry of the brokers, who informed them that it was a certain amount, and defendants then agreed to accept it. A charter-party was drawn up, in which defendants inserted the represented cubical capacity, but the brokers gave notice that they had no authority to guaranty cubical capacity, and it was agreed to send the charter-party to the vessel's agents, who, on receipt of it, declined to guaranty the capacity. *Held*, that there was no contract, as the representation made by the brokers as to the capacity was, under the circumstances, a part of the contract on the part of the defendants, whatever it may have been on the part of the brokers.

In Admiralty. Libel for breach of contract to charter.

This is a libel *in personam* for damages and expenses resulting from the breach of an alleged contract for the charter of the English steamship *Netherholm* for a shipment of cotton from Norfolk to Liverpool. Bowring & Archbold, of New York, and Lamb & Co., of Norfolk, were the brokers of the libelants in the transaction upon which the libel is founded. The leading facts of the case seem to be as follows: On inquiry from Myers, one of the respondents, about 9 o'clock A. M. on the 11th of October, 1888, at Norfolk, Page, a member of the firm of Lamb & Co., stated that his firm had in hand that morning two ships for charter, one of them being the first-class new English steamer *Netherholm*, which would be due at Norfolk on the 1st November, rated at 1,295 tons registered capacity and 2,900 tons dead weight, which he would charter at 62s. 6d. per registered ton. At Myers' request an option on this ship was given until 11 o'clock that day. The price was the highest that had been given that season, and is about as high as is ever given in Norfolk. Myers found on going to his office that the *Netherholm* was not described in any of the books in which the capacity, dimensions, and character of ships are published. The registered tonnage of a ship is determined by arbitrary rules of measurement that do not afford accurate information of her cubical and carrying capacity. The *Netherholm* had never been loaded at Norfolk. It resulted from these circumstances that Myers, on going to his office, found no *data* to guide him to a knowledge or safe conjecture of the actual cubical capacity of the *Netherholm*; and he was put upon inquiry of Page as to her real capacity. Page received from the New York house that morning a telegram stating the cubical capacity of the *Netherholm* to be about 141,356 feet, and communicated the fact to Myers in a personal interview at the office of Myers & Co., about 11 o'clock. Vessels differ considerably in their cubical capacity, compared with their nominal registered tonnage. Some of them have as little as 80 cubic feet to the registered ton, while others have more than a hundred. When Myers and his partner were informed that the *Netherholm* had a cubical capacity of 141,356 feet, which was nearly 110 cubic feet to the ton, and which (estimating 22 feet as the cubical dimensions of a bale of cotton) made the *Netherholm* a vessel which would

carry five bales to the registered ton, whereas most vessels carry less, some of them not more than four bales to the ton; they agreed to take this ship at the unusually high price of 62s. 6d. per registered ton; whereupon Page returned to his office, and prepared a charter-party, which he sent to the office of Myers & Co. Later in the day Myers returned to his office, and found there the charter-party, which had been sent for his signature. On reading it he discovered that it contained no mention of the cubical capacity of the *Netherholm*. He thereupon inserted in the paper the phrase, "Owners guaranty steamer's capacity for cargo, 141,356 cubic feet," signed the charter-party, and returned it to Lamb & Co. At a conference soon held between Page and himself, Page insisted that his correspondents in New York would not guaranty the capacity to be 141,356, and that he had stated the capacity to be about that figure. Myers then inserted the word "about" in the phrase, but afterwards erased it. Page expressed the belief that the New York firm would not sign the charter with those words in, as they had not authorized him to guaranty. It was agreed between them that the charter should be sent to the house in New York with the phrase in it, and also with a clause allowing the ship to receive cargo at the adjacent port of Newport News. The charter-party was sent to New York in the form thus described. On the next day, the 12th October, Page received a telegram from the New York house, stating that the paper was not in proper form, and that Lamb & Co. were not authorized to guaranty cubic capacity. This was promptly shown to Myers, who at once replied that he had consented to take the vessel on the faith that her cubical capacity was what had been stated, and that their representation of the capacity could not have been made for any other purpose than to enable him to determine whether to take her or not. The New York house also required that the charter-party should declare that the ship had sailed on the 6th October from Mayport, England, for Halifax and Bridgewater, and should not stipulate that she was due at Norfolk on the 1st November, as had been written in the charter. Myers refused to consent to the cancellation of the phrase guarantying the cubical capacity of the ship, and little was said of the clauses relating to Newport News, and to the ship being due at Norfolk on the 1st of November. The New York house, Bowring & Archbold, had not in their telegram of the 12th to Lamb & Co. either expressly affirmed or disaffirmed the charter-party, unless their refusal to guaranty the ship's cubical capacity was a disaffirmance. Then followed attempts between Page and Myers to reach a compromise, which were continued until the 16th October, orally and by letters. I do not think that these negotiations materially change the character of the transaction which I have set forth. On the 16th, Bowring & Archbold telegraphed that the owners of the *Netherholm* declined any compromise whatever, and insisted upon the charter being carried out as verbally arranged with Lamb & Co., before the charter was signed. This telegram was apparently intended as responsive to the last sentence of a letter from Myers & Co. to Lamb & Co., of the 13th, in which they had said:

"The situation then appears to be that no completed contract exists between us, inasmuch as Messrs Bowring & Archbold, acting for the owners, have repudiated a charter which no one can deny contained the essential features of the proposition made by you to us, viz., to charter S. S. Netherholm, 141,356 cubic feet cargo capacity, for 62s. 6d. per ton register; which proposition they claim was not authorized in one of its most essential features; and you have tendered us, under their instructions, a contract which we will not accept because it does not embody what you proposed on the day you first offered us the vessel."

In reply to the peremptory telegram of the 16th, from Bowring & Archbold, Myers & Co. telegraphed on the same day, as follows:

"Charter, as originally drawn, which you have repudiated and declare unauthorized, was in accordance with the original proposition. You having repudiated it, we consider negotiations between us at an end."

It may be added that, among other things that transpired after the 16th October, was the fact that freights about that date took a decided decline; that Lamb & Co. chartered the Netherholm to another Norfolk shipping firm at 57s. 6d.; that on the 18th the owners of the ship offered to allow the insertion of the clause guarantying the ship's cubical capacity; and that Myers & Co. declined then to accept the charter, in consequence of having engaged their freights to other steamers.

It was shown in evidence that it is quite unusual for charter-parties entered into in Norfolk to contain a guaranty of cubical capacity; and respondent Myers testified that this fact results from the concurrent fact that the cubical capacity of almost all ships loaded at Norfolk is known either by their having been loaded before at this port, or that almost all of the ships that apply for cargoes for European ports are described, as to their measurement, tonnage, and cubical capacity, in books published for the purpose of giving this information to shippers and charterers. The damages claimed by libelants in this suit are the difference between the freight money which they received at the rate of 57s. 6d. per registered tonnage, and what they would have received at the rate of 62s. 6d., with their expenses; aggregating about \$1,640. In passing upon this case I have not the aid of any written brief from counsel for the libelants, and do not recollect that in their oral argument any authorities were cited in support of the propositions for which they contended.

Walke & Old, for libelants.

Sharp & Hughes, for respondents.

HUGHES, J., (*after stating the facts as above.*) It is a matter of doubt from the evidence in this case whether Lamb & Co. had any authority to make a complete and final contract for the charter of this ship. Their function would seem to have been merely to find a customer, and to state to him the terms of charter; all besides depending for validity upon ratification by Bowring & Archbold in New York. If they had authority to contract at all, and if the letters and telegrams of Bowring & Archbold are to be regarded as defining that authority, it was merely to charter the first-class new steamer Netherholm, bound at that time to Halifax and Bridgewater, registered tonnage, 1,295, dead-weight, 2,900, for 62s.

6d. per ton registered. The entire contention of the libelants rests upon the assumption that this was the only contract that Lamb & Co. had authority to make, and that Myers & Co. knew this from custom or otherwise; and, having made some contract with Lamb & Co., this and nothing else was the contract that was made. It was evidently on a different basis that Myers & Co. proceeded in the negotiation. Page was made to know from the commencement of the negotiation that the acceptance of the ship by Myers & Co. at the high rate charged depended upon her cubical capacity. This was not known to Myers & Co., and no source was open to them from which they could obtain the information, except Lamb & Co. This firm could have informed Myers & Co. that the capacity was 141,356 for no other purpose than to aid them in making up their minds whether to take the ship or not. It was not meaningless, objectless talk. It was a piece of information known to themselves, which Myers & Co. were casting about to obtain, and which Myers & Co. could not obtain except from them. It was the inducement, or a chief inducement, to taking the ship. Nor was it until the cubical capacity was given, that Myers & Co. declared that they would take the ship. Lamb & Co.'s statement of the ship's capacity, under the conditions and circumstances existing at the time of the statement, made it a part of the contract on the part of Myers & Co., whatever it might have been on the part of Lamb & Co. A warranty or guaranty may enter into a contract without express words to that effect or even the intention of the person who makes the representation which constitutes it. What, then, was the result of this negotiation at the hour of 11 o'clock on the morning of the 11th October? Myers & Co. contracted on the inducement of the ship's capacity being 141,356 cubic feet. Lamb & Co. contracted on the basis that the capacity was not guaranteed. Their minds did not meet; for the law makes the statement of the cubical capacity, under such circumstances, a warranty. When the charter came afterwards to Myers & Co. for signature, this discordance of minds immediately developed itself. Myers inserted the cubical capacity clause; Page objected to it. Their minds had not met. When the charter subsequently went to New York, and the house there "repudiated" the capacity clause, it was thereby still further shown that the minds of the contracting parties had not met, and were at hopeless variance. There had been no contract. Nothing is more true in the transactions of business men than that "it takes two to make a bargain." It is elementary law that there shall be a meeting of minds—a mutual agreement—upon all its material terms and provisions, in order to constitute a contract. If a firm in New York sends orders to Norfolk that a ship shall be chartered as they prescribe, and not otherwise, sending also her cubical capacity; and negotiations are made in which the other party declares, "I will take the ship on your statement of her cubical capacity, which I have no other means of ascertaining except from you;" and the firm in New York afterwards withdraws the statement, and insists upon its obliteration,—then there is no contract. Such was the case at bar, and decree must be for respondents.

On the subject of warranty, where it is not expressed in the contract,

and arises necessarily out of the representations of parties, made during the negotiation of the contract, the authorities sustaining my view of this case are very numerous. See Whart. Ag. §§ 72, 158, 161, 167, 168, 170, 708; 1 Add. Cont. § 65; *Schuchardt v. Allens*, 1 Wall. 369; Pol. Cont. 527, 528; *Insurance Co. v. Kasey*, 25 Grat. 270; *Grim v. Byrd*, 32 Grat. 800; *Veazie v. Williams*, 8 How. 134; *Crump v. Mining Co.*, 7 Grat. 352; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Bannerman v. White*, 10 C. B. (N. S.) 844; 2 Add. Cont. §§ 625, 626; *Smith v. Richards*, 13 Pet. 26, 38, 42; *Carv. Carr. by Sea*, 133-136; *Cave v. Coleman*, 3 Man. & R. 2; *Salmon v. Ward*, 2 Car. & P. 211; *Wood v. Smith*, 4 Car. & P. 45; 1 Evans, Ag. 76, 77; *Bristow v. Whitmore*, 9 H. L. Cas. 404; *Behn v. Burness*, 3 Best & S. 751; *Louber v. Bangs*, 2 Wall. 736, 737; *Glaholm v. Hays*, 2 Man. & G. 257; *Olive v. Booker*, 1 Exch. 416; *McAndrew v. Adams*, 1 Bing. N. C. 29; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. Rep. 346.

PRICE v. THE SONTAG.

(District Court, D. New Jersey. October 10, 1889.)

COLLISION—VESSELS AT DOCK—NEGLIGENT STOWING OF ANCHOR.

The canal-boat M. and the bark S. were lying at dock securely fastened, with their bows pointing in the same direction. The S. was astern of the M. about 5 feet, and drew 30 feet forward and 19 feet aft. The M. drew 7½ feet. The depth of water in the dock at high-tide was about 21 feet, with a rise and fall of 6 feet. The in-shore anchor of the S., weighing 4,000 pounds, with a shank 8 feet long, hung from her port bow, so that the stock was even with, or just above, the surface of the water. The M. was hemmed in by the S. and other boats, and was unable to move in any direction. The dock was full of boats and ice, with the wind blowing off shore. When the tide was half ebb, and the S. aground, the anchor of the S. caught under the bilge of the M. on her starboard stern quarter, and the M. was careened to port and pitched forward. The anchor of the S. was lowered, but not enough to clear the M., as the tide receded, and the fluke penetrated the seam of the M., causing a leak, which sank her in a few hours. Held, that the S. was solely to blame, as her anchor was not properly stowed.

In Admiralty. Libel for damages.

Hyland & Zabriskie, for libellant.

Owens, Gray & Sturges, for respondent.

WALES, J. The libellant sues to recover damages alleged to have been sustained by his canal-boat, T. A. McIntyre, by coming in contact with the fluke of the Sontag's anchor on the 15th of February, 1888, under the following circumstances: Both vessels had been lying for several days in the Standard Oil-Dock, at Bayonne, in the state of New Jersey, with their bows pointing in the same direction, and their port sides securely fastened to the wharf by bow, breast, and stern lines. The Sontag was astern of the McIntyre, at a distance of not exceeding five feet. The bark, being loaded nearly to her full capacity, drew 20 feet forward and 19 feet aft. The canal-boat, having on board 243 tons of coal, drew 7½

feet. The depth of water in the dock at high tide is about 21 feet, with a rise and fall of 6 feet. The inshore anchor of the Sontag, weighing 4,000 pounds, with a shank 8 feet long, hung suspended from her port bow, so that the stock was even with or just above the surface of the water. The two vessels had remained in their respective positions, without injury to either, until the day of the accident. On that day the McIntyre was hemmed in by the Sontag at her stern, and by other boats along-side and ahead of her, and was unable to move in any direction. The dock was full of boats and floating ice, with the wind blowing strong from the north-west and off shore. At about 4 P. M., the tide being half ebb, and the Sontag aground, the captain of the McIntyre discovered that the anchor of the Sontag had caught under the bilge of his boat, on her starboard stern quarter, and that she was careened to port, and pitched forward. He immediately called to the people on the Sontag to lower their anchor, which was done, but not sufficiently to clear the McIntyre as the tide receded; and as a consequence the fluke penetrated a seam of the boat, making a V-shaped fracture, and causing a leak which sank her in a few hours.

The libel charges negligence on the part of the Sontag in leaving her anchor suspended in the manner described, when, according to rule and usage, it should have been carried at cat-head, or hauled in. The answer admits that the injury complained of was caused by the Sontag's anchor, but alleges that she had remained in the same place for several days, with her anchor hanging from the hawse-pipe, without doing any harm, and without complaint or notice to remove it, and that the anchor was promptly lowered on request. The answer also denies the existence of any rule or custom which requires the in-shore anchor of a vessel, moored as the Sontag was, to be catted or hauled in, and claims that the damage was caused primarily by the inattention of the McIntyre's captain to the fastenings of his boat, which were allowed to become loose, and let her sag down on the Sontag's anchor. There is no proof of negligence on the part of the canal-boat. She had taken her berth first, the Sontag coming in afterwards; and, if it was incumbent on either to keep at a proper distance from the other, that duty belonged to the bark, so long as the canal-boat remained stationary. The evidence does not show that there was any material change in the position of the McIntyre. The situation required some vigilance on the part of both vessels. When two vessels, moored at the same wharf, are lying so near to each other as these two were, there will be more or less play on their lines, with the rise and fall of the tide, and consequently some danger of collision; and it is the duty of each so to dispose of its tackle as to avoid injuring the other in case they come together. The Sontag was in fault by failing to perform this duty. The expert testimony proves the general custom and usage to be that vessels moored at wharves or piers, as these were, must have their in-shore anchors catted, and the off-shore ones hauled in on the forecastle. Such also is the rule established by the board of harbor masters of the port of New York, (rule 9.) The custom is founded on sound prudential reasons, for mutual protection in case of collision; and

one purpose of the rule is to prevent just such accidents as the one which happened to the McIntyre; since, if the Sontag's anchor had been catted, the accident could not have occurred. But, independently of local customs or rules, the maritime law requires that vessels, when navigating narrow rivers or coming into docks, should have their hamper properly stowed. *The Palmetto*, 1 Biss. 143; *The Kolon*, 9 Ben. 198, 199. The conclusion is that the Sontag was solely to blame; and there must be a decree for the libelant, with an order of reference to ascertain the damage.

CAMILLE v. COUCH.

(District Court, E. D. South Carolina. October 22, 1889.)

ADMIRALTY—JURISDICTION.

Admiralty will refuse to take jurisdiction of a libel for personal injuries inflicted by the master of a foreign vessel on a foreign seaman while on the high seas, where the relations of libelant to the ship have been settled by his and respondent's consuls.

In Admiralty. Libel for damages.

C. B. Northrop, for libelant.

J. N. Nathans, for respondent.

SIMONTON, J. The libel is for personal injuries inflicted by the master of the steam-ship *Resolven* on libelant on the high seas off the Canary islands. Libelant shipped at Cardiff, Wales, on British steam-ship *Resolven*, signing the articles as a resident of the isle of Malta. His engagement was for one year, and the steamer was bound for the port of Charleston. Reaching this port, the libelant sought the French consul, alleging that he was a French citizen, and asking his good offices in obtaining a release from the shipping articles. The French consul saw her British majesty's consul, and, after some discussion and negotiation, libelant obtained his discharge, received the balance due him for wages to this port, and released the ship. The steamer is about to put to sea to-day. The libel was filed this morning, and the respondent was arrested. The action is between foreigners. The cause of action was on the high seas on a foreign vessel. The cause, however, is within the jurisdiction of this court, (*The Belgenland*, 114 U. S. 362, 5 Sup. Ct. Rep. 860,) if it chooses to take jurisdiction. The relations of libelant to this ship were settled by his own consul with the consul of the respondent. These gentlemen discussed these relations when they made the settlement. Under all the circumstances I will not interfere. Dismiss the libel.

DELBANCO v. SINGLETARY *et al.*

LEVY *et al.* v. SAME *et al.*

(Circuit Court, D. Nevada. July 29, 1889.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION.

Defendants demurred to plaintiffs' complaints in the state court. The demurrers were heard and sustained in the state court, and plaintiffs were given leave and time to file amended complaints, which they filed. To plaintiffs' amended complaints defendants demurred, and at the same time filed their petitions and bonds for removal of the cases to this court. *Held*, that the petitions and bonds were not filed within the statutory time, and that the cases must be remanded.

2. SAME—FILING TRANSCRIPT—RULE OF COURT.

Under rule 79 of this court (ninth circuit) the plaintiff may, at any time after defendant has filed and submitted to the state court his petition and bond for removal of the cause, procure a transcript of the record of the cause from the state court, and file the same in this court, and, after service of notice thereof, as prescribed in said rule, this court will take jurisdiction of the case for all purposes.

(*Syllabus by the Court.*)

Motion to Remand.

J. A. MacMillan and M. S. Bonnfild, for plaintiffs.

W. F. Goad, Wm. S. Bonnfild, and W. C. Belcher, for defendants.

SABIN, J. The points involved in each of the above cases are substantially the same, and the cases are considered together, the same ruling being applicable to each case. The actions were begun in the state court, and removed to this court. Summons and complaint were served on the defendant Singletary, May 27, 1889. By state statute defendants were required to plead or answer within 10 days after the date of service of summons, exclusive of the day of service, *i. e.*, June 6, 1889. On that day, to-wit, June 6, 1889, all of the defendants in the actions appeared by counsel, and filed demurrers to the complaints on various grounds. On June 8th the demurrers were heard by the court, and sustained, and plaintiffs were given 10 days within which to file amended complaints, and defendants were given 20 days after service of said amended complaints to answer thereto. On June 15th plaintiffs served and filed amended complaints in each action, and on July 3d defendants filed demurrers thereto, together with their petitions and bonds for the removal of the cases to this court, and on July 5th the state court ordered the cases transferred to this court. Under rule 79 of this court plaintiffs caused a transcript of the record in each case to be filed in this court on July 8th, and they now move that the cases be remanded to the state court, on the ground that the petitions and bonds for removal were not filed within the time required by the act of congress of August 13, 1888.

Under repeated rulings of this and other circuit courts it is clear that the cases must be remanded. It has been repeatedly held by the supreme court, under the removal act of 1875, that the hearing of a demurrer was a trial of the case within the meaning of that act. *Alley v.*

Nott, 111 U. S. 472, 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 112 U. S. 711, 5 Sup. Ct. Rep. 360; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. Rep. 855. It has also been repeatedly held by the same court, under the removal act of 1875, that the "term at which the cause could be first tried" was the first term after issue joined, when, in the ordinary course of proceedings, the case could be ready for trial, and be tried; and that, where the trial of a case had been continued over the first term of court at which it could be tried, either by order of court or stipulation of parties, a petition for removal of the case, filed thereafter, came too late. *Babbitt v. Clark*, 103 U. S. 606; *Car Co. v. Speck*, 113 U. S. 84, 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. Rep. 743; *Kerting v. Oleograph Co.*, 10 Fed. Rep. 17; *Theurkauf v. Ireland*, 11 Sawy. 512, 27 Fed. Rep. 769; *Keeney v. Roberts*, 12 Sawy. 39, 39 Fed. Rep. 629. From these authorities it will be seen that parties desiring to remove their cases to the national courts have always been held to a strict compliance with the statute relative thereto.

The removal act of 1888 is much more restrictive than that of 1875. The right of removal is confined to the defendant, and he must file his petition and bond for removal "at the time, or any time before, the defendant is required by the laws of the state, or the rules of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff." Under the removal act of 1888 writs of error or appeals do not lie to an order remanding a case to the state court. But if they did, it cannot for a moment be doubted but that the supreme court would hold the defendant to a strict compliance with the statute in all respects. In the cases at bar the petitions and bonds for removal were not filed until the demurrers to the amended complaints were filed, and after a hearing and judgments on the first demurrers. This was clearly too late. *Wedekind v. Southern Pac. Co.*, 36 Fed. Rep. 279; *Dixon v. Telegraph Co.*, 38 Fed. Rep. 377; *Hurd v. Gere*, 38 Fed. Rep. 537; *Kattel v. Wyllie*, 38 Fed. Rep. 865. We think it will be better for all parties concerned, will save time and expense to litigants, if it is clearly and distinctly understood that parties desiring to remove their cases from the state courts must act promptly, and comply strictly with the provisions of the statute relative thereto; that courts have not the authority to, and will not, by doubtful construction, enlarge, change, or modify the clear terms of the statute. The statute is clear and simple as to the time when the petition and bond for removal must be filed, and parties must comply with it. In *Wedekind v. Southern Pac. Co.*, *supra*, decided by this court, an inference might arise that possibly an order of the state court, extending defendant's time to plead, might be construed as extending his time within which to file his petition and bond for removal of the cause. If such inference fairly arises in that case we wish here to correct it, as under the authorities cited it seems clear that such an order of the state court could not have any such effect. The state court could not, by order or otherwise, enlarge or modify the terms and provisions of an act of congress, nor confer jurisdiction upon this court, which otherwise it would not have.

It is urged on the part of two of the defendants that, inasmuch as the summons and complaint were served on only one of the defendants, the time of the defendants not served to plead or answer must be considered as commencing at the date of the order of court sustaining the demurrers, and giving plaintiffs leave and time to file amended complaints. We think this point untenable. The defendants all appeared at the time of filing the demurrers to the first complaints, and judgments were had in their favor upon said demurrers. Such appearance was a waiver of service of summons, and necessarily of the intervening time between service of summons, had they been served, and the time at which they filed their demurrers. And further, the actions are not separable, as between the defendants, and they could not be removed as to two of the defendants only. They must be removed as to all or none.

It is further urged by defendants that these motions to remand are premature, at the present time, and cannot now be entertained or heard by the court. It is contended that, as the removal act only requires the defendant to file a copy of the record of the case in this court "on the first day of its then next session, * * * and, said copy being entered as aforesaid in said circuit court, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court," therefore the court cannot entertain these motions until the next term of court, to-wit, next November term or session. In support of this position counsel cite *Railroad Co. v. Koontz*, 104 U. S. 5. We do not consider this case particularly applicable to the cases before us. The point here involved was not considered or discussed in that case, but rather the reverse, to-wit, the power of the circuit court to permit a copy of the record to be filed after the first day of the term when it should have been filed. And the supreme court held that, in a proper case, on cause shown, the circuit court might permit the record to be filed after the first day of the term at which it was due. But the opinion in that case does not intimate that the record may not be filed in the circuit court at any time after the petition and bond are filed in the state court, and before the next term of the circuit court, by any party interested, other than the removing party, or that, being so filed, the circuit court would not have full jurisdiction of the case. Counsel also cite *Railway Co. v. Lumber Co.*, 36 Fed. Rep. 9. This case is closely analogous to the cases before us, but we are not able to concur in the conclusions reached in that case. Indeed, we think the tendency of the authorities cited and referred to in that case is to an opposite result. It does not appear from that case, as reported, whether or not there is any rule of court in the eighth circuit regulating the matter of procuring the record from the state court by any party other than the party seeking to remove it, and filing it in the circuit court. From the fact that no mention is made of any such rule of court, we infer that the court has not adopted any such rule in reference thereto, as prevails in this circuit. Rule 79 of this circuit provides:

"Whenever proper proceedings have been perfected in a state court to remove a case from such court to this court, pursuant to any statute of the

United States, either party may at any time thereafter, as of course, file the transcript required by law in this court, and serve written notice of such filing upon the adverse party or his attorney; and upon filing in this court satisfactory evidence of the service of such notice the clerk shall enter the action upon his register, and thenceforth the provisions of rule 78 of this court shall be applicable thereto, and the same proceedings may be thereafter had as if the transcript had been filed by the party removing the case at the time prescribed by law."

Rule 78 provides in regard to amendments of pleadings, etc. Rule 79 was adopted in March, 1879. It was made under the authority of section 918, Rev. St., which provides:

"The several circuit and district courts may from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the return of writs and process, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Rule 79 was the outgrowth of the case of *Mining Co. v. Bennett*, 4 Sawy. 289, and was intended to cover that and all similar cases where long delay might occur by reason of the neglect of the removing party to file the record in this court. As said by the court in that case:

"It is true, as urged by defendant, that the statute makes no provision for filing the copy of the record before the first day of the next succeeding term, or by any other person than the party removing the cause. But it is also true that there is nothing prohibiting the filing of the record at an earlier day, or by any party interested other than the one removing the cause."

The reasoning of the court in that case is applicable in the cases before us. The next term or session of this court begins November 4th. The petitions and bonds for removal were filed July 3d. Hence, if defendants' contention is correct and tenable, there must be a delay of four months in these cases; and this merely for delay, for, as we have seen, upon examination of the records, the cases would have to be remanded whenever the court should take them up and consider them, four or five months hence. But it is conceded that for some purposes the circuit court may and will assume jurisdiction of a case before the record is filed by the removing party, and will issue such writs and make such orders as may be necessary to preserve the rights of the parties; and this from the apparent necessity of preserving those rights. That in such cases this court may and will issue or discharge writs of attachment, issue or dissolve injunctions, appoint receivers or discharge them, issue commissions to take testimony; in short, will exercise its highest authority and powers, and virtually assume full jurisdiction of the case and parties. This, in effect, is the substance of the authorities cited in *Railway Co. v. Lumber Co.*, *supra*. But will or can a court properly exercise these high powers and functions without first inquiring and determining whether or not it has jurisdiction to make any orders in the case affecting the rights of the parties? In the cases cited in *Railway Co. v. Lumber Co.*,

supra, it is evident that the record in each case, to a certain extent, and in some form, fully or in brief, and by some means, must have been laid before the court, before the court could have been asked to make any orders therein. And why should a court hesitate, or decline to look fully into the record, in the first instance, and determine whether or not it has any jurisdiction of the case, when, months afterwards, it must make this examination, and, failing to find jurisdictional facts, must vacate all orders theretofore made, and remand the case to the state court? Jurisdiction, when challenged, is the first and fundamental question to be settled in all cases, and without it all proceedings are vain. Without the aid of rule 79 we would have little hesitancy in holding that these motions to remand could now be properly entertained and heard by the court. We think the statute directory, not mandatory, in requiring the defendant to file a copy of the record in the circuit court "on the first day of its next session." In *Railroad Co. v. Koontz*, *supra*, it was held that, if the removing party did not file a copy of the record on the first day of the term, it was in the discretion of the court to permit it to be filed thereafter on cause shown. If the statute is directory as to time, is it not equally so as to person? It certainly does not prohibit the filing of the record by any person interested other than the defendant, or at a date earlier than the first day of the next session of court.

Rule 79 of this court has been in effect for 10 years. It is believed that it is not opposed to, or in contravention of, any statute, or of the rights of any party litigant. On the contrary, its sole object and purpose is to carry out the express terms of the statute "for the advancement of justice, and the prevention of delays in proceedings." The practical working of the rule has been most salutary, and demonstrative of its wisdom, utility, and propriety. It works no hardship upon any one not seeking delay only; and courts will not brook wanton delay in proceedings before them, when the opposite party is urging audience and judgment. We are not disposed to vacate or rescind a rule believed to be wholly lawful, and in harmony with the statute, the practical effect of which is only good, and in aid of "the advancement of justice and the prevention of delays in proceedings," in this court. Let the cases be remanded to the proper state court.

AMERICAN LOAN & TRUST CO. v. EAST & WEST R. Co. *et al.*

(Circuit Court, N. D. Georgia. October 30, 1889.)

COURTS—DISTRICT JUDGES—VACANCY—AUTHORITY OF JUDGE OF ANOTHER DISTRICT—LEAVE TO SUE RECEIVER.

Rev. St. U. S. § 603, provides that "when the office of district judge is vacant in any district in a state containing two or more districts, the judge of the other or either of the districts may hold the district court or the circuit court, in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district during such vacancy." *Held*, that it is only when the office of district judge of one district is vacant that the judge of another district has authority to discharge judicial duties in the former district, and a leave granted by the judge of another district to sue a receiver, the judge of the district being out of the state, is void.

To the Honorable, the Judges of the Circuit Court of the United States for said District:

The petition of Charles P. Ball, receiver, appointed by the Honorable Don A. Pardee, respectfully shows unto your honors that one H. F. Alsabrook has brought suit for personal damages against your petitioner in the superior court of Polk county, in the state of Georgia, and in the petition filed therein the said Alsabrook alleges that on the 17th day of July, 1889, he obtained from the Honorable Emory Speer the following order: "Leave granted as prayed, the judge of the northern district being out of the state. July 17th, 1889. EMORY SPEER, U. S. Judge,"—all of which is more fully shown in the copy of the petition which was served upon one of the agents employed by your petitioner in conducting and operating the said railroad, attached hereto. Your petitioner further shows that he has been informed by the employes operating the said railroad that the alleged injuries were received from no fault or negligence on their part; that the plaintiff in said petition is a resident citizen of Cleburne county in the state of Alabama; and that the said alleged injuries were received within the state of Alabama; and petitioner prays that the said H. F. Alsabrook may be cited to appear before your honors at such time and place as your honors may direct, to show cause; if any he has, why said alleged order, granting leave to bring said suit, should not be revoked, and that, pending said notice, the said H. F. Alsabrook may, by the order of your honors, be restrained from further prosecuting said suit until the hearing and determination of this petition.

CHAS. P. BALL, Receiver.

Alexander T. Loudon, for receiver.

T. N. Broyles, for Alsabrook.

PARDEE, J. This cause came on to be further heard upon the petition of Charles P. Ball, receiver, in relation to the suit brought by one H. F. Alsabrook against the receiver in the superior court of Polk county in the state of Georgia, and was argued by Mr. Alexander T. Loudon for the receiver and Mr. T. N. Broyles for Alsabrook; whereupon, the court considering that under the proper construction of section 603 of the Revised Statutes it is only when the office of district judge of the

northern district is vacant that the judge of the southern district has authority, under said section, to discharge judicial duties in the northern district, it is ordered and adjudged that the leave granted by the judge of the southern district to said Alsabrook to institute suit against the receiver in this case be, and the same is, declared null, and of no force and effect. It is further ordered in this case that the said receiver may bring bill with suitable averments in the United States circuit court for the southern division of the northern district of the state of Alabama, which court appointed Charles P. Ball receiver, against the said H. F. Alsabrook, setting forth the facts in the case, and praying for injunction to restrain the further prosecution of the suit instituted by the said H. F. Alsabrook in the superior court of Polk county for the state of Georgia, all as authorized by section 3 of the act of congress, approved March 3, 1887, entitled "An act to determine the jurisdiction of the circuit court of the United States, and for other purposes."

STRONG v. UNITED STATES.¹

(Circuit Court, S. D. Alabama. June 17, 1889.)

APPEAL.—FROM DISTRICT COURT.—CLAIMS AGAINST UNITED STATES.

By act Cong. March 3, 1887, the district court is given concurrent jurisdiction with the court of claims "where the amount of the claim does not exceed \$1,000," and the same right to appeal and take writs of error is given to the plaintiff or the United States as "now reserved in the statutes of the United States in that behalf made." *Held*, that the statutes referred to as reserving the right to appeal and take writs of error were those relating to appeals and writs of error from judgments of the court of claims to the supreme court, and that in such cases the circuit courts have no jurisdiction of appeals from, and writs of error to, the district courts. *U. S. v. Davis*, 9 Sup. Ct. Rep. 657, followed.

Appeal from, and Error to, District Court. 34 Fed. Rep. 17.

On motions to dismiss the appeal and writ of error.

Geo. H. Patrick, for appellant.

M. D. Wickersham, U. S. Dist. Atty.

Before LAMAR, Justice, and PARDEE, J.

LAMAR, Justice, (*orally*.): The account which was the foundation of the action having been previously made out, submitted to, and approved by, the district court, was presented for payment to the treasury department. The comptroller of that department allowed a portion of the account, but disallowed the balance. To recover this balance suit was brought. The court below found that the balance due, after deducting the sum paid by the government, (which was credited upon the account,) was \$181, and rendered judgment accordingly. From this judgment the present appeal and writ of error are taken. The motion to dismiss rests upon two grounds. We deem it necessary to consider only the

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

first ground, viz., that neither an appeal nor a writ of error will lie to the circuit court from a judgment of a district court in cases brought under the statute of March 3, 1887. The appellant bases his claim to the right of appeal or writ of error, as the case may be, on the following language of the act, (section 9):

"That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes." 24 U. S. St. at Large, 507.

The question to be considered and determined is, what statutes are here referred to as reserving the right of appeal to the plaintiff or to the United States? Are they the statutes generally governing appeals and writs of error, or are they those which specially govern writs of error and appeals in the court of claims? The expressly declared purpose of the act is to give to the United States district and circuit courts concurrent jurisdiction with the court of claims, not only as to the classes of cases already within its cognizance, but also as to the new classes of cases embraced within the enlarged jurisdiction conferred by the act under consideration. The fourth section of the act provides—

"That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt."

We think the general scope and purpose of the act negatives the contention that any larger right of appeal is allowed in the district or circuit courts than is by the then existing statutes allowed in the court of claims. In other words, the peculiar nature of this enactment, and its special object, giving, as it does, a new field of jurisdiction to the United States courts, making it the same as the jurisdiction of the court of claims, within a limited amount, and the indications of the intention of congress found in the context of the act, restrain the general words of section 9, relied upon by the attorney for appellant. The supreme court of the United States has already passed upon the question of the interpretation of this section in *U. S. v. Davis*, and *U. S. v. Schofield*, which were considered and determined together. The decisions in those cases were announced on the last day of the late term of the court, and will be found in 131 U. S. 36, 9 Sup. Ct. Rep. 657. Schofield and Davis each filed their respective petitions in the district court of the United States for the district of Maryland, under the act of 1887, and each obtained judgment for \$25. A motion was filed by the appellee in each of those cases to dismiss the appeal upon the grounds that an appeal would not lie to the supreme court from a district court performing the appropriate duty of the district court; that the supreme court had no jurisdiction to re-examine judgments of the circuit or district courts since the act of February

16, 1875, in such actions, unless the matter in dispute should exceed the sum of \$5,000, exclusive of costs; and that the United States are not entitled to a writ of error or appeal if the same remedy is afforded under similar circumstances to a private party. In passing upon this question, the court said, (page 39, 131 U. S., and page 658, 9 Sup. Ct. Rep.):

"By the act under which these suits were brought the district court was given concurrent jurisdiction with the court of claims as to matters of which that court had jurisdiction, 'where the amount of the claim does not exceed one thousand dollars,' and the same right of appeal was given to the plaintiff or the United States as 'now reserved in the statutes of the United States in that behalf made.' Section 707 of the Revised Statutes reads: 'An appeal to the supreme court shall be allowed, on behalf of the United States, from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine.' By section 708, such appeals must be taken within ninety days after the judgment is rendered; but this period is enlarged to six months by section 10 of the act in question. Inasmuch as the object of the latter act was to enable the district and circuit courts to exercise concurrent jurisdiction with the court of claims in respect to suits against the United States, as therein provided, in our judgment the right of appeal reserved to the government 'in the statutes of the United States in that behalf made,' before the enactment of this act, was the right of appeal reserved in the statutes relating to the court of claims, and as that right could be exercised by the United States in the instance of any judgment of the court of claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the district or circuit courts of the United States under said act."

The motions to dismiss in those cases were overruled; and, for the same reason given by the court, the motion in this case must be granted, and the appeal is dismissed. A like order will be entered by the clerk upon the motion to dismiss the writ of error.

PARDEE, J., concurred.

PELZER MANUF'G CO. v. ST. PAUL FIRE & MARINE INS. CO.

SAME v. SAVANNAH FIRE & MARINE INS. CO.

(Circuit Court, D. South Carolina. November 2, 1889.)

FEDERAL COURTS—PRACTICE—TIME TO ANSWER.

The period allowed the defendant to answer or demur by Code S. C. is suspended by filing in the state court bond and petition for removal to the United States circuit court, and becomes current when the record is filed in that court; and, under the circuit court rules, (fourth circuit,) the defendant will be in time if he serve his defense before the rule-day next thereafter.

In Equity. Motion for leave to file answer.

Smythe & Lee, for plaintiff.

Julius H. Heyward and Jos. W. Barnwell, for defendants.

SIMONTON, J. The action in each of these cases began in the circuit court of South Carolina for the county of Greenville. The summons in each was issued, and complaint filed, on 31st July, 1889. On 17th August thereafter, a petition for removal into this court, with a proper bond, was filed by defendant; the ground for removal being diversity of citizenship, and the amount in controversy being over \$2,000 principal. On 4th October, 1889, the first term of the state circuit court next after filing the petition, an order was passed by that court, on motion of the attorney for defendant, directing the record in each case to be sent here. The records were filed with the clerk of this court on the 18th of October, 1889. Thereupon the plaintiff's attorney, no answer or demurrer having been filed, gave notice that on the rules-day next thereafter, 4th November, he would move before the clerk for judgment by default, under our rule 12. The defendant comes in with affidavit, and after notice, craving in each case "leave to answer in this action, and for such other relief as may be proper."

When a proper petition and bond are filed in the state court, the jurisdiction of this court is complete, the rightful jurisdiction of the state court is at an end, and no further proceedings can properly be had there, unless, in some form, its jurisdiction is restored. *Railroad Co. v. Mississippi*, 102 U. S. 135; *Insurance Co. v. Dunn*, 19 Wall. 214; *Railroad Co. v. Koontz*, 104 U. S. 14. When the case comes here, this court takes it in the same condition it was when it left the state court. The removal does not vacate or change what has been done, but simply carries the suit to the circuit court for further proceedings. *Duncan v. Gegan*, 101 U. S. 812. It is necessary, however, that a copy of the record from the state court be entered in this court, in order to enable it to proceed with the cause, although the jurisdiction does not depend on this entry. *Fisk v. Railroad Co.*, 6 Blatchf. 362; *Railroad Co. v. Koontz*, 104 U. S. 15; *Torrent v. Lumber Co.*, 37 Fed. Rep. 728. See *Webster v. Crothers*, 1 Dill. 301. In each of the present cases, the summons, with the complaint, was served 31st July. The petition and bond were filed 17th August. Sixteen of the twenty days allowed under the Code to the defendant to demur or answer had elapsed. At this stage it came into this court. But, before this court could proceed, the record should be filed here. This was done on October 18th, at the instance of the defendants. See *Mining Co. v. Bennett*, 4 Sawy. 289. Thereupon the period for demurring or answering, suspended by the removal, again became current. Under our rules, the defendants, if they serve their defense before the rule-day next thereafter, —the rule-day in November,—will be in time. Let the answers be filed as of to-day.

JOHNSON v. WATKINS.

(Circuit Court, W. D. Michigan. November 6, 1889.)

COSTS—IN FEDERAL COURTS—STATUTES—REPEAL.

Rev. St. U. S. § 968, provides that, where a plaintiff in a circuit court recovers less than \$500, he shall not recover costs, but at the discretion of the court may be adjudged to pay costs. This section formed a part of the judiciary act, which fixed the jurisdictional amount at \$500. Act. Cong. March 3, 1887, fixed the minimum limit of the amount in dispute, necessary to give jurisdiction, at \$2,000, but made no reference to section 968. *Held*, that the section was not amended by the act of 1887. *Eastman v. Sherry*, 37 Fed. Rep. 844, followed.

At Law. On cross-motions for judgment for costs.

Frank S. Donaldson, for plaintiff.

Smith & Stevens and *Mitchell & McGarry*, (*E. S. Eggleston*, of counsel,) for defendant.

SEVERENS, J. In this cause, which was an action for tort, counter-motions were made by the respective parties for a judgment in form which should carry costs to them respectively. The process and declaration of the plaintiff claimed damages to an amount sufficiently large to bring the case within the jurisdiction of the court; the minimum limit of which was fixed by the last act of congress dealing with the subject at \$2,000. This was the act of March 3, 1887. The jury, however, have rendered a verdict for only \$1,333. Costs being a matter of statutory regulation, the right of parties to them depends entirely on the proper construction of the statutes relating thereto. The lower limit of jurisdiction under the former law was fixed at \$500; and by section 968 of the Revised Statutes it was provided that, when the plaintiff recovered less than that amount, he should not recover costs, but, in the discretion of the court, might be compelled to pay the defendant's costs. This last section was not changed in terms, or amended, by the act changing the limit of jurisdiction in respect to the amount in controversy.

It was urged in behalf of the defendant that the primary intent of section 968 was to forbid the recovery of costs by the plaintiff in case he should not recover a sum equal, at least, to the minimum of jurisdiction, and that \$500 was mentioned in this statute only because it was the symbol of that limitation, and as having a meaning synonymous therewith. Upon the argument of these motions, I was much impressed that this was the real intent of congress, and that, if so, effect should be given to it accordingly. The result would be that this section, so construed, would harmonize with the later law raising the limit of the jurisdiction to \$2,000, and would now prevent a plaintiff from recovering costs who should recover less than that limit. But as the rule had been held otherwise by Judge JENKINS in the eastern district of Wisconsin, in *Eastman v. Sherry*, 37 Fed. Rep. 844, and the question was one of importance throughout the country, and one upon which it seemed advisable to have uniformity, I deemed it prudent to confer with the circuit judge about it. In answer to my communication, he informs me that the point has

been up before him on previous occasions, and that he has held to the same construction as Judge JENKINS did,—that the statute, section 968, could not be expanded by interpretation beyond the purpose to forbid costs where the plaintiff recovered less than \$500; that the statute is so; and that it is for congress to change the rule, if it is advisable. Under these circumstances, my own doubt must give way to the holding of the circuit judge. The motion for costs to the defendant will therefore be denied, and that of the plaintiff allowed.

ALLEN *et al.* v. FAIRBANKS.

(Circuit Court, D. Vermont. October 22, 1889.)

1. ABATEMENT AND REVIVAL—DEATH OF PARTY—SCIRE FACIAS TO REVIVE.

It is not a ground for a motion to dismiss a *scire facias* to revive a suit upon the death of a defendant, that the bill does not state a cause of action, or is not sustained by the proofs.

2. SAME—CORPORATIONS—STOCKHOLDERS—CONTRIBUTION.

The liability of a stockholder to contribute towards debts of the company paid by other stockholders survives him.

In Equity. On motion to dismiss a *scire facias* to revive an action.

Daniel Roberts, for orators.

Henry C. Ide, for defendant.

WHEELER, J. Upon the death of the defendant a *scire facias* issued to revive the cause, pursuant to section 955, Rev. St. The executors appear, and move to dismiss the *scire facias* and the bill as to them, because the action does not survive. That the bill sets forth no ground for relief, and the plaintiff's proof establishes none, is urged against survival; because, if no cause of action existed, none could survive. But, whether the bill is demurrable or not, or is or is not sustained by proof, cannot be tried in this manner. The question is not whether the plaintiffs maintained their cause of action by their pleadings or their proofs, but whether their cause of action is such that they so have a right to maintain it if they can. The cause of action is the liability of the testator as a stockholder in the Illinois & St. Louis Bridge Company, a corporation of Illinois, Missouri, and the United States, for whose debts the stockholders were, under some circumstances, chargeable, to contribute towards debts paid by the other stockholders. The liability may not exist, those seeking contribution may not have become entitled to it, and the testator may not have been brought within the liability; but whether so or not are questions to be tried, and the orators cannot be deprived of the right to have them tried by pointing to the probable result. If success upon these questions will entitle the orators to relief, they cannot be deprived of the right to try to succeed because they may, or probably will, fail. Generally those who are subject to a common

burden are holden to bear it equally and ratably. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; *Miller v. Sawyer*, 30 Vt. 412; *Pollard v. Bailey*, 20 Wall. 520. The orators seek to bring the testator within this rule, and to have the common burden made even by contribution. If this can be done, the liability will rest upon the implied obligation to render to the orators what equitably and justly belongs to them. This does not grow out of any such tort as dies with the person at common law, but appears to be such an obligation as survives. *Hambly v. Trott*, Cowp. 372; 2 Redf. Wills, 163; *Dana v. Lull*, 21 Vt. 383. The orators appear, therefore, to be entitled to have their case tried, and it cannot properly be dismissed without trial. Motion to dismiss denied.

EASTON *et al.* v. HOUSTON & T. C. RY. CO. *et al.*

(Circuit Court, E. D. Texas. June 4, 1889.)

1. RAILROAD COMPANIES—MORTGAGE FORECLOSURE—TRUSTEES AND RECEIVERS—COMPENSATION.

On foreclosure proceedings it appeared that the trustees and receivers contracted originally to render their services for the sum of \$1,500, and that they were paid such sum up to the beginning of the litigation; that since the litigation commenced they have been paid by allowances by the court to them as receivers, and by appropriation by themselves as trustees, at the rate of \$4,500 per year. The services rendered were not exclusive of their business, and did not take all or nearly all of their time, and there was no great responsibility requiring extraordinary compensation. *Held*, that they had been amply compensated, and that an extra allowance was improper.

2. SAME.

The allowance of \$500 was ample compensation for the services of a trustee of a mortgage, of which there was only one bond of \$500 outstanding, the balance of the issue of \$1,500,000 being deposited with a trust company; his services in the litigation being merely nominal, and going no further than the use of his name.

3. SAME—ATTORNEYS' FEES.

Such trustee insisted on the services of his attorneys in filing the bill for foreclosure of the mortgage of which he was trustee; and it was admitted that at the time of such employment such services were worth \$2,500. *Held*, that such sum should be allowed to the attorneys.

4. SAME.

In the foreclosure proceedings there was no substantial contest, the whole matter being practically carried out in pursuance of a plan of reorganization, for which the solicitors for complainants were in no particular degree responsible. *Held*, that the sum of \$100,000 should be allowed as compensation to the solicitors who represented the trustees of all the mortgages.

In Equity. On exceptions to the master's report on the subject of compensation.

Farrar, Jonas & Kruttschnitt, for Central Trust Company.

T. J. Semmes, for Rintoul and Easton, trustees, and for Sullivan & Cromwell and Davenport, Dilloway & Leeds.

Willie, Mott & Ballinger, *in pro. per.*, and for Ballinger, Mott & Terry. *Goldthwaite & Ewing*, *in pro. per.*, and for Sheperd, trustee.

Before LAMAR, Justice, and PARDEE, J.

PER CURIAM. This cause has been heard on the exceptions of the Central Trust Company, and other parties interested, to the allowances made by the master to Messrs. Easton and Rintoul, trustees and receivers, and to Messrs. Sullivan & Cromwell, solicitors for Easton, trustee, and to Messrs. Davenport, Dilloway & Leeds, solicitors for Rintoul, trustee, and upon the exceptions of Messrs. Goldthwaite & Ewing to the insufficiency of the allowance made to them as solicitors of Benjamin Sheperd, trustee, and upon the exception of Benjamin Sheperd, trustee, to the insufficiency of the allowance made to him as the trustee of the indemnity mortgage, and upon the exceptions of Ballinger, Mott & Terry and Willie, Mott & Ballinger to the allowance made to them as solicitors for Easton and Rintoul, trustees, and for the Farmers' Loan & Trust Company, trustees; and was argued.

We have examined the master's report, and considered the evidence in relation to the matters involved in these exceptions, and in the report of the special master. In regard to the services of Rintoul and Easton, trustees and receivers, we have considered that their services in and about the litigation, which ended in the foreclosure of all the mortgages against the Houston & Texas Central Railway Company, were not exclusive of their business; not of such a nature as to take all, or nearly all, of their time; that there was no great responsibility requiring extraordinary compensation, but that their services were perfectly consistent with following their regular avocations; and that, as a matter of fact in the case, Trustee Rintoul makes no pretense that he has been hindered or delayed in any way in the transaction of his regular and legitimate business. We find in the case that these gentlemen contracted originally to render their services for the sum of \$1,500 a year, and that they were paid such sum up to the beginning of this litigation; that since the litigation commenced they have been paid in various ways—through allowances by the court to them as receivers, and by appropriations made by themselves as trustees—the full sum of \$17,500 each, or at about the rate of \$4,500 per year since the litigation begun. Under these circumstances, we are of the opinion that the said receivers have been amply paid and compensated for the services rendered by them in the amounts that they have already received in the case. We therefore conclude that the exceptions to the master's report, making each of them an additional allowance, are well taken.

As to the compensation of Sheperd, trustee, we find that he was trustee of a mortgage of which there was only one bond of \$500 outstanding, the balance of the issue of \$1,500,000 being deposited with a trust company; that he has rendered no services for which he has not been compensated; and that his services in this litigation were merely nominal, and went no further than the use of his name; and that the allowance by the master to him of \$500 was ample compensation for all that he has done in the case. It was practically admitted on the hearing that the services of Goldthwaite & Ewing, in filing the bill for the foreclosure of the indemnity mortgage, of which Sheperd was trustee, were insisted upon by Sheperd, trustee; and that at the time of employment such

services were admitted to be worth \$2,500. We therefore think that that sum should have been allowed by the master, and that the exception filed by Goldthwaite & Ewing is well taken.

As to the compensation of the solicitors who represented the trustees of all of the mortgages that were foreclosed in this suit, considering that the services were rendered under the eye of the court, and that the judges are well acquainted with the character of the services, and that in the foreclosure proceedings proper there was no substantial contest, the whole matter being practically carried out in pursuance of a plan of reorganization, for which the solicitors for complainants were in no particular degree responsible, we are of the opinion that the sum of \$100,000 will be ample and generous compensation; and we are of the opinion that this compensation should be apportioned among the several counsel employed as follows: \$2,500 to the firm of Goldthwaite & Ewing, solicitors for the trustee in the indemnity mortgage; that the balance, \$97,500, should be equally divided between the New York solicitors for Rintoul and Easton, trustees in the several mortgages represented by them; and the solicitors of the Farmers' Loan & Trust Company in the several mortgages represented by said trust company; and the firms of Ballinger, Mott & Terry and Willie, Mott & Ballinger, who represented in Texas all the said trustees, with the exception of Sheperd, trustee of the indemnity mortgage. This apportionment will give to Messrs. Sullivan & Cromwell the sum of \$16,250, which amount, by the report of the master, it seems they have already been paid by the trustees represented by them out of the trust fund; to Davenport, Dilloway & Leeds, solicitors for Rintoul, trustee, the sum of \$16,250, which, by the report of the master, has also been paid by the said trustees out of the trust fund. The solicitors for the Farmers' Loan & Trust Company, by stipulation heretofore filed in the case, have accepted in full compensation the sum of \$32,250, which is but \$250 less than would have been set apart to them under this apportionment. It gives to Messrs. Ballinger, Mott & Terry and Willie, Mott & Ballinger, who represented both sets of trustees in Texas, the sum of \$32,500. By the master's report it appears that they have been paid on account the sum of \$7,250 by the trustees represented by them, leaving, according to this apportionment, the sum of \$25,250, which should be further reduced by such sums as said firms have received, pending this litigation, as the counsel for the several receivers in the case. For these reasons, it is therefore ordered, adjudged, and decreed that the master's report in this case on the compensation of Messrs. Rintoul and Easton, trustees, be so amended as to recommend no further allowance to them beyond the amounts they have already been paid by the court as receivers, and paid themselves, as trustees, for their services in the case. That in the matter of compensation to Messrs. Sullivan & Cromwell, solicitors for Nelson S. Easton, the report be so amended as to find that they have been amply compensated for their services rendered in this case by the amounts already received from the trust funds, and that they are entitled to no further allowance. As to the compensation of Davenport, Dilloway & Leeds, that the master's re-

port be so amended as to find that they have been amply compensated for their services in the case by the amounts already received from the trust funds, and that no further allowance be made to them. That on the compensation of Ballinger, Mott & Terry and Willie, Mott & Ballinger, the said master's report be so amended as to find that they are entitled for their services rendered in and about the said suit the sum of \$32,500, and that they should be allowed such sum subject to credit for the amounts received on account either from the trustees or for services rendered to the receivers. That in the matter of compensation of Goldthwaite & Ewing, the master's report should be amended so as to recommend an allowance of \$2,500 for their services in and about the said litigation. That, as amended, all exceptions to the said report be, and the same are hereby, overruled, and the said report as amended be, and the same is, approved and confirmed.

SILVER v. CONNECTICUT RIVER LUMBER CO.

CONNECTICUT RIVER LUMBER CO. v. SILVER.

(Circuit Court, D. Vermont. October 22, 1889.)

1. ARBITRATION AND AWARD—MISCONDUCT OF ARBITRATORS.

The facts that one arbitrator unconsciously permits his jealousy of the other, who had often been selected as arbitrator in similar causes, to slightly warp his judgment against the selector of the other arbitrator, and that the other, from lack of independence, adjusts his judgment to balance that supposed leaning, do not vitiate the result honestly reached by them.

2. SAME.

That the arbitrator selected by defendant in choosing a third consults with defendant with the concurrence of the other arbitrator, and without objection from the orator, is not a vitiating irregularity, where the result is the selection of one satisfactory to all.

3. SAME—MISTAKE IN FACTS.

In an action to set aside an award of \$1,000 as damages to premises by floating logs, it appeared that a substantial part of the damages allowed was for the breaking of the bank of the river where it was supposed not to have been broken before. From facts not then available it appeared that the bank had been broken before. The master found that the actual damages were not above \$600. The amount allowed by the arbitrators for the broken bank was not ascertainable. *Held*, that the defendant might elect to remit \$400, and, upon failure to so remit, that the award should be set aside.

At Law. Action by William R. Silver against the Connecticut River Lumber Company, to enforce an award, and suit in equity by the Connecticut River Lumber Company against Silver, to set aside the award.

Henry C. Ide and Edgar Aldrich, for the lumber company.

Fletcher Ladd and William Heywood, for Silver.

WHEELER, J. This action at law is brought upon an award by arbitrators for damage done to lands of the plaintiff by logs of the defendant floating in Connecticut river. The amount of the damages, and not the

liability, was submitted, but the parties, by the terms of submission, agreed to perform the award. The defendant insists that no liability follows damages so done; and that, as none was awarded or submitted, no right of recovery arises from the award. The river is navigable for such purposes, and as such is a highway common to all, and ordinarily no right to recover for damages done by logs floating upon it and carried by the elements would probably exist. Gould, Waters, §§ 90, 98; *Thompson v. Improvement Co.*, 54 N. H. 545; *Carter v. Thurston*, 58 N. H. 108. But the logs might be put, or be left to be taken, into the river in such large numbers at a time as to be dangerous to the shores of the river and lands adjacent; and that negligence towards, and disregard of, the rights of the riparian proprietors might create a liability to them for damage done in consequence. *Ball v. Herbert*, 3 Term R. 253; *Haines v. Welch*, 14 Or. 319, 12 Pac. Rep. 502. Whether such negligence caused or contributed to this damage is not found, and is not material. The defendant's officers and agents chose to waive all question about that, and contest the claim of the plaintiff in respect to amount only; and the award, if good, would make the obligation to perform it by paying the amount awarded, complete.

This suit in equity is brought to set aside the award for partiality and misconduct of one of the arbitrators, for fraud of the plaintiff in the action upon the award, and for a mistake of all in making the award for too much. Both causes have been by stipulation of the parties sent to a referee and special master, who has found and reported the facts. The president of the orator chose one arbitrator, and the defendant in the equity case chose another, and, if these two did not agree, they were to choose a third. River farms in that region were exposed to and frequently suffered damage from floating logs. The arbitrator chosen for the orator was a hill farmer, who had at several times so been chosen and acted in that capacity, before. The one chosen by the defendant was a river farmer, who had experienced some such damage, but had made no claim for it, and who thought the remedy for such damage was not sufficiently speedy and certain. The president of the orator did not know his situation and views, but one of his employees who assisted him knew that this arbitrator was a river farmer. No objection was made on this account, and any bias he might have from this situation must be considered as waived. *Fox v. Hazellon*, 10 Pick. 275. As the amount of the damage, and not the question of liability, was what was submitted, his views of what the law of the subject was or ought to be would be immaterial. He was a little jealous of the other arbitrator, because of his being chosen by the orator, and of his former acting as such. The master finds that honestly and without conscious purpose he suffered these things to, and they did, a little warp and bias his judgment in favor of the defendant against the orator, and make his estimate of damage higher. The principal of these things appears to have been the attitude of the other arbitrator. This arose upon the occasion, and was not inherent. From lack of independence and strength his judgment appears to have become adjusted to balance the supposed leaning of that other arbitrator.

The views, opinions, and inclinations of triers, as they arise in the course of proceedings before them in respect to the various phases of the subject and positions of one another, ought not to disturb the result honestly reached by them. The strength of minds, and their capacity for dealing with conflicting claims and interests, are much diversified, and triers cannot be selected with any certainty as to course of reasoning to be adopted or result to be reached. Arbitrators are judges chosen by the parties for themselves; and, when so chosen, they must be taken as they are, with their weaknesses and frailties, of which all have some; and while they act honestly and fairly, according to such abilities as they have, with reference to what is submitted to them, their proceedings are valid and binding. Bac. Abr. "Arbitrament and Award;" *Van Cortlandt v. Underhill*, 2 Johns. Ch. 339; *Davy v. Faw*, 7 Cranch, 175. In choosing the third arbitrator he consulted the defendant with the concurrence of the other arbitrator, and without objection from those acting for the orator; more, apparently, to avoid objectionable men than to give the defendant his choice. The result of the consultation was favorable to a choice by the arbitrators themselves, and not by the defendant, and one satisfactory to all was selected. Here is no vitiating misconduct or irregularity. Nothing about the arbitrator in question, according to the standard indicated, or about the proceedings, when given the latitude which necessarily belongs to such tribunals, appears to be adequate to disturb this award. *Water-Power Co. v. Gray*, 6 Metc. 131; *Morville v. Society*, 123 Mass. 129.

A substantial part of the damages claimed and allowed was for the breaking of the bank of the river by these logs where it was supposed not to have been broken before. The question whether it had been broken before, or was broken by these logs, appears to have been fairly presented and tried, upon such proofs as were at hand, and such appearances as were visible. The master finds, from clear proof not then available, that the bank had been broken at that place before. So much of the damages as was allowed for that was for what did not exist, and should not, and would not, have been allowed for, if that fact had then been known. The amount of the damages allowed for this is not ascertainable. The master has found the actual damage not to be above \$600. The arbitrators might have awarded more than that without including this supposed break, and they might have awarded less. What amount they would have awarded if that had been excluded is also uncertain. If a new trial could be had, that might be proper; but there is no mode of obtaining one. To wholly set aside the award for this cause would be harsh, and does not appear to be absolutely necessary. The orator, in asking equity, should be willing to do equity by paying the amount of actual damages, according to the finding of the master in the proceeding which he has invoked. No injustice to the orator is apparent from compelling payment of that. The defendant may prefer to remit the excess to having the award set aside. If so, that opportunity can be afforded in analogy to allowing a *remittitur* of damages to avoid the granting of a new trial because they are excessive. *Moore v. Luckess*, 23 Grat.

160; *Overby v. Thrasher*, 47 Ga. 10; *Rank v. Rank*, 13 Atl. Rep. 829. To allow the plaintiff in the action at law to remit \$400 and retain the right to the balance of the award seems to be just and proper in these cases. As neither party was in fault about this mistake, the decree should be without costs. Let a decree be entered that the plaintiff in the suit at law, at his election, within 30 days, remit all but \$600 of the award, and take judgment on the report for that sum, with interest and cost; and that on failure to so elect the award be set aside, and judgment be entered in the action at law for defendant.

HOWARD v. DELAWARE & H. CANAL CO.

(Circuit Court, D. Vermont. October 26, 1889.)

1. MASTER AND SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

Plaintiff's intestate was a trackman running a hand-car, under direction of the section boss, towards an approaching train, to which the boss had sent a signal-flag by one of the trackmen, to warn those in charge of the train of the approach of the hand-car. The persons in charge of the train failed to keep a lookout, and ran into the hand-car before those in charge could get out of the way, and intestate was killed. *Held*, that the negligence of those in charge of the train caused the injury.

2. SAME—FELLOW-SERVANT.

Trackmen are not fellow-servants of those in charge of trains.

3. DEATH BY WRONGFUL ACT—DAMAGES.

Rev. Laws Vt. §§ 2138, 2139, provide that the person or corporation negligently causing the death of another shall be liable to an action in the name of the personal representative for the benefit of the wife and next of kin, and such damages may be given as are just with reference to the pecuniary injury resulting from such death to them. *Held* that, in an action for the benefit of the collateral kindred, the measure of damages is what the deceased would probably have accumulated afterwards if he had lived; and, where the deceased has accumulated nothing for any one up to the time of his death in middle life, only nominal damages will be awarded.

4. SAME—PLEADING.

A declaration which sets forth adequately the right of the personal representative to recover is sufficient without alleging specifically the rights of the respective distributees.

At Law. Action for damages for wrongfully killing plaintiff's intestate.

David E. Nicholson and Joel C. Baker, for plaintiff.

John Prout and Henry Ballard, for defendant.

WHEELER, J. Clary, the plaintiff's intestate, was about thirty-seven years old; had three brothers and two sisters, no wife, children, or parents; and had accumulated no property. He was employed as a trackman by a section boss of the defendant's road; and, with four others, under direction of the boss, was running a hand-car over a part of their section towards a train coming from the other way, to which the boss had sent their signal-flag by one of the trackmen, to warn those in charge of the train of the approach of the hand-car. Neither the engineer nor any one in charge of or on the train was keeping any lookout

ahead as it approached the hand-car, and no one on the train saw it till within two or three rods of it. The trackmen supposed the train would slow up as it approached them, in obedience to the warning, and came so near it before stopping to take the hand-car from the track that the boss saw it would be struck by the train before they could get it off, and told the men to run it the other way. They tried to do so, but could not move it fast enough to get away from the train, and he directed them to abandon it. In jumping from it, Clary was thrown under it, the engine struck it, and he was instantly killed.

The statutes of the state provide that when the death of a person is caused by such wrongful act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action therefor, the person or corporation that would have been liable if death had not ensued shall be liable to an action in the name of the personal representative for the benefit of the wife and next of kin, and that such damages may be given as are just, with reference to the pecuniary injury resulting from such death to them. R. L. Vt. §§ 2138, 2139. This action is brought upon this statute, for the benefit of the brothers and sisters, as next of kin, and has been tried by the court upon waiver in writing of a trial by jury.

The defendant claims that Clary was negligent in remaining so long upon the car, and in jumping from it, and thereby contributed to the injury; that the collision was caused by the negligence of the flagman, a fellow-servant with Clary, in giving wrong information to the trainmen about where the hand-car would be met; and that, if it was caused by negligence of the trainmen, all were so fellow-workmen with Clary that the defendant is not liable to his representative for it.

Clary could see the train coming, and could have got out of its way; but, with the others, he relied upon due respect of the trainmen to the flag, and to the directions of the boss, for safety; and, in view of what he had a right to rely upon in those respects, he does not appear to have been negligent of duty to himself or others in staying at his place on the car as he did. He was moving backwards with the car, working it, with the others, to his utmost strength, when directed to abandon it; and appears to have been thrown before it by a misstep, caused by haste in turning and jumping, made necessary by the nearness of the train, and ledges of rock which prevented jumping off from the side of the car on which he was. Natural instinct would impel him to do what he could to save himself, and nothing shows that he did not obey it.

The testimony is conflicting as to what the man who carried the flag told those in charge of the train about where the trackmen and hand-car would be. Whatever that was, the flag of the sectionmen itself was a warning that they were on the track somewhere near, and were to be approached with caution; and it would be in force from the time when the flag was observed until they should be passed. To run the train towards them, after that warning, without keeping any lookout ahead for them, was a neglect of duty required for their safety as well as for that of the train. This negligence appears to have caused the collision, and the in-

jury to Clary, without any contributing neglect of duty on his part. If the flagman contributed to the happening of the collision by giving wrong information, it would not have happened but for the negligence of those in charge of the train; and whoever is chargeable for that is liable for its consequences to Clary. *Railroad Co. v. Barron*, 5 Wall. 90.

The question of law whether the defendant is liable to its trackmen for injuries done to them by negligence of those in charge of its trains is presented by these facts. If this question was to be determined by the decisions of the court of last resort of the state, that in *Davis v. Railroad Co.* appears to be the latest and most apt. 55 Vt. 84. It appears to hold, in effect, that a railroad company in the state is liable to its trainmen for the negligence of those it has placed in charge of its tracks. It overrules, in view of intervening decisions of other courts, *Hard v. Railroad Co.*, 32 Vt. 473, which classed all persons employed in maintaining the track and machinery of railroads and operating their trains as fellow-servants, for injuries to whom by negligence of each other the companies were not liable. If the company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow. But the courts of the United States are not bound by the decisions of the courts of the states upon questions of general law like this, although they are entitled to and receive the highest respect. *Boyce v. Tabb*, 18 Wall. 546; *Chicago v. Robbins*, 2 Black, 418. This court is, however, in duty bound to follow the decisions of the supreme court of the United States upon all such questions. That court has held that a railroad company is liable to its trainmen of one train for the negligence of those whom it has placed in charge of another train, and of the same train. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. This decision appears to have been made by a bare majority of the court, but it stands unreversed and unshaken, and is equally binding here with those that are unanimous. Trackmen are no more co-laborers with trainmen than the trainmen of one train are with those of another train on the same road, and not so much so as trainmen of the same train are. Those in charge of this train were placed there, and clothed with that authority, by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train; and their negligence in that behalf appears, according to this decision of the supreme court of the United States, to be the negligence of the defendant. The principles of this decision lead to the same conclusion as those of the latest decision on this subject of the highest court of the state, as cited. In *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, a brakeman of one train appears to have been held to be so the fellow-servant of the engineer of another train of the same company as not to be entitled to recover of the company for injuries occasioned by his negligence. That engineer does not appear to have been clothed with any of the authority of the company about the moving of the engine or train; and in that respect it differs from the later case. In the case under

consideration the flag was brought to the notice of the conductor, who had control of the train as to where it should undertake to pass the hand-car. In this respect it is like the later case, rather than the former. Upon all of these cases Clary would appear to have been entitled to recover damages of the defendant if he had not been killed, and by force of the statute the plaintiff appears to be entitled to recover now. As the plaintiff is entitled to recover, he is entitled to nominal damages at least; and to such further sum as is proved within the meaning of the statute.

No case has been cited or observed from the courts of the state in which the right of recovery, or measure of damages, in actions upon this statute for the benefit of collateral kindred has been considered. In *Railroad Co. v. Barron*, 5 Wall. 96, the action was upon a statute of Illinois, almost like this in words, and precisely in meaning, as to giving a right of recovery to the wife and next of kin, and authorizing such damages as are just with reference to the pecuniary injury resulting from such death to them, and was for the benefit of brothers and sisters. The defendant there, as here, asked the circuit court to hold that no recovery could be had for the benefit of any but those who had a legal right to support from the deceased. The court ruled that the action was given for the benefit of those named in the statute, whether they had such right to support or not; and instructed the jury that they could not take into consideration the wounded feelings of the surviving relatives, but might the amount of property of the deceased, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age, with the business and means which he had. These rulings were approved, and Mr. Justice NELSON, in the opinion of the supreme court, said:

"If the deceased had lived they may not have been benefited, and, if not, then no pecuniary injury could have resulted to them from his death. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his representative."

This shows that the pecuniary injury resulting from the death is the loss of what the deceased would probably have accumulated afterwards if he had lived. In this case the deceased had accumulated nothing for any one up to the time of his death in middle life. He was no more likely to accumulate property from then forward than before. The deprivation of his society, affection, or counsel is not to be considered. The actual probable pecuniary loss is all that the statute covers and can be allowed for. Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever have accumulated any property for his brothers and sisters is apparent.

Question is made as to the sufficiency of the allegations of the declaration for supporting a recovery for the benefit of the brothers and sisters. If the action was given directly to those suffering the injury, the declaration would need to set forth the facts constituting the right of re-

covery of those who should bring suit. But the action is given to the personal representative; and the right is the same for whosever benefit the suit may be brought. The recovery is to go to the widow and next of kin, as the personal estate would, exclusive of creditors and legatees. *Railroad Co. v. Barron*, 5 Wall. 96. The questions as to who are beneficiaries are left until distribution. A declaration, which sets forth adequately the right of the personal representative to recover, would seem to be sufficient, without alleging specifically the rights of the respective distributees. Let judgment be entered for the plaintiff for one dollar damages.

BAEDER v. JENNINGS.

(Circuit Court, D. New Jersey. October 18, 1889.)

1. PUBLIC LANDS—SURVEYS—APPOINTMENT OF DEPUTY SURVEYOR.

Where it appears that one who purported to make a survey, as deputy surveyor, in 1690, was a man of high position, identified largely and in many ways with the proprietary affairs, and afterwards surveyor general, and that he had made and returned a great number of surveys as deputy surveyor, which the council of proprietors allowed to remain on their records without protest, it will be held that he was a regular deputy surveyor when he made the survey in question, though there is no record of his appointment.

2. SAME—WARRANTS—EVIDENCE—RECITAL IN ANCIENT SURVEY.

A recital, in a survey made in 1690, that a warrant had been issued, is presumptive proof of the fact, not to be questioned without some evidence to the contrary.

3. SAME—SURVEYS—PRESUMPTION FROM LAPSE OF TIME.

After the lapse of 200 years, it must be presumed that a survey regularly entered on the books of the proprietors, and never objected to by them, was entered with their consent and approbation.

4. SAME—NECESSITY FOR ISSUE OF PATENT.

A survey made in 1690, by a regular deputy surveyor, and officer of the proprietors, returned to their office, and duly entered on their books without objection, constitutes a good title in New Jersey, and a patent is not necessary to vest title.

5. SAME—NEW JERSEY ACT OF 1787.

Act N. J. June 5, 1787, which declared that any survey made of any lands within either the eastern or western division of the proprietors of the state of New Jersey, and inspected and approved of by the general proprietors or council of proprietors, and by their order entered upon the record, should, from and after such record was made, preclude and forever bar the proprietors and their successors from any demand thereon, applied to surveys made and recorded before its passage.

6. SAME—CONSTITUTIONAL LAW—RETROSPECTIVE OPERATION.

To give the act retrospective operation does not make it unconstitutional, as the constitution of New Jersey had no provision on the subject, and the constitution of the United States had not been adopted when the act was passed.

7. SAME—WEST JERSEY SOCIETY—QUASI CORPORATION.

Daniel Cox, who was a large proprietor of West New Jersey, governor of the colony, and invested with the powers of government therein, in 1692 disposed of all of his properties to an association of 70 persons, to be distributed among them according to their respective interests. The deed was to two, to the use of the shareholders. At the same time he granted to the same persons the right and powers of government in West New Jersey. These associates assumed the powers of government, made regulations for the management of their affairs and the conveyance of their lands, etc. They acted and were treated as a corporation, and were so treated by the proprietors of East Jersey, under whom defendant claimed, in respect to their ownership of the properties in East Jersey purchased from Cox. They held and conveyed large tracts of land, and were recognized by the name of the "West Jersey Society" in courts and by the legislature. *Held*, that the society was a quasi corporation, with power to convey lands by its corporate officers, viz., president, vice-president, and committee.

8. SAME—POWER OF ATTORNEY—EXECUTION BY CORPORATION.

On February 1, 1749, the society, by its president, vice-president, and committee, executed a power of attorney to sell its lands in New Jersey. The paper was executed not only under the hands and seals of the officers, but under the common seal of the society, and its execution was duly proved by the subscribing witness before the lord mayor of London, and was duly recorded. *Held*, that the paper was a corporate document, duly executed by the society.

9. DEEDS—ANCIENT DEEDS—AUTHENTICATION—EVIDENCE.

The various deeds and grants by which Daniel Cox derived title to shares of property in East Jersey, and conveyed them, 71 in number, were among a large lot which remained in the repositories of the West Jersey Society in London from the early part of the reign of William and Mary to the middle of the last century. They were then sent to the society's agent in New Jersey, after being registered in the office of a notary in London, carefully identified by the oaths of the notary and the secretary before the lord mayor of London, and by the oath of the captain of the ship who brought them over, and were recorded in West Jersey. Their validity and existence had been fully recognized by the proprietors of East Jersey. *Held*, that they were sufficiently authenticated to entitle them to record, and were properly received in evidence in an action between one claiming under them and a grantee of the proprietors of East Jersey.

10. SAME—ACT OF 1743.

The act of 1743, which merely declared that certain acknowledgments or proofs theretofore taken should be deemed sufficient to authorize the deeds to be recorded, did not declare that no other proofs should be insufficient.

11. SAME.

The failure to record them in East Jersey is not material to the question of the existence of such deeds.

12. SAME—ANCIENT DEED—PROOF BY RECITAL.

A deed alleged to have been executed in 1772, forming a link in plaintiff's chain of title, was not produced, but a deed executed in 1823, more than 60 years before defendant undertook to take possession, was produced, which recited the existence of the deed of 1772. The grantors in the deed of 1823 had exercised various acts of ownership. *Held*, that the recital was admissible to prove the existence of the deed as against defendant.

13. EVIDENCE—PROCEEDINGS IN PARTITION.

Proceedings in partition in 1818 were introduced, but the original petition, and the order for the appointment of commissioners, were missing. There were shown the report of the commissioners dividing and allotting the land, a map of the premises, and their allotments, and an order of the court directing the report to be filed. *Held*, in consideration of the lapse of time, and possession of the property in conformity with the division, that the proceedings were admissible.

14. SAME—ADMINISTRATOR'S DEED.

A recital, in an administrator's deed, of an order of sale, is sufficient presumptive proof, 40 or 50 years after the date of the deed, of such an order; the possession being conformable to the deed.

At Law. In ejectment.

On rule to show cause why verdict should not be set aside, and a new trial granted.

This rule came on to be argued, by agreement of the parties, before Mr. Justice BRADLEY, at his chambers, city of Washington, 11th February, 1889.

At the trial of the cause before Judge WALES, at Trenton, September term, 1887, a stipulation was made between the parties as follows:

"It is on this 28th day of September, 1887, agreed by and between the respective attorneys of the above parties that at the close of the testimony both parties shall rest; that a *pro forma* verdict shall be taken for the plaintiff; that an application for a rule to show cause why a new trial should not be had shall then be made by the defendant's attorney, which rule to show cause, by consent of plaintiff's counsel, shall be allowed; that the attorneys of the respective parties shall each furnish to the other side a brief of the points and cases relied upon, at least 20 days before the argument of the rule, the defendant first presenting the plaintiff his briefs, to which the plaintiff shall

reply; that the rule shall be argued at such time and place as shall be directed by the court upon the points raised by the record, and relied upon in the respective briefs above mentioned.

[Signed]
[Signed]

"I. W. CARMICHAEL, Atty. of Deft.
"GARRISON & FRENCH, Attys. of Plff."

The report of the proceedings shows that, after the evidence was closed, the judge, referring to this stipulation, charged the jury as follows, to-wit:

"Gentlemen of the Jury: Counsel on both sides have come to a stipulation which is a very convenient one for both you and the court. You observe that the case is a very intricate one, the testimony involving the examination of old records and ancient statutes,—colonial statutes,—which the court would have had to make itself familiar with, and give you an opportunity to investigate them; but counsel have come to a conclusion to let you render a verdict, and the matter will be argued hereafter on a motion for a new trial, and the court will decide whether your verdict will stand or be set aside."

Thereupon the jury brought in a verdict for the plaintiff.

The motion was argued on the whole evidence in the cause, and the question was whether the evidence was sufficient to sustain the verdict in favor of the plaintiff; in other words, whether the rule to show cause should be made absolute or discharged.

Garrison & French and *P. L. Voorhees*, for plaintiff.

I. W. Carmichael and *B. Gumere*, for defendant.

BRADLEY, Justice. The land for which the action was brought, as described in the declaration, is a parcel of 5 acres and 61 hundredths of an acre, situate on Long Beach, in the township of Eagleswood, in the county of Ocean, and state of New Jersey, being to the east of the line between East and West Jersey, bounded south-easterly by the Atlantic ocean, and north-easterly by the line between lots numbered 17 and 18 of the Cox patent, as divided by J. S. Earl and others in the year 1818, and being part of said lot No. 18. The plaintiff set up two grounds of title: *First*, by grant from the proprietors of East Jersey to Daniel Cox in 1691, and deduction of title to the plaintiff; *second*, by continuous possession under claim of title for a long period of time, to-wit, more than 20 years before the defendant took possession. The defendant claimed title under a warrant for 10,000 acres of land from the proprietors of East Jersey to Charles E. Noble, trustee for themselves, issued in 1884, and a survey thereunder to said trustee, dated March 18, 1886, duly returned and recorded, and a deed of conveyance from Noble to the defendant. Of course, the defendant relies upon his possession, and claims that the plaintiff must prove title in herself; but it is not pretended that the defendant acquired possession in any other manner than under the said survey of 1886, made for the use of the proprietors. The controversy is really with them. The links in the chain of documentary title on which the plaintiff relies are as follows, to-wit:

1. Certain deeds of conveyance vesting in Daniel Cox two shares of propriety in East New Jersey. These deeds are: *First*. One from Edward Byllynge, one of the original 24 proprietors of East Jersey,

(see Leaming & Spicer, 73,) being a lease and release for one share, dated 19th and 20th of March, 2 Jas. II., (1685-86;) *second*, a deed from the widow and heir of William Gibson, another of the original 24 proprietors, to Thomas Cox, for one share, dated 6th April, 3 Jas. II., (1687;) and a deed from Robert West and Thomas Cox to Daniel Cox, for the same share, dated 4th December, 1 W. & M., (1689.) These deeds, if duly authenticated, show that Daniel Cox—who, history tells us, was not only a noted person at court, being physician to the queen of James II., and to Princess, afterwards Queen, Anne, but a very prominent man in the affairs both of East and West Jersey—was the owner of two shares of propriety in 1689. It will be seen that he disposed of them to the West Jersey Society in 1692. But in the mean time he made other deeds or mortgages affecting these shares. The records show that he conveyed the first share, purchased from Byllynge, to one Samuel Standcliff, in April, 1687, and that Standcliff got out a warrant for 10,000 acres of land upon it, but whether he ever procured surveys therefor is not shown. It would seem that this conveyance was by way of security or mortgage, and that the share was re-conveyed to Daniel Cox; for, in January, 1690-91, Cox conveyed the same share to John Hyde and John Haskins by way of mortgage; and they joined him in releasing it to the West Jersey Society, in March, 1692, soon after the conveyance of his property in America to that association, as will presently be mentioned. The other share, derived from the Gibson estate, was also mortgaged by Daniel Cox to Robert West and Benjamin Wetton, by lease and release, dated 5th and 6th of June, 2 W. & M. (1690;) and these persons joined him in a quitclaim to the West Jersey Society, in March, 1692. The records and certified copies of all these conveyances were produced in evidence on the trial. The objections to their reception will be noticed hereafter. Meanwhile it is pertinent to observe here that they were recognized by the proprietors of East Jersey, as will presently appear.

2. The next link in the plaintiff's chain of title is a survey to Doctor Daniel Cox, returned and entered October 7, 1691, for 2,400 acres of meadow at Little Egg Harbor beach, which it is conceded embraces the premises in question. The plaintiff first introduced a resolution of the council of proprietors, adopted May 20, 1690, as follows:

"Forasmuch as this board is given to understand by the surveyor general that there is at least 24,000 acres of meadow at Barnegat, it is therefore agreed and ordered that each propriety have allotted to it 1,000 acres of the said meadow, and that warrants be granted to each proprietor, and such other person or persons, their equal quantity, according to each one's proportional share in a propriety as they now hold, when desired, and that all the upland adjoining to the said meadows be granted to such of the said proprietors as desire the same, provided it join their own meadow."

Several of the proprietors availed themselves of this resolution, and took up lands at the Barnegat meadows and on Little Egg Harbor beach, and took patents therefor. Four of these patents were produced in evidence,—one to Peter Spmans, dated 24th May, 1690, for 6,300 acres,

partly on the beach; one to A. Gordon, of same date, for about 4,000 acres, embracing 3 miles of the beach; one to Thomas Hart; and one to William Dockwra,—all including portions of the beach in continuous tracts. The tenor of the survey to Dr. Cox is as follows, to-wit:

"By warrant from the proprietors of East New Jersey, dated May 20, 1690, surveyed and laid out for Doctor Daniel Cox, (in right of two proprietries,) two thousand four hundred acres of meadow and upland at Barnegat, in two tracts: The first on the beach of Little Egg Harbor, beginning at the north side of the mouth or opening of the harbor on the point of the beach, or the beginning of the partition line betwixt East and West Jersey, and running north-easterly, as the beach goes, six miles, more or less, to Peter Soman's line in length, and from the sea to the bay in breadth, including all the meadows and islands adjoining on the side of the main channel of the sound or bay, bounded east by the sea, south by Little Egg Harbor, west by the channel of the bay, north by Peter Soman's. The other tract on the main side of the bay, opposite to the last-mentioned tract, beginning," etc., (describing the same.) "Also, five hundred acres of land at Wickatunk, which is his lot there, being number twenty-three, beginning," etc., (describing the same.) "Also five hundred acres of Topenenny, which is his lot there, being number eleven, beginning," etc., (describing the same.) "Also a home lot, being 24 chains in length, and 12 chains in breadth, bounded north-west by land unsurveyed, north-east by Thomas Warne, south-east by Robert Barclay, south-west by a highway. [Signed] JOHN BARCLAY."

This survey has an entry in the margin, as follows, to-wit: "Entd. 7 Oct. 1691." It is objected that there is no proof that John Barclay was a deputy surveyor in 1690 or 1691. It is hardly credible that a man of his high position, a son of the then recent governor, Robert Barclay, himself identified largely and in many ways with the proprietary affairs, a member of the council, and afterwards appointed surveyor general, (April, 1692,) would have ventured to act as a deputy surveyor if he had not been duly authorized so to do. It is hardly credible that the council of proprietors would have allowed his surveys (and there are great numbers of them) to have remained on their records without some protest, if he had not held a commission as deputy surveyor. I think that they, and all claiming under them, are estopped from denying his authority. We have the positive testimony of the historian, William A. Whitehead, Esq., in his "Contributions to the Early History of Perth Amboy," (page 42,) that in January, 1688, John Barclay was appointed deputy surveyor under George Keith, and succeeded him as surveyor general, April 6, 1692. His appointment as deputy, it seems, was not recorded, and has been lost in the 200 years which have since intervened. But I cannot think that this should vitiate his surveys. I have no hesitation in holding that he was a regular deputy surveyor of the proprietors when he made the survey in question.

Nor have I any greater hesitation in holding that it will be presumed that a warrant was issued as recited in the survey. No warrant was produced on the trial, and that was made a ground of objection to the survey. That there was such a warrant is evidenced by the recital. This is presumptive proof of the fact, not to be questioned at this late day without some evidence to the contrary.

Some suspicion is sought to be cast on the book in which the survey is recorded, Book O. This is very strange indeed. Hundreds of surveys are only to be found in this book. It is of public consequence to the citizens of New Jersey that it should be carefully preserved. In the schedules annexed to the Elizabethtown bill, the proprietors themselves largely refer to it as the authority for many of the surveys which they cited as evidence of their acts of ownership, and of submission to their claims as proprietors, over the lands in dispute in that case. Book O and Book 2 of Surveys are very important records, and a transcript of them should be deposited in the office of the secretary of state at Trenton. It is strange that it has never been done.

But supposing the survey genuine and authentic, and made by a proper officer, it is still objected that it is insufficient to vest the title in Daniel Cox without a patent; and no patent was produced. It is conceded that no patents have been issued since the surrender of government, in 1702; the titles granted since then all resting on the surveys alone. If a patent was necessary before, why is it not necessary since? No law was ever passed to dispense with a patent; yet no one supposes that it is necessary, in order to perfect the title. It is merely a question of regulation. A patent, it is true, is authentic evidence of a title; but it is the survey and return that segregate the land from the common domain. Daniel Cox was one of the proprietors, owning one-twelfth of the whole province. His title, therefore, was already perfect. The survey and return were sufficient to segregate the lands, and set them apart to his use. See the observations of Chief Justice KIRKPATRICK in *Arnold v. Mundy*, 1 Halst. 67-69. Perhaps a non-compliance with the regulations might have authorized the board of proprietors, within a reasonable time, to vacate and set aside the survey in a regular way; but, until thus set aside, it seems to me it stands good. A survey made by a regular deputy surveyor, an officer of the proprietors, returned to their office, and duly entered in their books without objection, (as this was,) has always been deemed a good title in New Jersey. A statute was passed on the 5th of June, 1787, declaring "that any survey made of any lands within either the eastern or western division of the proprietors of the state of New Jersey, and inspected and approved of by the general proprietors, or council of proprietors of such division, and by their order or direction entered upon record in the secretary's office of this state, or in the surveyor general's office in such division, shall, from and after such record is made, preclude and forever bar such proprietors and their successors from any demand thereon, any plea of deficiency of right or otherwise notwithstanding." Revision N. J. p. 599, § 3. It is contended that this act is not retrospective, and does not apply to surveys made prior to its passage, and would be unconstitutional if it did. If it does not apply to surveys made and recorded before its passage, it would be of little use. In terms, it applies to all surveys; and the evil to be remedied related to past as well as future surveys. The previous section of the same act, making 30 years' actual possession, under certain circumstances, a bar to all prior locations, is

careful to give to parties 5 years to sue after the passage of the act. That section was certainly intended to be retrospective, and yet it is couched in no more absolute terms than the section under consideration. As to the allegation that a retrospective effect given to the act would make it unconstitutional, an obvious answer is that the constitution of New Jersey had no provision on the subject, and the constitution of the United States had not yet been adopted when the act was passed. In my opinion the survey produced was sufficient. After 200 years, it must be presumed that a survey regularly entered on the books of the proprietors, and never objected to by them, was entered with their consent and approbation.

3. The next link in the chain of the plaintiff's title is the conveyance of the land described in the survey of October, 1691, by Daniel Cox to the West Jersey Society. This is proposed to be shown by certified copies of several deeds offered in evidence for that purpose. Daniel Cox had become a large proprietor of West New Jersey, and was governor of that colony, and was invested with the powers of government therein. That colony was divided into hundredths, of which Cox held 20, besides large tracts of land which had been segregated, and large colonial interests in other parts, Minisink, etc. In the beginning of 1692, Cox disposed of all these vast proprieties to an association of some 70 different persons, to be held in 1,600 shares, distributed among the parties according to their respective interests. By deeds dated the 4th day of March, 1691-92, he conveyed to Jonathan Greenwood and Peter Guyon, to the use of the shareholders, all his proprietary rights, and all his property in West Jersey and in Minisink, and his two proprietary rights in East Jersey, besides other property specified, and concluding with general words conveying "all his, the said Daniel Cox's, parcels and tracts of land known by the name of 'towne lots,' situated and being in or near Gloucester towne and Egg Harbor, in West Jersey, aforesaid, and all other the lands, tenements, and hereditaments in America whatsoever of him, the said Daniel Cox, whereof or whereon he, the said Daniel Cox, or any other person or persons in trust for him or to his use, is or are standeth or stand seized of any estate," except certain lands referred to, not connected with this controversy. By a deed of the same date, (March 4, 1691-92,) not offered in evidence, but constituting an important document in the public political history of New Jersey, Daniel Cox granted and conveyed to the same persons the right and powers of government in West New Jersey. (These two deeds are copied in the New Jersey Archives, vol. 2, pp. 41, 64.) By another deed executed in the following January, (1692-93,) Daniel Cox released to the same parties a certain charge reserved in the first deed on one-third of the property, as security for part of the purchase money, and conveyed to them 4,000 acres of land in West Jersey, part of a tract which had been reserved by John Fenwick to himself, and an additional half propriety in East Jersey, which had been conveyed to him (Cox) by Robert West. The associates to whom Cox thus conveyed his interests assumed the powers of government over West Jersey, appointed the governor, made

regulations about the management of their affairs, the conveyance of their lands, etc. (See their Articles of Agreement, copied in New Jersey Archives, vol. 2, p. 73, which is an historical document. A certified copy of these articles was produced in evidence.) They appointed a standing committee to act for the body, consisting first of eleven, afterwards of nine, persons. They acted and were treated as a corporation. They were certainly a corporation *de facto*, and I think a corporation *de jure*; as much so, and with as much authority, as the proprietors of East New Jersey, whose corporate capacity has never been questioned. Exercising the powers of government, they were a law unto themselves, and a corporation of mere right. They were treated this way by the proprietors of East Jersey, in respect to their ownership of the two and one-half proprietries of that province which they had purchased from Daniel Cox. In 1745 the proprietors of East Jersey filed a bill in the court of chancery of the province against a large number of persons in the vicinity of Elizabethtown, who claimed certain lands adverse to the proprietors, which bill was called the "Elizabethtown Bill," already referred to; and the West Jersey Society is one of the most prominent of the parties complainant in this bill, being named, in the order of dignity, next after the earl of Stair and the Penns. The bill commences thus:

"To his Excellency Lewis Morris, Captain General and Governor, etc.: Humbly complaining, show unto your excellency your orators, John, earl of Stair, John Penn, Thomas Penn, Richard Penn, [John Child, Levy Ball, Francis Minshull, Joseph Mico, Henry Greenaway, and Thomas Knap, in behalf of themselves and other proprietors of the eastern division of New Jersey, commonly called and known by the name of the 'New Jersey Society,'] Samuel Neville,"

—and about 20 others, describing themselves as "general proprietors of the eastern division of New Jersey, in behalf of themselves and the rest of the general proprietors of the said eastern division of New Jersey." Those in brackets are the committee of the West Jersey Society, called in the bill the "New Jersey Society." Their title to the two and one-half shares of propriety before referred to is set forth in the bill, and in Schedule 2 thereto annexed. In the bill they say as follows, to-wit:

"And your orators, John Child, Levy Ball, Francis Minshull, Joseph Mico, Henry Greenaway, and Thomas Knap, in behalf of themselves and the rest of those called the 'New Jersey Society,' do show unto your excellency that, by sundry mean conveyances under the said Edward Billing, William Gibson, and Robert West, they stand seized of and entitled in fee-simple unto the whole of those two proprietries, or 24th parts of East New Jersey aforesaid, formerly belonging to the said Edward Billing and William Gibson, and to one-half of that propriety or 24th part formerly belonging to Robert West;"

—And they refer to said Schedule No. 2 for the derivation of title to the said two and one-half proprietries, which exhibits the same deeds of conveyance through Daniel Cox before referred to. This presentation of title is binding as an admission, both on the West Jersey Society and on the proprietors of East Jersey, and effectually disposes of the objections to the title of Daniel Cox to those proprietary shares in 1690 and 1691, when the survey of the Barnegat or Little Egg Harbor beach was made

to him. The West Jersey Society, or, as sometimes called, the "West New Jersey Society," and the "New Jersey Society," long held immense tracts of land in West Jersey, as well as considerable tracts in East Jersey, and a great many titles are dependent upon their deeds of conveyance. It is too late, at the present day, to doubt of the corporate or *quasi* corporate capacity of this association, and its power to sell and dispose of its lands by its corporate officers. It has been recognized by the legislature of New Jersey. Near the close of the Revolutionary war, on the 5th of October, 1781, the legislature passed an act for the protection of its property, entitled "An act for vesting the powers of agency for the West Jersey Society in Joseph Reed, esquire, one of the said society." The preamble of the act is as follows:

"Whereas, the said Joseph Reed hath, by his petition, represented, that on or about the 4th April, 1692, Sir Thomas Lane, knight, Michael Watts, esquire, and divers other persons, then residing in the kingdom of Great Britain, associated together by the name of the 'West Jersey Society,' for the purpose of locating and improving lands in North America, and did accordingly purchase of Doctor Daniel Cox divers lands, tenements, and rights or propriety in West Jersey, East Jersey, Pennsylvania, and New England," etc.

The act then gives power to Reed to protect the society's property, to rent it, etc., for the period of seven years, unless he should sooner be superseded by another agent. This was rendered necessary from the fact that many, if not most, of the associates, resided in Great Britain, and could not look after their interests during the continuance of the war. It appears by the articles of association of the society, and the instance of the Elizabethtown bill, that the society acted by its president or vice-president and standing committee, which was annually elected.

4. On the 1st of February, 1749-50, the West Jersey Society, acting by its president, vice-president, and committee, executed a power of attorney to Henry Lane and Lewis Johnston, authorizing them and either of them to sell and dispose of its lands in New Jersey, and do other acts specified in the power. This paper was executed, not only under the hands and seals of the officers, but under the common seal of the society. Its execution was duly proved by John Stephenson, the subscribing witness, before the lord mayor of London, and was duly recorded. I consider it a corporate document, duly executed by the society, under its corporate seal, and by its usual officers.

5. The next link in the plaintiff's chain of title is a deed for the Cox survey from the West Jersey Society, executed by their said attorneys, Lane and Johnston, to James Haywood, and dated April 1, 1751. The execution of this deed was acknowledged by one of the attorneys before the Honorable James Alexander. It is objected that both of the attorneys should have acted. The *testimonium* clause shows that they did, but only one acknowledged the execution. This was sufficient, as the power to sell was conferred upon both or either of them. The title then proceeds as follows:—

6. A deed of conveyance of the same property, dated March 26, 1762, from James Haywood to 20 different persons, including, among others,

John Monro, Edward Tomkins, John Leonard, William Newbold, Anthony Sykes, Benjamin Gibbs, and John Chapman. (A certified copy of this deed was produced, showing it to have been regularly acknowledged and recorded in the office of the secretary of state, May 30, 1762.)

7. A deed from John Chapman to Joseph Newbold, dated October 8, 1772, for one-half of his one-twentieth interest in said lands, and to Caleb Shreve for one-fourth of said twentieth. (This deed was not produced, but is recited in the deed from William and Clayton Newbold and others to Samuel Deacon and Simeon Haines, hereafter stated.)

8. A quitclaim deed from Benjamin Gibbs to his co-tenants, dated December 20, 1775, for his one-twentieth of said lands; so that the shares held in common became 19 in number, instead of 20. (This deed was not produced on the trial, but is recited in a certain deed, which was produced, from George Sykes to Thomas P. Sherborne, Jr., for a portion of lot No. 13, set off to John Leonard in the proceedings in partition hereinafter stated.)

9. Will of Joseph Newbold, dated 27th March, 1790, proved 19th May, 1790, devising his interest to Clayton Newbold; and will of said Clayton Newbold, dated 26th May, 1808, proved 18th September, 1812; devising the same to William and Clayton Newbold. Also the devolution by descent of Caleb Shreve's interest to his children and heirs at law; to three of whom, Benjamin, Caleb, and Reuben, the others released their interest.

10. Proceedings in partition for the division of the Daniel Cox survey among the said 19 shares; said partition being executed on the 1st of December, 1818, by John Collins, Jr., Charles F. Lott, and Joshua S. Earle, appointed commissioners for that purpose by Hon. WILLIAM ROSELL, second justice of the supreme court of New Jersey, on the 18th of June, 1818, on the application of Samuel Sykes, one of the heirs of Anthony Sykes, deceased; which commissioners made their report on the 9th day of December, 1818, and on the 12th of the same month the said report was presented to the said justice, and by him ordered to be filed in the clerk's office of the supreme court at Trenton, and the same was filed accordingly, together with a map thereto annexed, showing the several parcels into which the said commissioners divided the said lands. None of the proceedings in said partition were produced on the trial, except a duly-certified copy of the commissioners' report and map, and the order of the judge indorsed thereon, declaring that he had examined the within report; and directing the same to be filed as aforesaid, and a statement of the expenses of said partition, it being alleged that the other proceedings could not be found. This partition was cited and referred to in several deeds for various portions of the Cox survey, given in evidence for that purpose. In this partition, the lines of division between the several portions into which the tract was divided, extended across the tract from south-east to north-west, and the several portions were numbered from 1 to 19, beginning at the north end, and extending south-westerly to the old inlet of Little Egg Harbor. Lot No. 18, containing 194 acres, was the last lot bounding on the ocean. No. 19 (still fur-

ther south) was bounded by the inlet. All the lots extended back to the channel of Little Egg Harbor bay. Lot No. 18 fell to the share of John Chapman, then (in 1818) belonging, one-half thereof to William and Clayton Newbold, and one-quarter thereof to Benjamin, Caleb, and Reuben Shreve. William and Clayton Newbold claimed the remaining fourth of that share by virtue of paying the share of the expenses due from it, no one appearing to claim the same, or to pay said expenses. The judge had power, by the law, to order a sale of any share whose owner failed to pay a proportionate part of the expense, and one or more of such sales seem to have been made.

After this partition the next links in the plaintiff's chain of title were—

11. A deed dated 4th March, 1823, from William and Clayton Newbold, and Benjamin, Caleb, and Reuben Shreve, to Samuel Deacon and Simeon Haines, for the one-half of the John Chapman share owned by the Newbolds, and the one-fourth owned by the Shreves; and another deed of same date from William and Clayton Newbold to said Deacon and Haines for all their right, title, and interest in the remaining fourth. (The originals of these deeds were produced, duly acknowledged.) The first contains a recital of the deed from John Chapman to Joseph Newbold and Caleb Shreve, dated October 8, 1772, before referred to; and of the partition just described, and the allotment of lot No. 18 to the representatives of John Chapman.

12. A deed dated 31st May, 1823, from Samuel Deacon and Simeon Haines to William Elliott, George Armitage, John Kenworth, Marine Tyler Wickham, Charles Eaton, and Joseph Few Smith, conveying the said three-fourths and one-fourth of the John Chapman lot (No. 18.) (The original of this deed was produced, duly acknowledged.)

13. A deed dated 20th May, 1824, for the same lot, No. 18, from the last-named grantees (who are declared to hold in trust for the Long Beach Sea-Shore Company) to George Armitage, Marine Tyler Wickham, and James Baker, in trust for the uses and purposes declared in certain articles of association of the said company annexed to the deed, and signed by the grantors and various other persons. (The original of this deed was produced, duly acknowledged.) The articles declare that the association was formed for the purpose of keeping a house of public entertainment on the southernmost end of Long beach, in the county of Monmouth.

14. A deed dated 4th May, 1827, from M. T. Wickham and James Baker, surviving trustees, to Jacob Alter, for the same property, described as "all that tract or piece of land, with the buildings and improvements thereon erected, (distinguished by lot number 18 in a certain plan or map of a larger tract of land known by the 'Southwesterly part of Long Beach,') situate in Monmouth county, in the state of New Jersey, containing about 194 acres, be the same more or less." The deed recites that the requisite majority of the shareholders of the association were in favor of selling the house, land, and all other property of the company at public sale at a time named, unless previously disposed of at private

sale; and that the company should be dissolved; and that it was sold at auction accordingly, to James Alter, for the sum of \$1,750. (The original of this deed was produced, duly acknowledged.)

15. A deed dated 5th May, 1827, from Jacob Alter to Marine Tyler Wickham, Cornelius Stevenson, John Moore, George Wilson, James Baker, and Thomas Stroud, as tenants in common in fee, conveying the same property. (Original produced, duly acknowledged.)

16. Various deeds and proceedings in partition, by which the title of the last six grantees was conveyed and transferred (or claimed to be so) to James Burk, to-wit: (1) A deed from James Stroud to Burk, dated 7th April, 1835, for his (Stroud's) one-sixth part of said property. (Original produced, duly acknowledged.) (2) A deed from Cornelius Stevenson to Burk, dated 31st December, 1835, for his (Stevenson's) one-sixth. (Original produced, duly acknowledged.) (3) A deed from the administrator of M. T. Wickham to said Burk, dated 16th November, 1835, for Wickham's sixth part. (Original produced, duly acknowledged.) This deed recites the order and proceedings of the orphans' court of Monmouth county, for the sale of the land to pay debts, but the order itself was not produced, and for this cause the deed was objected to. (4) A deed dated 1st May, 1837, from commissioners appointed to make partition of said property among the said six shares, conveying the whole property to said Burk. (Original produced, duly acknowledged.) The deed recites the proceedings and orders of three judges of the court of common pleas of Monmouth county for the partition and sale of the land; but the said proceedings and orders were not produced, and for this reason the deed was objected to. Burk is shown to have had a tenant in the property by the name of William Ivins, in 1835, or about that time, down to about 1839.

The next muniment of title is—

17. A deed dated 28th June, 1839, from James Burk to David Good, for the entire property. (Original produced, duly acknowledged.)

18. David Good died in June or July, 1840, leaving a widow and three children, his heirs at law, namely, Rachel Ann, wife of Charles Baeder, the now plaintiff; Matilda, wife of Jonas Bowman; and John S. Good. The title of the other heirs was duly conveyed to the plaintiff by various mesne conveyances, the originals of which were produced, duly acknowledged, namely: A deed from John S. Good to Charles Baeder, dated February 12, 1866, for his third part; and several deeds from the heirs of Matilda Bowman, executed in 1874 and 1875, except one of said heirs, who conveyed to one Bullock in 1884, and Bullock conveyed to the plaintiff, and Charles Baeder conveyed the interests transferred to him to one Taylor, who reconveyed the same to the plaintiff.

It thus appears that the plaintiff's father, David Good, and his family, (including the plaintiff,) and finally the plaintiff herself, have had the ostensible title to the property since June, 1839. David Good left a will, executed in Pennsylvania, in presence of only two witnesses, by which he devised the property to his wife for life, with remainder to his children. The latter seem to have acquiesced in this will during their moth-

er's life-time. She died in 1862. If to this period we add that during which James Burk claimed the ownership, it carries us back to 1835, 50 years before the invasion of the proprietors and their grantee, the defendant. And Burk's title, barring some imperfections in the records, ordinarily requisite to validate conveyances by administrators and commissioners in partition, is regularly deduced from John Chapman's representatives in the partition made in 1818, (namely, the Newbolds and Shreves,) to whom was allotted lot No. 18 as set off in that partition, which includes the premises in question. Chapman was one of the grantees of James Haywood in 1762, and Haywood received title from the West Jersey Society in 1751. The title of the society is claimed under the various deeds from Daniel Cox and his mortgagees or trustees, made in 1692. The claim of Cox is founded on the resolutions of the proprietors in 1690, and the survey made in 1691. So that there has been a constant claim of title, with undoubted color of title, to the property in question, adverse to the proprietors of East New Jersey, for nearly 200 years past, and an almost perfectly connected chain of conveyances of undoubted validity for over 140 years. The alleged defects in certain links of the chain will be adverted to hereafter. In the mean time the question arising from alleged possession under claim of title, on the part of the plaintiff and her predecessors, will be examined.

Of course, it is difficult to produce actual proof of possession beyond the memory of man. We have, it is true, a gleam of historical evidence in the private act of the legislature passed the 27th of October, 1770. This act is entitled "An act to regulate the pasturing the lands, meadows, and islands in common, lying on and adjoining to a certain beach known by the name of 'Barnegat,' or 'Long Beach,' and for other purposes therein mentioned." There can be no shadow of doubt that the act refers to the property embraced in the Cox survey, including the lands in question. Its terms are in precise conformity to the then situation of the title as evinced by the deeds produced in evidence. It will be remembered that James Haywood had conveyed the property to twenty persons as tenants in common in 1762, eight years previous to the act. The names of certain of these grantees are mentioned in the act, in the appointment of managers for regulating the common use of the property. The preamble and first section are as follows:

"Whereas, the owners and proprietors of a certain tract of land, meadows, and islands, situate in the township of Statford and county of Monmouth, called 'Barnegat,' or 'Long Beach,' have by their petition set forth that the situation and circumstances attending said beach, meadows, and islands are such that they cannot conveniently be divided in the ordinary way by fences or ditches, by means whereof it is in the power of a few proprietors to greatly prejudice the said beach and meadows by overstocking the same, and receiving the whole profits to themselves; and praying a law to limit and regulate the pasturing said beach, islands, and meadows in common, which is but reasonable and just, therefore be it enacted by the governor, council, and general assembly of the colony of New Jersey, and it is hereby enacted by the authority of the same, that from and after the tenth day of May, which will be in the year of our Lord 1771, no possessor, owner, or their representatives shall

put on, or suffer to run at large on, said beach, islands and meadows a greater number of horses, horned cattle, sheep, or other stock, than in proportion to the quantity and quality of the lands, islands, and meadows he or they shall respectively hold, or be entitled unto."

The second section is as follows:

"And be it enacted by the authority aforesaid that it shall and may be lawful for the proprietors, owners, or their representatives to meet and assemble yearly on the fourth Tuesday in October, at the now dwelling-house of Benjamin Randolph, in the township of Statford, or any place to be hereafter appointed by a majority of the said proprietors, owners, or their representatives, met and assembled, and then and there choose three managers to regulate the pasturing said beach, islands, and meadows, which managers shall be and are hereby invested with power to enter upon said beach, islands, and meadows, view the same, and to limit and proportion the number of horses, horned cattle, sheep, or other stock each proprietor or owner shall put on or let run at large on said beach, islands, and meadows in proportion to the quantity and quality of the same."

The following sections provide for branding the increase of the stock with the mark of the respective owners, and authorize the managers to erect pounds for that purpose, impose penalties for violation of the regulations, and provide means of collecting the same by sale of stock, etc., and prescribe other duties of the managers as to keeping records, accounts, etc. The sixth section enacts "that *Anthony Sykes*, *William Newbold*, and *John Leonard* are hereby appointed managers for the ensuing year, and so to continue till such time as others are chosen in their room." The eighth section declares that the waters surrounding "all that beach island called 'Barnegat,' or 'Long Beach,' and also the waters which surround a certain island called 'Beach Island,' lying and being next unto and on the north of Long beach, shall be deemed a lawful fence around each of said islands, so as to support any action of trespass for any trespasses committed or done on those islands, or either of them; and that all trespassers within those premises shall be subject to the like penalties as are inflicted by the laws of this province on trespassers on any of the inclosed lands within this colony." From the antiquity of this act I have no doubt of its competency as proof that the lands therein described were used and occupied by the then claimants to the title thereof, and that they claimed the land as their own. This evidence is also *prima facie* proof, unless the contrary appears, that the land continued to be occupied and possessed by the owners thereof, according to its quality and adaptations.

The proceedings in partition which took place in 1818 (as well as intermediate conveyances of portions of the land) tend to the same conclusion, namely, that it was never abandoned by the persons claiming to own the same, but continued to remain in their possession. But, coming down to later times, within the memory of living men, we have the testimony of John D. Thompson, 80 years of age, that he lived on Long beach in 1834, in the company's house, which, he thinks, was built about 1830, and stood right south of Bond's house. The company referred to was either the Long Beach Sea-Shore Company or the

associates who then owned the property as grantees of James Alter, in his deed executed in May, 1827. They were M. T. Wickham, Cornelius Stevenson, John Moore, George Wilson, James Baker, and Thomas Stroud. The house is specially mentioned in the deed to Alter, executed just previously, namely, in May, 1827. Thompson, testifying, more than 50 years afterwards, undertakes to give the names of some of the company. He mentioned James Hickey, John W. Moore, Henry Shively, John Wilson, and Mr. Baker. Of course it is obvious that the persons he came in contact with may only have represented the owners. He states that he agreed with the Long Beach Company for the house; agreed with James Hickey, who was the property man; paid rent to William Ivins, who lived in the house after Thompson. (Hickey was probably the agent of the owners.) In 1835, as we have seen, some of the part owners sold out to James Burk, and in 1837 he purchased all the interests at commissioners' sale. Ivins, who received rents from Thompson, became tenant of Burk. An agreement between him and Burk in respect to the occupancy of the premises was produced in evidence. Thompson says that Ivins afterwards moved to Barnegat, and died there, and he (Thompson) was his administrator. He says that he found Ivins there (in the house) when he (Thompson) took possession in 1834; and after the season, he left Ivins in possession, and he (Ivins) resided there until he went to the Mansion of Health House, Manahawkin, in 1838, two years before his death; and that he died in 1840. After witness left, some year or so, Ivins sold out to a lawyer by name of Jones, who moved there, and Ivins moved to the Mansion of Health. There is a little confusion in Thompson's statements, but not more than would naturally be expected from an old man half a century after the events. It is clear from his testimony that the property was occupied by the ostensible owners, under the conveyances produced, from about 1830 to 1839; and the recitals in the deeds show that it was occupied and a house built on it several years before 1830, probably as early as 1824. The map made by the commissioners of partition in 1818 shows a house on the land at that time, occupied by a person by the name of Horner. The nature of the land was such that it was probably only used as a place for summer resort, or for pasturing cattle during certain seasons of the year. In regard to such lands, a continuous *pedis possessio* is not necessary to maintain the owner's possession in law, sufficient to antagonize all trespassers.

In 1839 Burk conveyed the property to David Good, and his family have claimed to own it ever since. We have the testimony of David Good's son, John S. Good, who was born, as he says, in 1823, and was therefore 16 years old when his father purchased the land. He testifies that after his father's death (in 1840) he several times visited the place with his mother; that it was then owned by his mother. (It has been seen that David Good devised the property to his wife for her life; and the children, no doubt, recognized her right to it, although the will, being witnessed by only two witnesses, was not a valid devise in New Jersey. She had a right of dower in it at all events.) John S. Good

says he thinks that Lloyd Jones was in possession when his mother owned it. He says that they (he and his mother) sometimes staid there two or three weeks at a time; that they were there three or four times. His recollection is somewhat indefinite. But it is clear that the family always continued to claim the property as their own. Living in Pennsylvania, and not able in those times to derive much income from the property, they may have let it lie unused for many years. There is no evidence on this point. But this did not deprive them of their right to it, or of their legal possession as against all trespassers. Certainly the Board of Proprietors of East New Jersey had, least of all, any right to disturb them, or to interject a party into possession, and thus place them in the position of being obliged to make out strict title after peaceable private ownership of the property for many generations. In my judgment there was a legal possession of the property, under color of title, in the plaintiff, and those whose estate she acquired, for a much longer period than 20 years, and the defendant has not shown an adverse possession for a sufficient period to overcome the *prima facie* right of the plaintiff. This conclusion is arrived at independently of any alleged defects in the documentary title produced by the plaintiff, and therefore the rule to show cause why a new trial should not be granted must be discharged without regard to those alleged defects.

It will be more satisfactory, however, to examine the objections made by the defendant to the documentary title of the plaintiff. The first general objection relates to the deeds and grants by which Daniel Cox derived title to the two shares of propriety of East Jersey, under which the survey of 1691 was made, and to those by which he and his mortgagees conveyed his and their interests to the West Jersey Society. Several of these deeds were never entered upon the East Jersey records at all, and were not entered on those of West Jersey until 1754. It is objected, for one thing, that these deeds were not acknowledged or proved. But no law required them to be acknowledged or proved. The regulation of the original concessions and agreement of Berkeley and Carteret, with regard to the acknowledgment and proof of deeds, referred only to conveyances between private persons; and no other regulations went into effect prior to the surrender, except the act of 1699, which did not make any change in this matter, being substantially a mere repetition of the concessions. The deeds in question were among a large lot of deeds and papers, 71 in number, which remained in the repositories of the West Jersey Society, in the secretary's office in London, without having been placed on record, from the early part of William and Mary's reign to the middle of last century. They were then sent to this country to their agent here, after being registered and recorded in the office of a notary public in London, carefully identified by the oaths of the secretary and notary, taken before the lord mayor of London, and by the oath of the captain of the ship that brought them over, taken before the honorable James Alexander, and indorsed on each deed, and were then recorded in Book M of Deeds for West Jersey, as they principally related to property in that division of the province. They were ancient deeds. Sixty years

had passed away since their execution. There was then no method by which they could be authenticated except that which was adopted, namely, to prove in the most indubitable manner that they came from the society's archives, the proper custody to which they belonged, and to place them on the public records. They not only came from the proper custody, but they were conformable to the possession and claim of the property to which they referred. Their existence and validity were fully recognized by the proprietors of East Jersey themselves in the Elizabethtown bill and the schedules annexed thereto; and no stronger act of possession could have been exercised over the shares than was exercised by the West Jersey Society in that transaction. This is conclusive, and renders further discussion unnecessary. I am entirely satisfied that the records of these deeds were properly received in evidence.

The act of 1743, referred to by counsel, did not stand in the way of recording these deeds. The first section of that act declared that certain acknowledgments or proofs theretofore taken should be deemed sufficient to authorize the deeds to be recorded. It did not declare that no other proof should be insufficient. The second section clearly did not refer to such a case as that presented by the deeds in question.

I have not overlooked the fact that the deeds referred to were not recorded in the East Jersey office, but in that of West Jersey. If this were a question between those claiming under these deeds and subsequent purchasers without notice, the want of registry in East Jersey might be a material circumstance; for such purchasers would have a right to say, "We are only bound to know what was on record in East Jersey." But the question is a very different one. It relates to the existence of the deeds,—to the inquiry whether there ever were such deeds. That fact may be determined, in proper cases, even by oral testimony, if the witnesses have seen the deeds, know their contents, and the signatures of the parties. The proof of ancient deeds, especially if of such great antiquity as those in question, may be made in various ways. If conformable to the history and possession of the property to which they relate, slight evidence will suffice. In the present case, according to the recorded proof, the deeds came from the proper custody in 1754, and were authenticated in the only way in which they could then be authenticated, and were then recorded in West Jersey, where the property to which they related was principally situated; and all this a hundred and thirty years ago, and the property always claimed and possessed in conformity thereto, and their validity admitted by parties adversely interested. Under such circumstances it seems to me that the records were *prima facie* proof of the former existence of the deeds.

The next material objection raised to the plaintiff's derivation of title is the non-production of the conveyance by John Chapman of his one-twentieth interest in the Long Beach property. This is alleged to have been made to the extent of three-fourths of said interest by a deed executed and bearing date the 8th of October, 1772, as before mentioned. Such a deed is recited in the deed from William and Clayton Newbold, and Benjamin, Caleb, and Reuben Shreve to Deacon and Haines, dated

the 4th day of March, 1823, more than 60 years before the defendant, under the East Jersey proprietors, undertook to take possession of the land. Under the circumstances of the case it seems to me that this recital is admissible to prove the existence of the deed in question. The Newbolds and Shreves claimed the Chapman share under the deed of 1772. They were evidently parties to the partition of 1818. The two Newbolds claimed the outstanding fourth part of Chapman's share by reason of having paid the proportion of the expenses of the partition due from said fourth part. Then they make the deed of 1823, and another deed for their right, title, and interest in the outstanding quarter. These acts of ownership, taken in connection with the previous history of the property, amount to such proof of possession as to clothe their deeds of 1823 with the character of a deed by parties in possession claiming title, and to confer upon their successors in the title and possession a right to the presumption that the deed of 1772 was executed and did exist as recited in the deed of 1823; such presumption also resting for support on the great lapse of time which has intervened. It seems to me that such a presumption (not of law, but of fact, and liable to be met by opposing proof) may reasonably and justly be raised against a trespasser having no title, or against the general proprietaries, who parted with their title long before. The same observations will apply to the supposed quitclaim deed of Benjamin Gibbs, dated 20th December, 1775, which is recited in the deed for one of the shares of the division, or a portion thereof, given by George Sykes to Thomas P. Sherborne, Jr., before referred to.

The proceedings in partition in 1818 are next objected to, because the original petition to the judge, and his order thereon, for the appointment of commissioners, was not produced. I assume that these papers could not be found. We have, however, the report of the commissioners, showing what they did in dividing the property and allotting the different parts to the shares in severalty, with a map of the premises and of their allotments, and the order of the judge directing the report to be filed. I think that this is competent evidence, under the circumstances, taking into consideration the lapse of time, and the possession of the property in conformity with the division.

We next come to the claimed transfer of title from Wickham and others (six in all) to James Burk, in 1835-37. The deeds for two of the shares (Stroud's and Stevenson's) are unimpeachable. Then there is a deed from the administrator of Wickham, under the order of the court, to sell land for payment of debts, but the order and proceedings are not produced, though recited in the deed. Is that sufficient? I am of opinion that the case is not aided by the statute of 1864, (Revision, N. J. 1045.) That statute refers to officers, or auditors in attachment, acting in pursuance of a decree, judgment, execution, or order of a court, and declares that their deeds, duly acknowledged, etc., shall be *prima facie* evidence of the recital therein. I do not think that an administrator can be called an officer. The question, then, is whether the recital in an administrator's deed of an order of sale 40 or 50 years after

the date of the deed, is sufficient presumptive proof of such an order; the possession of the property being conformable to the deed. In my judgment it is. The argument that the petition and order are necessary to the jurisdiction is not sufficient. Of course they are necessary to the jurisdiction. But what is necessary to prove that they were made is a question of evidence. And after a lapse of 40 or 50 years, I think that the recitals of the deed are evidence of the facts recited, other things concurring. The same remarks will apply to the deed of the commissioners in partition made to Burk in May, 1837. I consider the transfer of title to Burk as *prima facie* proven.

I believe these are all the material objections to the documentary title of the plaintiff. The result is that said title is maintained to three undivided fourths of the property in question, no title except that of possession being shown for the outstanding fourth part of John Chapman's interest in the Long Beach property. But if I should be mistaken with regard to the validity of the documentary title, the view which I have taken with regard to the possessory title requires a decision against the motion for a new trial. The rule to show cause, therefore, is discharged. A rule will be entered to that effect.

MCDERMOTT v. UNITED STATES.

(Circuit Court, D. Kentucky. October 21, 1889.)

1. UNITED STATES COMMISSIONERS—FEES.

Rev. St. U. S. § 847, prescribes the fees payable to commissioners for certain services, among others, "for administering an oath ten cents," "and for any other service the same compensation as is allowed to clerks for like services." Section 828 allows clerks "for entering any return, * * * or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents." Section 1758 provides that oaths of office may be taken before any officer authorized to administer oaths by United States laws; and section 1778 authorizes circuit court commissioners to administer oaths. Supervisors of election appointed by virtue of section 2012 are sworn officers, whose oaths are required to be preserved and filed by section 2026. *Held*, that a commissioner is entitled, for drawing oaths of supervisors of election, to 15 cents per folio; for administering same, 10 cents each; and for attaching his jurat, 15 cents each.

2. SAME.

He is entitled to the same compensation from the government for drafting affidavits of the supervisors that they had actually performed the services, administering an oath to each, and attaching his jurat, where he is instructed by the attorney general that such affidavits are required before the supervisors will be paid for their services.

3. SAME.

Rev. St. U. S. § 1014, provides for the mode of criminal procedure, "at the expense of the United States," against offenders against the United States, taken before commissioners for preliminary examination. Arrests for such offense can be made by virtue of a warrant issued on a sworn complaint only. *Held*, that under §§ 828, 847, a commissioner was entitled, from the government, to 15 cents per folio for drawing complaints in criminal cases for violating election laws, heard before him, and to 15 cents each for entering returns of such warrants and subpoenas for witnesses for the government in such cases.

4. SAME.

Rev. St. U. S. § 828, gives clerks for making dockets and indexes, on the trial of a cause where issue is joined, \$3, and in a cause which is dismissed, \$1. Act Cong.

Aug. 4, 1886, (24 St. p. 256, c. 903,) which is a deficiency appropriation bill, contains no provisions other than appropriations to pay deficiencies, but, in the appropriation for fees of commissioners, provides that they shall not be entitled to any docket fees. It contains no repealing clause, and does not refer to sections 828, 847. *Held*, that it does not repeal them, but the proviso refers simply to the money appropriated by the act, and that a commissioner is still entitled to the docket fees provided by section 828.

5. **SUPERVISORS OF ELECTIONS—FEES.**

Rev. St. U. S. § 2031, provides that supervisors of election shall be paid, for services as such, certain compensation apart from and in excess of all fees allowed by law for performance of duties as circuit court commissioners. The chief supervisor of elections is required by statute to prepare and furnish the supervisors all necessary instructions. *Held*, that a chief supervisor of elections is entitled to fees for such instructions from the government, where it is conceded that the amount charged is correct.

6. **SAME.**

He is also entitled to 15 cents per folio for special instructions to each of certain supervisors concerning particular subjects, and particular names of voters on the registration lists, or denied registration, as each instruction is an original, and to 10 cents each for filing returns of same.

7. **SAME.**

But he cannot recover fees for notifying the supervisors of their appointment, as there is no statute providing therefor.

8. **SAME.**

Under Rev. St. U. S. § 2031, allowing the chief supervisor of elections 15 cents per folio for copies of any paper on file, he is entitled to that fee for copies of the oaths of office of supervisors, which are in his custody by virtue of section 2026, furnished by the United States marshal on requisition of the attorney general, and to 15 cents each for his certificate thereto.

9. **SAME.**

He is also entitled to 15 cents for each certificate to be attached to each deputy-marshal's and supervisor's account, furnished under instructions from the attorney general.

10. **SAME.**

He is entitled to 10 cents each for administering the oath required by section 2026 to voters whose right to vote is doubted, and to 15 cents for each jurat attached to such oaths.

11. **SAME.**

There is no statute allowing him mileage for attending the federal court in the performance of his official duties, and he is not entitled thereto.

12. **SAME.**

He is not entitled to a *per diem* fee for attending the federal courts in the performance of his duties, as there is no statute allowing such fee; the allowance of a *per diem* fee to supervisors by section 2031 not including the chief supervisor.

At Law. Action for official fees.

George Du Relle and H. G. Phillips, for plaintiff.

J. C. Wickliffe, U. S. Atty.

JACKSON, J. This suit is brought by the plaintiff to recover fees claimed by him for services rendered as circuit court commissioner and chief supervisor of elections. The provisions prescribed by the act of congress, approved March 3, 1887, giving this court jurisdiction in such cases, seem to have been strictly complied with in the bringing of the suit, viz., an account exceeding \$1,000 in amount, succinctly stated in plaintiff's petition, with the nature of the claim duly set forth, and the proof that a copy of the petition has been served upon the district attorney, and another copy mailed by registered letter to the attorney general. The district attorney has appeared, filed a general demurrer to the petition, together with his statement to the court that he "can file

no objections" to the items claimed by the plaintiff. Record evidence is on file in the case showing petitioner's appointment as commissioner and chief supervisor; and it is shown that the items claimed were embraced in plaintiff's account against the United States, which was duly approved by the court in the usual way, and as prescribed by the act of congress approved February 22, 1875, (Supp. Rev. St. U. S. 145, 146,) and forwarded to the treasury department at Washington, where they were audited, and the items here claimed were disallowed to plaintiff, by the first comptroller. The plaintiff has given his deposition showing that he actually performed the services, the fees for which are sued for here; and to the same effect is the affidavit of James T. Ford, who was in plaintiff's law-office in Louisville during the rendering of these services, and which affidavit is by agreement to be treated as a deposition. The petition itself is duly sworn to, and the case is submitted to the court upon the written arguments of plaintiff's counsel.

The record in this proceeding abundantly shows that the services sued for were actually rendered, in good faith, and with an honest endeavor to faithfully perform the duties required by law of the plaintiff in his character of commissioner and chief supervisor; and this is admitted by the government, in terms by the district attorney, and by the demurrer, which raises for the decision of the court the question whether the fees charged for such services are authorized by law. For convenience, the fees claimed by the plaintiff for work done by him as commissioner will be considered separately from those claimed for services rendered as chief supervisor of elections.

1. Section 828 of the Revised Statutes contains the tariff of fees chargeable by clerks of the federal courts, and is as originally enacted February 26, 1853, having remained unchanged since then; while section 847, *Id.*, also a part of the same act of congress, prescribes the fees payable to commissioners for certain services, "and for any other service the same compensation as is allowed to clerks for like services."

(a) The supervisors of election appointed and commissioned by the court, by virtue of section 2012, Rev. St., upon the recommendation of the chief supervisor, (*Id.* § 2026,) are sworn officers, whose oaths the chief supervisor must "preserve and file," as required by the latter section. Plaintiff charges for drawing these oaths of office 15 cents per folio; administering the oath to each supervisor, 10 cents; and for his jurat or official certificate in writing that each oath was administered, 15 cents in each instance,—these fees aggregating the sum of \$147.60. Commissioners are allowed "for administering an oath, ten cents," (*Id.* § 847;) and clerks of the federal courts, "for entering any return," etc., "or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents."¹ Oaths of office "may be taken before any officer who is authorized, either by the laws of the United States or by the local municipal law, to administer oaths in the state, territory, or district where such oath may be administered." Rev. St. § 1758.

¹ Rev. St. § 828.

Vide, also, section 1778, Rev. St.¹ These oaths were therefore required by law to be taken and filed, and they thereupon became a part of the records in the office of the chief supervisor. The sections of the statutes above quoted and referred to prescribe the rate of fees for taking them as claimed by the plaintiff, and no good reason appears why the defendant should not pay the same. Exactly similar items were allowed in *Re Conrad*, 15 Fed. Rep. 641, and in *Gayer v. U. S.*, 33 Fed. Rep. 625. It will be noticed that the charge is for drafting the official oath, swearing the officer to the same, and attaching the plaintiff's certificate or jurat thereto. The fee of 10 cents is given by the statute for "administering" the corporal oath, as in case of a witness to testify; and the additional fee of 15 cents for the jurat is allowable where the person taking the oath subscribes to the paper, as a deposition, affidavit, and the like, and the officer annexes his jurat as the record evidence appearing on the instrument itself that such oath was administered.

(b) The next claims in the plaintiff's petition to be considered are precisely similar to the foregoing, viz., drafting affidavits of the supervisors showing by their several oaths that they had actually performed the services for which compensation was claimed by them, respectively, administering an oath to each, with the officer's jurat or certificate of the same. They amount to the sum of \$100. Supervisors of election are paid by the marshal, and receipt to him on pay-rolls furnished by the government for that purpose. Here the attorney general, by a communication to the marshal, before the supervisors were paid, advised him that "affidavits of supervisors of election should be affixed to the pay-rolls as vouchers when forwarded to the treasury for settlement." This instruction of the attorney general was by letter furnished to the plaintiff; and the work was for this reason, and upon such request and instruction, done by the plaintiff as charged for. There can be no reason why the government should not pay the fees.

(c) In certain criminal cases heard before the plaintiff as commissioner, for violation of the election laws by the various defendants therein, he claims fees at 15 cents per folio for drawing the complaints or affidavits on which the warrants were issued, amounting to \$3.30, and for entering returns of the warrants and subpoenas for witnesses for the government in the cases, at 15 cents each, in the sum of \$3; or, in all, \$6.30. It would be difficult to conjecture any legal reason for the disallowance of these small fees at the treasury department. Section 1014 of the Revised Statutes provides the mode of criminal procedure, "at the expense of the United States," where offenders are arrested "for any crime or offense against the United States," and taken before "commissioners" or other proper officers for preliminary trial and examination. Such arrests can be made only by virtue of a warrant issued upon a complaint under oath. The fee of 15 cents a folio, as shown above, is prescribed by sections 828, 847, Rev. St. The fee "for entering any returns" is also fixed by statute,—"for each folio, fifteen

¹This section authorizes circuit court commissioners to administer oaths in all cases in which, under laws of the United States, justices of the peace are so authorized.

cents." Id. § 828. In the register of the department of justice, "compiled by the authority of the attorney general," and issued by the attorneys general successively for now nearly 20 years, is a "form of commissioners' account of fees" in cases where preliminary examinations are had, among other instructions to those officers from the department of justice; and this form has been continued without change through all the publications. Among the items are those "for" drawing complaints and "entering returns" of "warrant" and "subpoena" at the same rate per folio as is charged by the plaintiff here. These fees have also been allowed in the following cases: *Barber v. U. S.*, 35 Fed. Rep. 886, and *Rand v. U. S.*, 36 Fed. Rep. 671. And, the charges being correct, the plaintiff should be allowed them here.

(d) The plaintiff claims docket fees in the cases heard before him preliminarily as commissioner, to-wit, \$1 in the single case dismissed, and \$3 each in the cases in which there were actual hearings; in all, \$31. Section 828, Rev. St., gives clerks "for making dockets and indexes, taxing costs, and all other services [than those otherwise enumerated in the section] on the trial or argument of a cause where issue is joined and testimony given, three dollars," and, "in a cause which is dismissed or discontinued, one dollar." In *U. S. v. Wallace*, 116 U. S. 398, 6 Sup. Ct. Rep. 408, the supreme court, affirming the judgment of the court of claims in the case, held that commissioners were entitled to the same fees as clerks for making dockets and indexes, etc.; Justice MATTHEWS delivering the opinion. And the judgment of the court is based on section 847, Rev. St., giving commissioners the same compensation as clerks for like services. The decision was made in 1885, and in that case the commissioner was required by an order of the court to keep a docket containing certain entries, as is the case with commissioners at Louisville. Later, in 1887, following the case of *U. S. v. Wallace*, *supra*, Judge BUTLER, of Pennsylvania, in *Phillips v. U. S.*, 33 Fed. Rep. 164, held that an order of court was not necessary; that "the duty of keeping a docket seems to be a plain implication from the authority conferred to issue process and hear cases;" and that "a commissioner could not properly discharge his functions without keeping a record of his proceedings." And to the same effect is *Knox v. U. S.*, 23 Ct. Cl. 370. The right of commissioners to be paid docket fees, as they are popularly called, seems thus to have been finally settled in their favor, and no doubt or question could now be properly entertained concerning it, were it not for a proviso contained in the deficiency appropriation bill, passed August 4, 1886, (chapter 908, 24 St. 256.) It is as follows:

"Be it enacted," etc., "that the following sums be, and the same are hereby, appropriated out of any money in the treasury not otherwise appropriated to supply deficiencies in the appropriations for the fiscal year 1886, and for other objects hereinafter stated, namely: * * * Judicial * * * fees of commissioners: For fees of commissioners, and justices of the peace acting as commissioners, fifty thousand dollars: provided, that for issuing any warrant or writ, and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services; but they shall not be entitled to any docket fees."

Several of the courts have considered this statute. The first case was decided by Judge BRUCE, of the middle district of Alabama, in November, 1887, being *Bell v. U. S.*, 35 Fed. Rep. 889, in which the plaintiff, a commissioner, was held to be entitled to these docket fees, notwithstanding the provisions of the statute above quoted; and judgment was rendered in the district court in his favor. From this decision an appeal was taken to the circuit court by the United States, and the appeal was dismissed upon argument in July, 1888. The next case in point of time is *Strong v. U. S.*, 34 Fed. Rep. 17, decided in the district court for the southern district of Alabama, in February, 1888, by Judge TOULMIN, pending the appeal of the former case in the circuit court; and the right of commissioners to docket fees is denied under the proviso in the act of August 4, 1886, above quoted. In *Rand v. U. S.*, 36 Fed. Rep. 671, decided by Judge WEBB in the district of Maine in October, 1888, this statute is fully examined and construed, and the decision reached that the proviso does not take away the right of commissioners to receive docket fees, but only excepts their payment out of the sums appropriated by the act of congress containing the proviso. And to the same effect are *Rand v. U. S.*, 38 Fed. Rep. 665, decided by the same court as the case last cited, and *Hoyne v. U. S.*, 38 Fed. Rep. 543, in which a similar judgment was rendered by Judge BLODGETT at Chicago; both the cases last cited having been determined in April, 1889. These are the only decisions reported on this question. The act of August 4, 1886, does not refer to sections 828 and 847, Rev. St., nor in terms repeal them; nor does it contain the usual provision that all acts and parts of acts not consistent with it are repealed. If section 847 is not repealed as to commissioners' docket fees, the plaintiff here is of course entitled to recover them. If repealed, it can only be by implication; and courts look with small favor to the construction of a statute which would necessarily repeal another, unless the intention of the legislative body is manifest, and the language clear. The title of this act is "An act making appropriations to supply deficiencies in the appropriations for the fiscal year 1886, and for prior years, and for other purposes;" while the enacting clause recites an appropriation of money for the deficiencies of that year, "and for other objects." This act, embracing some 53 pages of the statute book, contains but four other provisos besides the one pertaining to commissioners' fees, viz.: One providing that no part of the sum appropriated to pay certain judgments shall be available till the right of appeal has expired; another, appropriating certain moneys for a reservoir, provides that a board of engineers shall make a full report of the work, etc.; another, appropriating certain moneys for postmasters' salaries, with a proviso that they shall be adjusted in the method pointed out; and still another, where a sum was appropriated for the expense of a board of visitors to the Naval Academy, with a proviso "that no part of this sum, or of any other appropriation by congress for expenses of the board of visitors, shall be used to pay for intoxicating liquors;" and this is the only provision containing new general legislation in the entire act, and its terms are clear and plain that the pro-

vision is not intended to have a wider scope than the expenditure of the money appropriated by this portion of the bill. As a matter of fact, though it is not proven in this record, the comptroller, disallowing these fees, has allowed them to commissioners in this circuit without question since the passage of the act of August, 1886; thus construing the proviso as operating only to prevent the use of the money thereby appropriated to the payment of such docket fees earned during the fiscal year of 1886 and prior years. The act in question was simply a deficiency appropriation bill. Its function was only to appropriate money to pay sums already due from the government. It contains no single provision other than an appropriation of public money for this purpose; and that this proviso was intended to repeal a general law on the subject of fees of over 30 years' standing, without any reference to it, and without any clause repealing it in terms, and without any general repealing clause, will not be imputed to congress, and the court ought not to so presume. These fees should therefore be allowed to the plaintiff.

2. The fees of chief supervisors of election are prescribed by section 2031 of the Revised Statutes, which provides that they shall be allowed and paid, for services as such, certain "compensation apart from and in excess of all fees allowed by law for the performance of any duty as circuit court commissioner." Their duties are mainly prescribed by sections 2020, 2026, Rev. St.

(a) The plaintiff here, as chief supervisor, prepared and furnished instructions to the supervisors concerning their duties at the registration of voters at Louisville, for which he claims \$322.50, and like instructions for their guidance at the election in that city for member of congress, his charge for which is \$427.05, together with instructions for the election supervisors in other towns (of less than 20,000 inhabitants) where there was no registration, claiming therefor \$161.70; in all \$911.25. The statute requires the chief supervisor to prepare and furnish the supervisors with all necessary "instructions" for their "direction" in the discharge of their duties; and an examination of the various provisions of the law on this subject will show that their functions are different in the large cities of over 20,000 population, from what they are in smaller cities and in the country; hence these different sets of instructions for which plaintiff claims compensation at 15 cents per folio,—some being 10, others 11, and the rest 13 folios in length. There are two reported cases as to these fees for instructions by chief supervisors: *In re Conrad*, 15 Fed. Rep. 641, and *Gayer v. U. S.*, 33 Fed. Rep. 625; the former decided in 1883, and the latter in 1888. In the *Conrad Case*, the chief supervisor was held entitled to be paid for such instructions 15 cents per folio; while in the *Gayer Case* he seems to have been allowed that fee for preparing the instructions, and a fee of 10 cents a folio for the copies of them sent to the supervisors. Since this case was submitted to the court, plaintiff has furnished an additional brief, showing recent rulings by the accounting officers of the treasury, made with the approval of the attorney general, under which such instructions are paid for at the rate claimed here; and there has been filed the original

report from the first comptroller's office, dated June 8, 1889, allowing to the chief supervisor in Indiana, on a rehearing of the disallowances in his account, the fees for similar instructions at 15 cents a folio; and other supervisors in this judicial circuit have since been paid similar fees, as I am informed. These instructions seem to have been issued to the supervisors generally; but the proof shows that upon notice they appeared before the chief supervisor in person, and were orally instructed as to their duties, in addition to each receiving one of the printed instructions, and it is not conceived that under such circumstances the officer's fees would be different from what they would where original instructions were issued to each supervisor, and addressed to him over the signature of the chief supervisor, though the latter is certainly the safer and better course. And while, of course, the construction given by the accounting officers to a statute is not binding upon the courts, it would seem to be a hardship to adjudicate the question against the petitioner, where there is really no contest between the parties over it, and where it is conceded that the amount charged is correct. It is accordingly allowed.

(b) As to the special instructions issued respectively to 23 supervisors at one time, and to 22 at another, concerning particular subjects and particular names of voters,—on the one hand appearing on the registration lists, and on the other hand denied registration,—there can be no doubt that each was an original, and should be paid for at 15 cents per folio, the fees for which amount, respectively, to \$14.75 and \$7.70; and the same are allowed, together with the fee of 10 cents for filing returns of same, \$4.50.

(c) The petitioner charges 15 cents each for notices sent by him as chief supervisor to the various supervisors by mail; the fees amounting in all to \$79.35. The court appointed these supervisors upon information furnished to it by the chief supervisor, (section 2026, Rev. St.;) and it was his duty to receive, preserve, and file their oaths as such, to properly instruct them as to their duties, and to receive from them "all certificates, returns, reports, and records of every kind and nature," under the provisions of the act authorizing their appointment. The statute does not provide how these officers shall be notified of their appointment, nor, in terms, whose duty it is to so notify them; but the chief supervisor is in a sense their immediate superior, and such notification by him is eminently proper, and there should be some provisions made to pay for the service, but the courts cannot make a statute, or supply its omissions by strained constructions. It seems that no statute has taken notice of such items of official service by the chief supervisors, and provided a fee for them.

(d) In the correspondence between the attorney general and the chief supervisor and marshal at Louisville (a copy of which is filed in this record) concerning the payment by the latter of the election supervisors and deputy-marshals, the petitioner was required to furnish the marshal with copies of all their oaths of office, for which he claims here \$135.90. The oaths were on file in his office, and he was their proper custodian.

Rev. St. § 2026. For a copy of any paper on file, the statute allows him 15 cents a folio. Id. § 2031. It was his duty to make and furnish these copies, and the statute fee therefor is certainly chargeable to the government. The petitioner has computed the copies at 15 cents a folio for the copy, and 15 cents for his certificate thereto; which makes this claim \$135.90 for the copies, and \$67.95 for the certificates thereto, for which he is entitled to judgment.

(e) In addition to these copies of their oaths, the chief supervisor was required to furnish his own official certificate, to be attached by the marshal to each deputy-marshal's and supervisor's account, showing the number of days each performed service as such officer. The instructions contained in the correspondence above referred to, as well as the correspondence between the petitioner and the district attorney, show this beyond any question; and the fee of 15 cents for each such certificate is charged in accordance with the statute, and amounts to \$67.95 in all.

(f) Petitioner was obliged to attend the United States court at Covington in the performance of his official duties as chief supervisor, and and he charges mileage at 10 cents a mile one way for 110 miles. The statute gives neither commissioners nor chief supervisors mileage in any case whatever; nor can the court. It was doubtless the petitioner's duty to attend the court as he did; and, as it will not be presumed that the law requires duties and expenses from an officer without compensation, perhaps petitioner's expenses on this trip to Covington might be recoverable, were they sued for; but the claim for mileage must be disallowed.

(g) Section 2026, Rev. St., prescribes, among other duties of the chief supervisor, that he shall cause the names of those who may register and vote, or either, "whose right to register or vote is honestly doubted, to be verified by proper inquiry and examination," etc.; and, in pursuance of this authority, petitioner administered an oath to each of 23 voters who were refused the right to register, and he charges 10 cents each for same, and 15 cents for the certificate or jurat to such oath. As these are the fees prescribed by law, plaintiff should be allowed this compensation for his services in this behalf, in the sum of \$5.75, as claimed.

(h) The remaining item of \$125 is for a *per diem* fee of \$5 a day for attendance on the circuit courts of Kentucky, 25 days, in the discharge of his duties as chief supervisor. Section 2011, Rev. St., provides that "within not less than ten days prior to the registration," or election, if there be no registration, the court shall be open for the transaction of the business contemplated by the statutes, (title 26,) and "shall proceed to appoint and commission, from day to day, and from time to time," the election supervisors, (Rev. St. § 2012.) The chief supervisor is required to receive all applications for the appointment of supervisors; and, "upon the opening * * * of the circuit court for the judicial circuit in which the commissioner so designated [as chief supervisor] acts, he shall present such applications to the judge thereof, and furnish information to him in respect to the appointment by the court of such su-

pervisors of election," (section 2026, Rev. St.) and "there shall be allowed and paid to each supervisor of election * * * who is appointed and performs his duty, under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days," (section 2031, Id.) The case *In re Conrad*, 15 Fed. Rep. 641, holds that the chief supervisor, under this legislation, is entitled to the *per diem* fee, but limits the amount to 10 days' attendance. In *Gayer v. U. S.*, 33 Fed. Rep. 625, the chief supervisor was allowed this *per diem* fee for 26 days; the court placing his recovery on the ground that "he would be entitled as commissioner, when engaged in his official duties, for services analogous to these," to be so paid. In the *Conrad Case* the court construes the words "supervisor of election" to embrace the chief supervisor; in the *Gayer Case* he is held not to be embraced within them; the two cases thus proceeding to judgment on widely different grounds. There is no similarity whatever between the duties to be performed by the supervisor and the chief supervisor; and by the statute (Rev. St. § 2031) the former is paid only by a *per diem* fee, while the latter is paid according to the tariff of fees prescribed in that section. There is no *per diem* fee whatever provided by section 847, Rev. St., for attendance upon the circuit or district court, but only for time employed in the preliminary examination of defendants charged with criminal offenses, which certainly bears no analogy to the duties required of the chief supervisor by title 26 of the statutes. Nor can his services performed simply as chief supervisor be paid for by the fees provided for commissioners for entirely different duties, although the same person holds both offices. There being therefore no provision in the law authorizing the payment of *per diem* fees to a chief supervisor of elections, petitioner cannot be allowed them, and judgment must be refused as to this item.

It follows, from the foregoing conclusions, that the plaintiff is entitled to recover of the United States the amount of the several sums herein allowed him as proper charges for the services rendered by him, both as United States commissioner and as general supervisor of elections; and judgment is accordingly awarded him against the defendant for the aggregate amount of said allowances.

BOGLE *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. October 30, 1889.)

1. CUSTOMS DUTIES—CLASSIFICATION—ANCHOVY PASTE.

Certain fish pastes, known in the trade as "Anchovy Paste" and "Bloater Paste," held to be included within the terms "pickles and sauces of all kinds" in schedule G, act March 3, 1883, (Tariff Index, 284,) and dutiable at 35 per centum *ad valorem*.

2. SAME—CONSTRUCTION OF STATUTE.

The phraseology of said paragraph "pickles and sauces of all kinds" is to be construed in its natural and ordinary meaning, and not in any particular or restricted trade meaning.

At Law.

Action to recover alleged excessive duties exacted by the collector of customs at the port of New York from the plaintiffs on their importations, between November 16, 1886, and July 20, 1887, on certain fish pastes known in the trade as "Anchovy Paste" and "Bloater Paste," contained in small jars, or bottles. The collector levied duty thereon at 35 per centum *ad valorem* under schedule G of the tariff act of March 3, 1883, (Tariff Index, 284,) which reads, "Pickles and sauces of all kinds, not otherwise specially enumerated or provided for in this act, 35 per centum *ad valorem*." The plaintiffs protested, and claimed the same to be dutiable at 25 per centum *ad valorem* under the same schedule, (Id. 283,) to-wit, "Salmon and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, twenty-five per centum *ad valorem*." The merchandise in suit was shown to be fish paste manufactured by some process or formula known only to the manufacturers thereof, whereby anchovies or bloaters were finely ground and mixed with spices, resulting in a highly seasoned mixture, generally used as a relish with other food, and as a stimulant provocative of hunger or thirst. It was shown by the evidence of several importers of and large dealers in provisions that the term "sauce" had a restricted trade meaning at the time of the passage of the tariff act of March 3, 1883, in which nothing was considered a sauce unless it was in liquid form; that the merchandise in suit was a paste, and not a liquid. Some of the witnesses testified that it was not only used as a relish when taken with food, but was in itself nutritious. On motion for a direction of a verdict in favor of the defendant, defendant's attorney cited *Maillard v. Lawrence*, 16 How. 251; *Greenleaf v. Goodrich*, 101 U. S. 278; Syn. Ser. 3492.

Comstock & Brown, for plaintiffs.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*charging jury*.) It is often difficult to determine which of two parallel rules of interpretation promulgated by the supreme court shall be applied; whether we shall take words in their general or in their special meaning. I am unable to differentiate this case from *Maillard v. Lawrence*, 16 How. 251, in which the circuit court had been requested to instruct the jury that if they should find that at the date of the act the shawls in question were commercially known as "manufactures of worsted, or of which worsted shall be a component material," and that they were not known in trade as "clothing, ready made," or as "wearing apparel," they were subject only to a duty of 25 per cent. This instruction was refused; and the supreme court sustained such action, holding that, while it was true that where words or phrases are novel or obscure, as in terms of art, it was proper to explain or elucidate them by reference to the art or science to which they were appropriate, it was not so when such words or phrases were familiar to all classes of trade and occupation; that the popular or received import of words and phrases

furnishes the general rule for the interpretation of public laws as well as of private and social transactions. The court added that, "if it should be conceded that, in the opinion of mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptance of language."

The phraseology which is used here—"pickles and sauces of all kinds"—seems to call for an exhaustive enumeration. There is nothing in the words themselves to indicate that they are used in a particular trade meaning; and there is nothing certainly shown in the record as to the facts which were laid before congress when the act was under discussion which would indicate that they were using the word in any particular trade meaning. The article before us here is, I think, plainly within the popular definition of the word "sauce." The testimony which we have as to its use, and what is known of its constituents, is sufficient to place it in that category. Following, therefore, the decision in *Maillard v. Lawrence*, and its affirmance in *Greenleaf v. Goodrich*, 101 U. S. 278, a verdict must be directed for the defendant.

The jury rendered a verdict for the defendant in accordance with the direction of the court.

FRTZSCHE *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. October 22, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—FLORAL EXTRACTS.

Since the passage of the tariff act of March 3, 1883, (23 U. S. St. at Large, c. 121, p. 488,) floral extracts, which are articles composed of about 95 per cent of alcohol and 5 per cent. of sediment, and used in the manufacture of perfumery, are not dutiable at the rate of \$2 per gallon and 50 per centum *ad valorem* as "alcoholic perfumery," under the subdivision of "Alcoholic Preparations," which provides for such perfumery, contained in Schedule A of said tariff act, but are dutiable at the rate of \$2 per gallon for the alcohol contained, and 25 per centum *ad valorem*, as "alcoholic compounds not otherwise specially enumerated or provided for" under the subdivision of "Alcoholic Preparations," which provides for such compounds contained in said Schedule A.

At Law. Action to recover back customs duties. The plaintiffs, on January 4 and April 27, 1888, made two importations from France into the port of New York of floral extracts,—jasmin and rose. These floral extracts were classified by the defendant, as collector of customs at said port, as "Alcoholic Perfumery," under the subdivision of "Alcoholic Preparations," which provides for "alcoholic perfumery," contained in Schedule A of the tariff act of March 3, 1883, (T. I. new, par. 100,) and duty thereon, pursuant to such provision, was exacted of the plaintiffs by him, as said collector, at the rate of \$2 per gallon and 50 per cent. *ad valorem*. Against this classification and exaction the plaintiffs made sufficient and seasonable protests, claiming therein that these floral ex-

tracts were "alcoholic compounds," dutiable at the rate of \$2 per gallon for the alcohol contained and 25 per centum *ad valorem* under the subdivision of "Alcoholic Preparations," which provides for "alcoholic compounds not otherwise specifically enumerated or provided for," contained in said Schedule A, (T. I. new, par. 103.) Thereafter the plaintiffs, within the time required by law, duly made appeals to the secretary of the treasury, and, within 90 days after adverse decisions were made thereon by him, brought this suit to recover the difference in duties at the rate exacted by the defendant as said collector, and at the rate claimed by them in their protests. Upon the trial it appeared that these floral extracts were colored liquids, the jasmin being of a wine color, and the rose of an olive green color; were composed of about 95 per cent. of alcohol and 5 per cent. of sediment; were somewhat greasy or oily to the touch, and were of a heavy fragrant odor; and that, when applied to a linen handkerchief, etc., they both left a greasy or oily stain upon it. From the plaintiffs' testimony it appeared that at and prior to the passage of the aforesaid act of 1883 the term "perfumery" was a trade term, having a more restricted meaning than the dictionary definition, and, in trade and commerce of this country, meant the finished products manufactured from various raw materials differently combined, and made ready for use as perfumery by the consumer; that in the manufacture of such finished products the various raw materials used had to be reduced in strength and rendered volatile, so that the heavy smell of them, as it was called in the trade, was made to disappear; that their different smells and odors had to be compounded in such a way as to produce imitations of nature; and that the natural coloring matter in these raw materials had to be treated, and the oil or grease in any of them removed, so that the finished products would not stain the handkerchief or other article to which they were applied; that these floral extracts were not, at and prior to the passage of the aforesaid act of 1883, in trade and commerce of this country, perfumery, or included in the term "perfumery;" that they have always been in such trade and commerce regarded as, and used as, one of the materials employed in the manufacture of perfumery. From the defendant's testimony it appeared that, at and prior to the passage of the aforesaid act of 1883, in trade and commerce of this country perfumery was anything which gave a pleasant odor, and that floral extracts like those in suit were so known as, and included in the term, "crude perfumery."

Comstock & Brown, for plaintiffs.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*charging jury*.) These articles are compounds of alcohol. As such they were properly dutiable as alcoholic compounds, which is the plaintiffs' contention, unless they are otherwise specially enumerated in the tariff act. The government contends that they are otherwise specially enumerated by the term "alcoholic perfumery." The definition of the term "perfumery," as given to us from the dictionary

which was used here, is unsatisfactory. The word "perfumery" is there defined by a reference only,—that is, "Perfumery. Perfumes in general;" and, when "Perfume" is turned to, we find that the only definition given is, "A substance that emits a scent or odor, which affects agreeably the organs of smelling." Of course new-mown hay is within this definition, but, while in one sense it may be said to be a perfume, yet the meaning which we attach to the word "perfumery" in daily life is much more restricted. The word, as generally used, means not only a substance which emits a scent or odor, but also one which is handled, bought and sold, and used for the purpose of obtaining from it such odor whenever required. But of course with the dictionary definition of the word we need not particularly concern ourselves. This tariff act is concerned with the trade and commerce of the country, and it is therefore proper to turn to that trade and commerce for the definition of words which are used in the act. Two definitions have been proffered here as to what the word "perfumery" means in the trade. One witness, called by the government describes it as "anything which gives a pleasant odor;" the articles in suit he calls crude perfumery. That is the claim of the government. The witnesses on the other side say that in trade the word "perfumery" is confined to the finished product that can be used by the consumer, and that until it is put into such a condition that the consumer into whose hands it finally comes can use it for the purpose for which perfumery is used by individuals, it is not "perfumery," as known in the trade.

It is for you to determine, in the first place, which of those definitions is established by the testimony in this case to be the trade definition. When you reach a conclusion upon that point, you will next say whether or not these particular articles fall within that definition.

Verdict for plaintiffs.

CLAY v. MAGONE, Collector.

(Circuit Court, S. D. New York. October 28, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—CELERY SEED.

Since the passage of the tariff act of March 3, 1883, (22 U. S. St. at Large, c. 121, p. 483,) such variety of celery seed as is not intended to be sown or planted to raise celery to be consumed by man, is not medicinal seed, but an aromatic seed, and is not edible, and is in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, is not dutiable at 20 per centum *ad valorem* as "garden seed," under the provision for "garden seeds, except seed of the sugar-beet," contained in Schedule N of said tariff act, but is free of duty as "seed," under the provision for "seeds" contained in the free-list thereof.

At Law. Action to recover back customs duties.

The plaintiff, on October 5 and December 12, 1887, and February 16, 1888, imported from Marseilles, France, into the port of New York 23 bales of celery seed. This celery seed, pursuant to the decision of the

treasury department, rendered March 23, 1887, and numbered 8,181, was classified by the defendant, as collector of customs at said port, as "garden seeds," under the provision for "garden seeds, except seed of the sugar-beet," contained in Schedule N of the tariff act of March 3, 1883, (Tariff Index, new, par. 465,) and duty thereon, pursuant to such provision, was exacted of the plaintiff at the rate of 20 per centum *ad valorem*. Against this classification and exaction the plaintiff made sufficient and seasonable protests, claiming that this celery seed was free of duty as "seeds of all kinds, except medicinal seeds, not specially enumerated or provided for" in the tariff act of 1883, under the provision therefor contained in the free-list thereof, (Tariff Index, new, par. 760,) or as "seeds aromatic, which are not edible, and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this act" under the provision therefor contained in said free-list, (Tariff Index, new, par. 636.) Thereafter the plaintiff, within the time required by law, duly made appeals to the secretary of the treasury, and, within 90 days after adverse decisions were made thereon by him, duly brought this suit to recover the duties exacted as aforesaid.

Upon the trial of this suit it appeared that each of the aforesaid 23 bales contained about 200 pounds of celery seed; that this celery seed was a very cheap article, and was always purchased without statement from the seller, or marks on the bales or packages containing the same, to indicate what kind of celery it would produce if sown or planted, or that, if sown or planted, it would even germinate; that it could not, therefore, be sold to those who sow or plant celery seed to raise celery; that while, to some small extent, it was used in making medicinal preparations, it was generally used in making celery salt and other condiments for soups and other articles of food for mankind; that it was not medicinal seed, but aromatic seed; that it was not edible, and was in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture; that at and prior to the passage of the aforesaid act of 1883 the term "garden seeds" in trade and commerce of this country meant seeds that were sown or planted to produce plants, vegetables, or other crops that were generally eaten by mankind; that at that time in this country celery seed sown or planted was sown or planted to produce celery which was exclusively so eaten; that at that time much the greater portion of celery seed produced in this country was sown or planted for that purpose; and that at that time in this country celery seed sold to be sown or planted was sold with marks, etc., to indicate and guaranty the kind of celery it would produce.

Comstock & Brown, for plaintiff.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*charging jury*.) The method of fixing rates of duty, by varying them according to the uses to which articles imported may be put, is, no doubt, a very philosophical and logical way of classifying articles for duty

under the tariff, but in practice it is at times extremely inconvenient; so much so that, unless the language of the tariff clearly indicates a plain intent on the part of congress that the article legislated upon should be classified according to its use, a court should be cautious in determining the rate of duty by the application of such test. Of course congress does repeatedly legislate in that way. Thus we have a provision for substances of all kinds used for manure, and one for animals imported for breeding purposes; and there are a number of other instances in the statute where imports are classified according to their use. But, unless the language of the statute plainly requires the test of use to be applied to a particular article, the dutiable character of any particular importation is not to be determined by an inquiry into its ultimate use. In the case at bar we have a word, or a phrase rather, which, as used, leaves it somewhat uncertain as to whether congress did or did not mean to apply the test of use. The phrase is "garden seeds." This may mean either seeds intended for use in the garden, or the class of articles known commercially as "garden seeds." There is testimony in the case that there was a distinct trade meaning of the phrase "garden seeds," known in trade and commerce of this country, and that congress adopted the phrase and put it in the tariff act. With regard, however, to the determination of the question whether or not we should interpret that phrase here as meaning the same thing as "seeds used or to be used for the garden," there is nothing left for this court to decide. That question has been considered by the supreme court in the case of *Ferry v. Livingston*, 115 U. S. 542, 6 Sup. Ct. Rep. 175, and the rule there laid down is, of course, controlling here. There, this same section being before the court, and the question being whether certain seeds then under consideration were to be considered as "garden seeds" or as "agricultural seeds," the court held, indeed, that it would not be sufficient, to show that they were not "garden seeds," to show that they were used both in the garden and in the field, but they went further, and indicated that if it appeared that the seeds in question (the particular cabbage seed then before the court) belonged to a variety not intended to be used to raise cabbages to be consumed by man, then they could not be regarded as "garden seeds." Now the same construction is to be applied here; and if we find (and that is the question which goes to you for your determination) that the celery seeds imported here were of a variety of celery seeds which was not intended to raise celery to be consumed by man, then it is not within the provision for "garden seeds," and your verdict must be for the plaintiff.

Verdict for plaintiff.

In re LAWLER.

(Circuit Court N. D. Georgia. October 23, 1839.)

1. ARMY AND NAVY—ENLISTMENT.

A petition for discharge on *habeas corpus* of one arrested as a deserter from the army alleged that petitioner was under 16 years when enlisted; that he enlisted through the fraudulent representations of one J., the recruiting officer; that his father's written consent was obtained by means of such representations; and admitted the desertion while still a minor. The return denied the fraud, and presented the written consent of petitioner's father to his enlistment, and petitioner's sworn statement that he was 20 years and 6 months old at enlistment, and alleged that J. was a private, and not the recruiting officer, who was one P. Held that, as the return was neither demurred to nor denied, it must be taken as conclusive as to all the facts therein set forth.

2. SAME—EVIDENCE.

Evidence of petitioner's relations, that he was under 16 years when he enlisted, is not sufficient to establish that fact against the sworn statement of the petitioner and the record in the family Bible, showing that the birth of petitioner, as recorded, had been changed from 1870 to 1871, and the record of the birth of a younger sister in 1871 entirely erased.

Appeal from District Court. *Habeas corpus.*

Blalock & Birney, for relator.

S. A. Darnell, for respondent.

PARDEE, J. A. C. Lawler filed a petition in the district court of this district, setting forth that he is a citizen of the United States and of the state of Georgia; that he is forcibly and illegally detained and deprived of his liberty in the United States barracks, at the military post in the city of Atlanta, by one Henry H. Clawson, in command of said post, by virtue of a pretended claim of authority of said Clawson, as agent of the United States, to hold petitioner upon the charge of being a deserter from the army of the United States. The petitioner further alleges that some time in the month of October, 1886, he enlisted as a private in the United States army, at the recruiting station in Atlanta; that at the time of said enlistment he was a minor under the age of 21 years, to-wit, of the age of 15 years and 6 months, and that therefore said enlistment was without authority of law, and contrary to law and void; that he was induced by fraudulent representations to enlist as above stated; that there was a written consent to said enlistment by petitioner's father, but that said written consent was obtained by fraudulent representations made by one Hayes Jemmison, recruiting officer, and agent of the United States, to petitioner's father; that said fraudulent representations, both to petitioner and his father, were to the effect that petitioner would be sent regularly to school, and would have other advantages in the army which he could not otherwise obtain; that all said representations proved to be false, and were known to said Jemmison to be false when he made them; that afterwards, on the ——— day of April, 1887, and while still a minor, petitioner left the said army, and has not since returned, and that on the 27th day of September, 1889, petitioner was arrested in the city of Atlanta, and is now held illegally and against his will. Petitioner prayed for a writ of *habeas corpus*, which was issued and served, and

thereupon the commanding officer, Gen. Jackson, made return substantially as follows: That the said Lawler was arrested as a deserter from the United States army, and is now held as such awaiting trial, which will be had as soon as a court-martial can be convened and organized for that purpose; that respondent denies all the allegations of petitioner as to his age, and states that in his belief he is of lawful age, and regularly enlisted; that no fraud was practiced to obtain his father's or petitioner's consent to the enlistment; that recruits in the army have the privilege of six months' schooling while in the army, and petitioner could have enjoyed this advantage if it did not conflict with his other duties as a soldier; that it is now compulsory for recruits to attend school where not in conflict with other duties; that he does not know what other advantages petitioner alludes to in his petition; and that recruits in the army do possess other advantages not enjoyed by others not in the service. Respondent tenders to the court the original descriptive list or enlistment papers upon which petitioner entered the United States army. Said papers show that at Hiram, Paulding county, Ga., on October 5, 1886, J. P. Lawler, as the father of Albert C. Lawler, gave his consent in writing for A. C. Lawler to join the United States army, Battery B, second artillery; that Albert C. Lawler filed a sworn statement on the 6th of October, 1886, stating that he was born in Randolph county, Ala.; that he was 20 years and 6 months old, and a farmer; that he voluntarily enlisted October 6, 1886, as a soldier in the army of the United States for five years, unless sooner discharged by the proper authority; that he agreed to accept such bounty, pay, rations, or clothing as established by law; that said Lawler also took the oath of allegiance, and swore to obey the orders of the president, his other superiors, and the rules and articles of war, all of which was signed and sworn to by said A. C. Lawler before Charles F. Parker, second lieutenant, second artillery, recruiting officer. Said papers also show the certificate of the surgeon that the applicant was free from bodily defect or mental infirmity, and the official statement of Charles F. Parker, second lieutenant, second artillery, recruiting officer, to the effect that he minutely inspected said A. C. Lawler previous to his enlistment; that he was sober when enlisted; that to the best of his judgment and belief he was of lawful age; and that he observed the other rules and requirements in regard to enlisting soldiers. Said return further shows that the said Hayes Jemmison, mentioned in the petition, was at the time of the enlistment of Lawler a private in the army of the United States, and that the recruiting officer was Charles F. Parker, second lieutenant, second artillery. This return was neither demurred to nor denied. Upon the case, as made by the petition and return, the case went to trial in the district court. On the trial, as it appears by the brief of evidence and bill of exceptions, the petitioner, by his counsel, asked leave to amend his petition by withdrawing from it the allegation that there was a written consent of the petitioner's father to his enlistment in the army, which proposed amendment was refused. The district court, after hearing the evidence, gave judgment discharging the writ, and remanding the petitioner to the custody of the respondent.

Thereupon petitioner applied for and was allowed an appeal to this court.

In the order allowing the appeal, no provision was made for the custody of the petitioner pending the appeal. The case has been argued at some length before the circuit court, mostly in regard to the rules of evidence in proving the contents of written papers, and upon the refusal of the district court to allow the amendment withdrawing the allegation of written consent by petitioner's father to his enlistment. It does not seem necessary to pass upon these questions. As the return of Gen. Jackson, the custodian of the petitioner, was neither demurred to nor denied, nor in any wise put at issue, it is to be taken as conclusive on the facts therein set forth. In this view of the case, no issue is left except the single one as to whether or not the petitioner was under the age of 16 years when he enlisted. If he was over the age of 16 years at that time, his enlistment, according to the return, was regular and valid; if he was under 16 years of age, the enlistment was void, whether the father consented in writing or not. On the question of the age of the petitioner at the time he enlisted I have carefully considered all the evidence, and it fails to satisfy me that the petitioner was under 16 years of age when he enlisted; but, on the contrary, satisfies me that he was over that age. On the side of the petitioner is the evidence of his father, mother, and himself, and his brother, no one of whom testifies with certainty, and as having good and sufficient reasons for certainty. On the other side is the sworn declaration of petitioner when he enlisted, the written consent of the father, the certificate of the recruiting officer, and what family record was presented on the hearing of the case in what purports to be the family Bible. The record in this Bible shows that the birth of the petitioner was originally entered April 20, 1870; that at some time since the original entry the record has been tampered with; an attempt made to erase the "0" in 1870, and insert the figure "1;" and that the birth of a younger sister, occurring some time in 1871 or 1872, has been entirely erased, in order, apparently, that the record might not show too many children born between 1871 and 1873. The conclusion left upon my mind is that the claim that the petitioner was under the age of 16 years when he enlisted was invented subsequent to the arrest for desertion, and that the petitioner's evidence has been somewhat made up to meet the necessities of the case. The judgment of the district court in the case will be affirmed.

DEERING v. MCCORMICK HARVESTING MACH. CO.

SAME v. WINONA HARVESTER WORKS *et al.*, (two cases.)

(Circuit Court, D. Minnesota. November 30, 1899.)

1. PATENTS FOR INVENTIONS—HARVESTERS—INFRINGEMENT.

The fifth claim of letters patent No. 191,264, dated May 29, 1877, for improved harvester, being a combination of toothed arms, a slotted receiving platform, and fixed springs, with the characteristics described in the patent, and co-operating for compacting the gavels, is not infringed by a harvester with a compressor in alignment with the packers, and below them, near the tail of a stationary receiving platform, working as a resistant to compact the gavel, the platform having one wide slot, through which the teeth move the wisps against overhanging rods.

2. SAME.

Letters patent No. 223,812, for improvement in harvester machines, so that the grain may be freely delivered by means of a swinging side elevator, conveying the grain, properly straightened, to the receiving table, so that it can be bound at the middle, are not infringed by a harvester with a swinging platform, and an elevator which drops the grain on an inclined board, with slots through which packing arms operate to compact the grain, with an endless apron, which is not connected with the harvester elevator.

3. SAME—PRIOR STATE OF THE ART.

The twenty-first claim of letters patent No. 266,913, relating to mechanism for compressing the bundle of grain just before tying, in connection with a spring link for relieving the binding mill from strain, and obviating breakage when the grain is no longer compressible, is not infringed, in view of the former state of the art, by a device furnishing an elastic yielding of the compressor, which is not of the peculiar construction set forth in the claim.

4. SAME.

In view of the prior state of the art, claims Nos. 3, 4, 9, and 10, under letters patent No. 272,598, dated February 20, 1888, whereby an automatic grain-binder regulates the position of the band in the gavel so as to place the gavel in its proper position, relative to the length of the grain, without the attention of the operator, must be limited to the peculiar construction of mechanism as set forth in the specifications by which this result is obtained.

5. SAME—ANTICIPATION.

The combination of the swinging butt-adjuster, arms, and a board pivoted to the adjuster, as set forth in claims 20 and 21 of letters 272,598, is anticipated by the "Heller Butt-Adjuster," used on harvesters in 1878 or 1880.

6. SAME.

Letters patent No. 251,147, dated December 20, 1881, describing a mechanism for raising, lowering, and fastening the grain platform of a harvester, is anticipated by a patent issued to one Bacon in 1838 for lowering, fastening, and raising windows.

In Equity. Bill for infringement of patents.

Banning & Banning and *B. F. Thurston*, for complainant.

Parkinson & Parkinson, for McCormick Manufacturing Company.

Dyrenforth & Dyrenforth, for the Winona Harvester Works and others.

NELSON, J. Three suits are brought by William Deering—two against the Winona Harvester Works and others, which are consolidated, and the other one against the McCormick Harvesting Machine Company—for the infringement of certain letters patent for improvement in harvesters, or harvester binders. They are heard together. In controversy, there are involved with the McCormick Company letters patent No. 191,264, issued May 29, 1877, to John F. Steward; No. 223,812, issued January, 27, 1880, to William F. Olin; No. 266,913, issued October 31, 1882; also No. 272,598, issued February 20, 1883, to John

F. Steward. The same patents are involved in the suit against the Winona Company, and, in addition, letters patent No. 278,639, issued May 29, 1883, and letters patent No. 301,190, issued July 1, 1884, also letters patent No. 251,147, issued December 20, 1881, to John W. Webster. The first two patents involved in the Winona Company's suit, and not in the McCormick case, relate to the "knotter" by which the cord is held around the bundle of grain; and counsel consent that a decree may be entered against that company for an infringement of these patents, so that they are eliminated from this controversy. The complainant and the McCormick Company are extensive manufacturers and competitors throughout the grain-producing regions of the world, and by their efforts have stimulated the inventive genius of that class of persons interested in the improvement and development of practical machinery for cutting and binding grain. The Winona Company was a new enterprise, inaugurated under the superintendence and management of men formerly in the employ of the complainant, and manufactured a machine in its general features and operation like those introduced and sold by the complainant, and also by the McCormick Company.

Steward Patent, No. 191,264, dated May 29, 1877.—Defenses: No infringement, and want of novelty and patentability, and estoppel. It is remarkable that no machines are in use, at the present time, manufactured precisely according to the specifications, claims, and design of this patent; and, although the complainant is the owner, he does not construct the machine sold by him like the drawing of the patent. The charge is made that both defendants infringe the fifth claim of this patent. This claim is as follows:

"The combination of the toothed arms, *p*, slotted receiving platform, *H*, and the fixed spring arms, *u*, *v*, for compacting the gavels, substantially as specified."

It is necessary to a proper understanding of this claim, and the devices involved, to look at the mechanism of the machine described, and for which the patent was granted, and its purposes, in the light of the existing state of the art. This patent is denominated "Improvement in Grain-Binders." The patentee, in his description, says:

"I have invented new and useful improvements in harvesters. The object of this invention is to improve the construction of grain harvesting and binding machines; and its nature consists * * * in providing a device for compacting the grain ready for binding; * * * in providing devices for retaining the cut grain in proper position at all times while being forced into the binding wire; and in the several parts, and combination of parts, hereinafter set forth and claimed as new."

The claim, in connection with the drawings and model exhibited, calls for a slotted receiving platform, toothed arms arranged to pass through it and protrude, so as to engage and force forward the flowing grain, and spring arms fixed directly opposite the slots in the platform, operating as resistants to the arms moving forward through the slots, and thus the packers or arms, with the springs directly opposite, acting as resistants, compact the gavel while it is being formed, and finally press it through

and under the springs, to be operated upon by the needle arm, and bound. When Steward applied for this patent he was familiar with the operation of a binder, then in the market, on the Gordon or McElroy machine, and alleges that the combination of this fifth claim in the patent was the result of his personal experience in the field, and that the necessity of such improvement was then demonstrated. In order to make a machine effective as a binder, the wisps of grain must be formed into a gavel of proper size to make the bundle. This could only be accomplished by some device which would press the wisps of grain together, and finally hold them, until the binding mechanism tied the bundle. In 1868, Carpenter received letters patent for "improvement in grain-binders," and his invention related to improvements for conveying the grain from the platform to the binding mechanism, and there compressing it into a bundle by means of compressor rods and the revolving rake. The compressor rods and the teeth of the revolving rake perform, to some extent, the same duties as the teeth, *p*, and the spring rods in the Steward patent. The rods are pivoted at one end only, and they operate as resistants in an opposite direction to the teeth on the revolving rake. They are held down by a spring pawl, which tends to make them rigid, so as to hold the bundle being formed by the wisps brought up by the rake teeth. The rods spring back when released by the pawl at the proper time, and the bundle is carried over the shaft which carries the binder arm.

So the Storle patent, 1869, has spring rods under which, on the platform, the wisps are raked, and these spring rods tend in a slight degree to compact the gavel as it forms, and keep the grain down. In the Whitney machine, 1875, overhanging curved rods, called "E," drop down, and, as the wisps are brought along by the rake teeth, the rods operate as resistants to compact the gavel. The Gorham machine was patented about this time, and the Gordon one year earlier,—called "Gordon-McElroy" by counsel. The latter had overhanging spring wires fastened to a rock shaft, and their function was to compress the gavel and hold it until a bundle was ready to be bound. As in the Storle and the Whitney, the bundle was formed by the revolving rake teeth, called "arms" or "packers," and the rods acting upon the grain on the platform. In the Gordon machine the spring rods were not placed directly opposite the advancing arms, and there was a difficulty in the practical operation of the machine in the field; and, as I understand the witness, this difficulty was due to the form of the overhanging rods, and the fact that they were not independent resistants. Steward then, in his patent, provided a device for compacting the grain for binding. He changed the shape of the Gordon spring rods, and fastened them to a cross-bar, not a rock shaft, so each would hang directly opposite to a slot in the platform, through which a tooth upon the revolving rake, or, as described in the patent, tooth of the sliding bar, operated. These rods had independent springs, and operated as resistants independent of each other. He made a receiving platform, *H*, tilted by a crank shaft, and its function is particularly described in the specifications of the patent. It is described

as slotted, and the purposes for which this platform is introduced could not be accomplished unless it was slotted, and was capable of being tilted; so then, whenever the receiving platform, H, is spoken of, it must be understood that reference is made to a receiving platform, described in the patent as slotted, and firmly attached to a shaft or journal bar, connected with a crank and other devices, so that the platform, H, shall be tilting, and can be raised and returned to its proper position, as appears in the drawings accompanying the patent. The specification requires the receiving platform, H, to be constructed in this manner; and when the patentee introduces in a combination claim the platform, H, whether it be designated as a slotted platform, or a tilted platform, reference is made to the platform particularly described in the patent as an element of the combination. My construction of the fifth claim, therefore, is that it is limited to a combination of the toothed arms, receiving platform, slotted and tilting, and the fixed springs, each having the characteristics designated in the patent, and co-operating for compacting the gavels in the peculiar manner described in the patent; and the claim is not infringed, except by the combination of the same elements possessing the essential characteristics of those designated in the claim, and co-operating in the same way, for the same purpose. The defendants use no such combination. They have a compressor in alignment with the packers, and below them, near the tail of the receiving platform, and working as a resistant to compact and press the gavel. The grain in their machine passes from the elevator over and onto a receiving platform, with one wide slot, through which the packers or teeth move forward the wisps against and under two wires or rods overhanging, and coming down to that part of the platform, which drops and permits the bundle, when tied, to fall to the ground. The receiving platform is not tilting, but stationary. The rods do not hang down, and operate as compactors and resistants, opposite the slot through which the teeth advance in alignment with them, but are located at each side of it, and continue to bear upon the gavel, and prevent the straws of grain from slipping down, while the gavel is compacted or pressed between the teeth and the compressor. This is not the combination of the fifth claim, in the Steward patent, of elements therein described, co-operating for the purposes designated; and the defendants do not infringe such claim, as charged. It is unnecessary to consider the other defenses.

Olin Patent, No. 223,812.—Defenses: No infringement, want of novelty and patentability, and equitable estoppel. The defendant the Winona Company is charged with the infringement of all the six claims of this patent, and the defendant McCormick Company is charged with the infringement of all the claims except the fourth. The patent issued to Olin for "improvements in harvesting machines," and the nature of the invention, is stated as follows:

"In that class of harvesting machines where the grain is received upon a carrier-platform, and elevated over the drive-wheel by an elevator, and deliv-

erer to the binders, or an automatic binder, it is desirable that there shall be no stoppage in the flow of the grain in its passage to its place of delivery; that the butts of the grain shall be carried up parallel, or nearly so, with the heads of the grain, so as to deliver the grain in proper shape for binding purposes; and that the grain shall be delivered to the receiving table so that it can be bound at or near the middle. The object of this invention is to provide devices for attaining all these results, and it consists in interposing a roller between the lower end of the elevator and the inner end of the grain carrier, to facilitate elevating the grain, and prevent clogging at that point, and prevent the grain from being carried down, or falling through between the elevator and carrier; in providing a belt or chain [called 'Q' in the patent] at the grain side of the machine for elevating the butts of the grain, supported on a swinging bar, so that it can be adjusted according to the length of grain being elevated, to deliver the grain so that it can be bound at the middle; in devices for operating and adjusting the elevator for the butts; in the peculiar construction of the cover; in arranging and operating the belt for the butts so that it prevents any clogging by short grain at the heel of the sickle; in arranging the device for elevating the butts so that it will bear against the butts of the grain, and crowd or move the grain back on the elevator towards the center, for the purpose of straightening the grain in its passage up the elevator, and delivering it so that it can be clasped or bound near the middle, to facilitate the ease of binding."

The drawings and model exhibited show and describe two rollers between the grain carrier, or receiving platform, of a harvester, and an elevator which carries the grain over the drive-wheel, and a supplemental swinging side elevator or belt for elevating the butts, arranged so that it will bear against the butts, and crowd the grain back on the main elevator towards the center, and at the same time straighten the grain as it passes up, and delivering it so that it can be clasped and bound near the middle. The peculiar means of adjustment of the swinging elevator, and the mode of combining it with the harvester elevator, and the devices and mechanism used, are set forth at length. The claims are:

(1) "In combination with a harvester elevator, a swinging elevator pivoted at its lower end, and suitable devices for shifting its upper end, whereby the swinging elevator forms a means for elevating the butts of the grain, and delivering grain of different lengths at the same point, substantially as specified." (2) "The adjustable elevator or belt, Q, having its pulleys or wheels arranged with their faces parallel with the upper surface of the main elevator, in combination with such main elevator, for carrying the butts up even with the heads, substantially as specified." (3) "The adjustable elevator or belt, Q, having its lower end, c, advanced in front of the line of grain travel, and arranged as described in relation to the main elevator, substantially as and for the purposes set forth." (4) "The pivoted frame or bar, e, supporting the elevator, Q, in combination with the sliding bar, l, rod, n, and lever, o, for adjusting the upper end of the belt, substantially as and for the purpose specified." (5) "The shaft, W, wheel, h, and frame, i, in combination with the gear-wheel, g, and pulley-wheel, d, for driving the elevator and keeping the gear-wheels, g, h, in gear, substantially as specified." (6) "The elevator or belt, Q, in combination with the inclined board, R, and main elevator, substantially as and for the purpose set forth."

In the operation of harvesters, it was found that the straws which have been cut do not fall so as to lie evenly upon the moving receiving

platform. Some of them, particularly in short grain, assume an angular position; the heads of grain, when reaching the elevator, being in advance of the butts, so that, when carried up, the swath of grain is not presented to be bound at or near the middle. The straws in the swath move along up the elevator in the angular position assumed when they reached it. In 1875, to overcome this difficulty, Elward was granted a patent, in which he placed a short endless apron, set at the inner edge of the receiving platform, with its rear end nearest the elevator, obliquely to the line of cut, so as to engage the passing butts of grain, and move them backward prior to delivery to the elevator. He says this apron may be operated either by the friction of the passing butts, or it may be given a positive movement. Green, also, in 1877, obtained a patent for improvement in grain-binders, and in it he has a grain-guide, "which is pivoted at the lower front corner of the elevator frame, on the grain side thereof, and which is provided at its upper end with a handle convenient to the driver sitting in his seat." The object of this guide is to move the butts of straw backward, so that the elevator will deposit the short grain into a receiver at its upper end, to be delivered to the compressing devices in proper position for being bound at or near the middle of its length. He claimed (No. 19) "an adjustable grain-guide, T, combined with a grain elevator in a harvester, substantially as described." As early as 1853, Watson and Renwick had a grain-binder patent, in which the grain was elevated to the binding apparatus "by means of a series of shifting endless bands, which, without stopping the machine, could be adjusted to present the grain to the binder in such position that the band will be passed around the middle of the sheaf, whether it be long or short." So, Marsh, in 1864, had along-side of the elevator a traveling independent belt, with teeth, to carry up the butts of grain, and prevent them from lagging, and this belt moved faster than the elevator; and the belt is claimed in combination with the elevator and the traveling platform, upon which the grain, when cut, falls. All these devices, in the several patents mentioned, were placed on the side of the machine, where the grain was first taken from the receiving platform and elevated. Olin followed with his devices for elevating the grain so that it could be bound at or near the middle, and they were all on the side of the upwardly inclined moving canvas or elevator, which carries the grain from the receiving platform. The supplemental butt elevator in his patent is pivoted at its lower end, and acts upon the butts as the grain ascends. It facilitates the ease of binding properly near the middle, operating in combination with the main elevator, by straightening the grain in its ascent. The specifications and claims refer to those parts of a harvester concerned in elevating the grain from the platform, which receives it when cut, to the point where it is discharged and falls upon the binder platform; and the supplemental swinging butt elevator, Q, is described in the patent, so located that its teeth will engage with the butts of grain on a roller called "I," interposed between the foot of the main elevator and the end of the moving receiving platform, and carry them up, as well as force them backward.

The defendant's harvester has a receiving platform and an elevator, which drops the grain brought up onto an inclined board or binding deck, having slots through which packing arms project, and operate to compact the grain while the gavel is forming; and at the upper end of this deck or descending table is pivoted an endless apron, arranged so that its face side engages the butts, which facilitates the descent of the grain at the butt ends, and adjusts it lengthwise in proper shape for binding. This endless apron has a downward movement, and operates on the grain after it is delivered from the elevator, and adjusts it between the point of discharge from the elevator and the point at which it is subjected to the binding mechanism; but it does not operate, in combination with a harvester elevator, to carry the grain up as it passes from the platform upon which the cut grain falls. It is urged that there is no difference in the function and operation of the supplemental swinging elevator of Olin and defendant's endless apron; and the complainant's expert, Bates, says, in considering the first claim:

"* * * As shown and described in the patent, this belt, Q, [the Olin swinging belt elevator,] is arranged with one end low down near the carrier platform, H, [the platform upon which the cut grain falls,] and the other end up near the highest point of travel of the grain; but it is obvious that these positions might be changed, and the device still operate in exactly the same way to push the grain back, and to convey the butts forward. For example, the receiving end of the belt, Q, might be further along on the path of the grain, even at the highest point on its path, or beyond it, and the delivery end also further along, even at the point, P, [a receiving table beyond the upwardly inclined canvas or elevator,] or near it. * * * I therefore understand the essentials of this device to be that it shall be combined with the devices which elevate or convey the grain from the carrier platform to the binder; that it shall be pivoted at its receiving end, so that its delivery end may swing back and forth to accommodate grain of different lengths, and that its delivery end shall be provided with devices by which it may be moved back and forth for that purpose; and that it is immaterial at just what point in the path of the grain said swinging belt or conveyor, Q, is located. * * * I am also aware that in the claims the device is called an 'elevator;' and this is correct, but perhaps slightly misleading, as, whatever its position in a machine of the class illustrated in the patent, it assists in elevating the grain from the point, H, to the point, P, even though it were so located that it acted on the grain only on the downward portion of its path."

Renwick, defendant's expert, says, in considering the Olin patent, that it is limited strictly to an arrangement in which the pivoted end of the swinging elevator shall be literally and absolutely the lower end, and in which the swinging elevator operates upon the grain while it is being elevated from the platform upon which it is deposited by the cutters. I think Renwick has construed the patent correctly, and the complainant's expert, Bates, has overlooked, or not taken into account, the statements of the patentee, when he says:

"The elevator, Q, need not extend the entire length of the elevator, but may stop some distance below the upper elevator roller."

And again, when he says:

"In order to elevate the butts even with the heads, the belt or elevator, Q, is so arranged that the teeth, b, will engage with the butts of the grain on the roller, I, and carry them up while the heads are being carried up by the elevator belts, M. The lower pulley, c, is to be so arranged that it will permit the teeth, b, on the elevator, Q, to clear the end of the roller and engage the butts, and this pulley, c, is located as close to the main frame as is possible and permit the operation of the butt elevator; which location of the pulley brings the butt elevator in position to enable it to catch any short grain, which short grain is liable to fall down and be caught by the heel of the sickle, and clog the sickle. By locating the lower pulley, c, of the belt, Q, at the proper distance above the main frame, A, the teeth, b, on the elevator will come in contact with such short grain, and force it forward onto the carrier platform; thus keeping the heel of the sickle clear at this point."

There is no infringement of the claims by either defendant.

Steward Compressor Patent, No. 266,913.—Infringement by both defendants of twenty-first claim alleged.—Defenses: "Want of novelty and patentability;" "prior use, before claim inserted, for more than two years;" "no infringement." The twenty-first claim is as follows:

"The combination of the vibrating arm, G², the shaft, F², by which it is supported and moved, provided with a crank, E², a moved part of the machine, and the connecting link, provided with a spring so that its length may elastically yield, whereby said vibrating arm will oppose the needle, and co-act therewith as a compressor, and move away to permit the escape of the bundle, substantially as described."

This combination relates to the mechanism for compressing the bundle, and squeezing it to the requisite smallness, just before tying. The object of securing the arm, G², to the shaft, F², at the location described, in relation to the needle arm, V, which forms a part of the combination, is to allow the vibrating arm, G², to co-act with this arm as a compressor, and relieve the binding wire from strain. The defendants' expert in his testimony describes the operation of the compressor arm, G², and the needle arm, V, and speaks of the spring link connecting the rock shaft, F², with shaft moving the needle arm, V, as being placed there to obviate breakage of the needle or arm, or stopping the machinery, which would occur, when the grain was no longer compressible, without the spring-link connection, so as to permit compressing the spring in the link. I think he is correct, for in the specification the patentee says:

"This spring is strong enough to operate the crank, * * * and yet allow the rod * * * to slide through the head or socket, when the arm, G², has completed the compression of the bundle, so that no injury can result if the crank * * * continues its movement after the arm, G², has compressed the bundle."

The spring link directly connects the two shafts actuating the compressor and the needle arm and allows the rod to yield, so that the movement of the compressor, G², may be such as to adapt it to bundles of various sizes; but the patentee states that it is strong enough to obviate breakage, and, when the expert states that the purpose is to avoid accident, it is true, and the only criticism of the statement made is that the device incidentally avoids breakage, while its purpose is to produce elas-

tic compression. Yielding compression is obtained by the mechanism adopted, and undoubtedly the peculiar construction of the link spring, and its location, avoids accident; so that it may fairly be said that, if the main purpose is elastic or yielding compression, it can only be accomplished by the use of a device between the arms to prevent breakage also. But elastic yielding of the compressor arm is found in many grain-binders before Steward's patent; most of them cited by defendants, or put in evidence. See particularly the Baker patent, No. 191,096, which even Steward admits in his letter to Messrs. West & Bond of March 30, 1878, came close to him. All are different in construction, and the movement of the compressor is such as to adapt it to bundles of various sizes. The spring connection is used in all; not directly between the two shafts actuating the arms, but indirectly for accomplishing like results. Steward attempted on July 15, 1882, to broadly claim the use of a spring link for elastic compression, (see Steward file contents,) which was rejected upon reference to Buxton and others, and he then modified his claim as it now stands in his patent. I think he must be limited to the peculiar construction in which the connection between the compressor arm and the needle arm, by use of the spring link, is direct; and any combination like the Buxton or Baker or Adams or Appleby, where an indirect spring connection was put in, is not an infringement. It is unnecessary to consider the defenses of prior use and others interposed, inasmuch as neither defendants infringe.

Steward Patent, No. 272,598, February 20, 1883.—Alleged infringement by defendant McCormick Company of the third, fourth, ninth, and tenth claims, and by defendant Winona Company of the twentieth and twenty-first claims.—Defenses: No infringement; want of novelty and patentability. The patent was granted for a "grain-binder," and the specification says:

"The object of my invention is to provide means that, combined with an automatic grain-binder, shall make it automatically regulate the position of the band on the gavel,—that is, shall automatically place the band upon the gavel in its proper position, relative to the length of the grain, without any aid or attention from the operator; and its nature consists in locating, in such position as to be influenced by the heads of the incoming grain or gavel or bundle, a device to be moved thereby, the said device connected with means for adjusting the relative positions of the said grain and the binding mechanism."

The McCormick Company is charged with infringing—

"*Third Claim.* The combination of the swinging revolving canvas for advancing the butts of the grain with the board, *e*, for retarding the heads of the same. *Fourth Claim.* The combination, with the delivery apparatus of a harvester, of a self-setting plate, *e*, on the binder table, adapted to be operated by the grain for directing scattering grain into the succeeding gavel, substantially as described." "*Ninth Claim.* In combination with the bundle-discharging mechanism of a grain-binder, the board, *e*, for the purposes set forth. *Tenth Claim.* The combination of the discharge arms, the board, *e*, and the butt-adjusting mechanism, substantially as described."

The patentee describes the ordinary grain adjusting and butting mechanism found in many binders, which, he says, "constitute no part of

the present invention, only as combined with other elements." At the top of the chute or deck, where the butts of the grain are delivered by the elevator, he places the grain-adjusting mechanism, which consists of a frame, D, carrying a roller at each end, around which rollers is drawn an endless canvas, called "d." This frame is pivoted so as to swing, and vibrates on the axis of the larger or upper roller, which is driven from the gearing of the harvester; and the endless canvas, in revolving, has a downward movement, and operates on the butts of the grain delivered from the elevator, and adjusts them before subjected to the binding mechanism. On the side of the deck, opposite the swinging revolving canvas, is a swinging board, e, pivoted to the harvester frame at its upper end, and nearly equal in width to that of the butt-adjusting canvas, for the purpose of retarding the heads of grain in its descent. The specification says:

"The use of the canvas, d, and the board, e, produces a new and beneficial result in their joint action upon the grain, in grain that stands thin on the ground, and hence is of that condition which always passes up the elevators head first. The butts are advanced by the revolving canvas, and the heads are retarded by the contact with the board, e, and thus reach the binding receptacle in much better condition than when the old devices, or none, are used."

The board, e, has a spring, e¹, secured at one end at about middle of its length, and the other secured to the framework of the binder, and by this means the board is caused to press elastically towards the grain. The board, e, has an arm, e², secured "at its upper edge, and near its top or hinged end, the said arm reaching upward over and parallel with the decking, and connecting by a joint with the rod, d⁵. By this means the movement of the board or plate, e, is transmitted to the adjuster, D, so that it moves in a reverse direction. In other words, the two parts, operating, one on the heads, and the other on the butts, of the grain, are so connected that they approach or recede from each other when one is moved. These parts, because of their weight, are inclined to swing apart, and also, because of the tendency of the motive power on the canvas, d, to swing its frame outward, and hence the spring, e¹, must be strong enough to overcome these tendencies, and as much stronger as is wished to have the parts moved quickly by the said spring when it is at liberty to move them. With the above described parts in the positions shown in Fig. 3, and the bundle as there shown, it is plain that, if the bundle is quickly ejected, it must engage the curved part of e, and force it out of its way, and hence backward, and, the butting canvas being connected thereto, it will be moved forward. Two forces, then, are apparent,—the bundle to force the parts opposing its head and butt from each other, and the spring to retract them. In order that each bundle shall leave the parts fixed for the time being in any position it may have caused them to assume, I provide a locking device that shall at all times retain the parts, except just while the head of each bundle is passing the curve on the plate, e, which device is constructed as follows: * * *

A locking apparatus is then described in the specification, which is released when the bundle is discharged, and then engages with the board,

e, and holds it in the position in which it has been set by the outgoing bundle, until it shall be reset by any succeeding bundle. Each outgoing bundle, when it is operated upon by the discharge arms, tends by the movement communicated from the board, *e*, to the revolving canvas, to set the revolving canvas in a position to feed the grain further forward or further backward. Certain parts of the invention are said to be capable of use singly, as well as jointly, and the independent use of the board, *e*, is described, when the rods between the board, *e*, and the revolving canvas are disconnected, and the locking device is removed, and the rod attached to the butt adjuster is fixed to the top of the deck by a pin. "I have an elastically swinging board for directing scatterings caused by imperfect adjustment of the reel of the harvester, or any other cause, into the gavel, whether the grain be long or short, and especially when short, as without this board there is a clear space between the heads of the gavel and the rear limit of the chute, where scatterings may pass freely to the ground." The joint action is then described:

"With the parts all connected, as best shown in Figs. 2 and 3, I have, as before stated, a device for regulating the position of the grain relative to the binding mechanism, the operation of which I will now describe. * * * The cut grain falls on the platform canvas, and is conveyed to and elevated by the elevating canvases, and delivered in a loose state onto the table, when it is engaged by the usual pushing mechanism, and forced forward to the binding mechanism, where it is bound, and from which it is finally ejected by the discharge arms or other means. With the butting mechanism, and the board or plate, *e*, in their positions nearest approaching each other, we will suppose the grain first acted upon to reach them. If the grain is long, the head of the bundle, when discharged, will press forcibly against *e*, more especially against its curve, and force it backward, it being at the proper instant permitted to move by being unlocked by the action of the cam, *f*⁴. The first bundle thus bound may be carried too far backward in its approach to the binding mechanism, and hence bound too near the butt; but, when it is discharged, the butt-adjusting device acts under the influence of the plate, *e*, and is hence moved forward to a position more nearly in keeping with the requirements, and the next bundle will be bound further from the butt. If, when going into a field of short grain, the butt-adjusting mechanism and plate, *e*, are wide apart, the first bundle will be deposited too far forward in the receptacle, and hence bound too near the heads; but, upon its discharge, the board, *e*, will be permitted to jump or swing with a quick movement to a position as far forward as the position of the bundle at that instant will permit, and hence the butting mechanism will be set for short grain. If the device is set to proper position for the first bundle before going into the grain, it will be properly bound, and it will leave the parts in position for the succeeding one. For the sake of clearness, I will further say the butt-adjusting mechanism, in all cases, directs the grain to the binding devices, (except litterings, that are thrown backward.) The position to which the butt adjuster is swung determines the relative position of the gavel to the binding mechanism. The passage of a bundle so long or far backward that its head will forcibly move the swinging plate, when the latter is unlocked, will cause the butt-adjusting mechanism to move forward, and deposit the succeeding grain in a position further forward in relation to the binding devices. If grain of decreasing length passes, the spring, *e'*, will cause the plate, *e*, to jump, when unlocked, until it meets the heads of the same, and the butt-adjusting mechanism thus be moved to deposit the grain of each succeeding shorter gavel a little further back in re-

lation to the binding mechanism. * * * The modifications that may be made in this arrangement are almost unlimited. For instance, the butting device may be of any kind competent to give the swath direction into the receptacle, or it may be of the kind that moves the gavel bodily endwise. The board or plate, *e*, may be connected with the butting mechanism in various ways, and the plate, *e*, itself may be varied; yet, should any device be used capable of being influenced by the heads of the grain, whether in swath, gavel, or bundle, for the purposes set forth, I should consider it an equivalent. The spring, *e'*, may be connected with the butting mechanism direct, as to any of the moving parts. The locking arrangement may be varied, and even dispensed with, under some circumstances. These suggested modifications are shown in an additional figure,—that numbered 7. In this the grain is shown as operated at each end by the two plates or boards; and it is plain that as the distance between these boards at their delivery end is regulated by the length of the grain, the butt-board will be caused to deliver the incoming grain properly. This would be used in that class of binders where the grain accumulates in the receptacle in a free state, and is taken bodily therefrom by the needle. The plate, *e*, may be located upon the elevator, and connected with the adjusting or butting mechanism, and produce the same effect."

In harvesters, boards for adjusting butts and heads of grain in their descent down the delivery board or deck, hinged and located on opposite sides, with a series of holes, in which pins may be placed, in the deck, to adjust the head or wind board, and in the arm attached to the butt-board, and thereby giving direction to the movement of the descending grain, for feeding it further forward or further backward, are old. Many resemble the boards of Steward, and represented in his diagram, Fig. 7, and will co-act upon the grain, when adjusted, so as to present the gavel in proper shape for binding. Elward (May, 1876) described them in his patent, but the movement of one board did not communicate a movement in an opposite direction to the other. There was conjoint action only when adjusted by the operator. In 1877, Appleby and Bullock substituted a traveling butter for the adjustable butter-board. Steward's butting mechanism and board, *e*, differ from others in a conjoint action between them, which he describes, and also a conjoint action between the bundle-discharging mechanism of a grain-binder and the board, *e*, whereby the bundle-discharging mechanism imparts a positive movement to the outgoing bundle against the board, *e*, so that it is set for the incoming bundle. The purpose of Steward's invention is, by combination of the parts described, to adjust the butter-board forward and backward, with the board, *e*, so that, "whatever the length of grain which passes, its center will always be at the same place;" and this is done through the connection described in the specification between the board or plate, *e*, and the endless canvas, *d*, by which it is made to swing backward and forward automatically, and thereby feed the butts of grain nearer to or further from the path of the needle. In the defendant's machines the butt-board or endless canvas is adjusted by hand to different fixed positions, and relative to the path of the needle; and this was a common method of construction before Steward. The adjustment of the endless canvas in the Steward patent, when disconnected from the board, *e*, is by hand, as the common

method before his invention; and the elastic pressure of the board, *e*, towards the grain is caused by the spring, *e'*, when not restrained by the locking mechanism, and is thus adjustable as circumstances may require. The Deering circular of 1880, put in evidence, shows a board opposite the butter canvas, constructed and adjusted as in defendant's machine. Chapman, in patent, June 19, 1877, and Buxton, in 1879, and Puetz, in 1880, have pivoted wind-board and butter attached to the deck, closely corresponding to the Steward board, *e*, and butt-adjuster, without the spring and rod connection. In September of 1881, McCormick substituted a spring for a pin behind the wind-board, (corresponding to board, *e*), so as to give to it elastic and automatic adjustment. Gottlieb Heller also, in the spring of 1878, put a wind-board on his machine, and held it at an angle by a spring, using it during the harvest of 1878, and the next season, whenever the binder was used, until the machine was laid aside. Rubin, George Heller, Schlesener, and others corroborate him, and prove it beyond doubt that at that time he put a wind-board with a spring behind it, corresponding to board, *e*, of Steward, for retarding the heads, and keeping short grain or scatterings from falling down. In view of these devices used before the construction of his mechanism, Steward must be limited to the peculiar construction of mechanism by which the conjoint action is obtained of the board, *e*, and the swinging butter, *D*, and also to the combined action of the self-setting board, *e*, and the delivery apparatus, operating in connection with butt-adjuster, whereby the bundle, as it passes out, fixes the position of the board, *e*, and the adjuster, *D*, for the succeeding gavel; and such combination of the bundle-discharging mechanism and the board, *e*, whereby the bundle-discharging mechanism imparts a positive movement to the outgoing bundle against the board, *e*, and at the same time sets it for the incoming bundle; and also to the conjoint action of the discharge arms, *j* and *k*, the board, *e*, and the adjuster, *D*. He must be restricted to the exact combinations shown, which are not used by the defendant McCormick Company.

The two claims which it is insisted the Winona Company infringe are:

"Twentieth. The combination, in a grain-binder, of moving butt-adjusting mechanism, and the board, *d*¹, substantially as described. *Twenty-First.* The combination of the swinging butt-adjuster, the arms, *d*², *d*³, and *d*⁴, and the board, *d*¹, pivoted to the swinging butt-adjuster, substantially as described."

The Winona Company undoubtedly use the mechanism, operating in the same manner, as described in the Steward specification and claims. The only difference between the butt-adjuster in the defendant McCormick machine and the Winona is the attachment, *d*¹. The arms, *d*², *d*³, and *d*⁴, with the frame, *D*, when operated, move like a parallel rule, and constitute a parallelogram; thus keeping the board attachment, *d*¹, parallel to the edge of the chute. Heller had put on a similar attachment, pivoted to the end of a butt-adjuster, in 1878; and, although the construction of the adjuster and attachment was crude, it operated suc-

cessfully, and embodied, substantially, the alleged invention described by Steward. Although Heller may have been in error when, in his deposition, he stated that the exhibit "Heller Butt-Adjuster, with Adjustable Extension," produced and put in evidence, was the identical device he put on his machine in 1878, the fact that he put on an extension to the butt-adjuster, and used it, is fully proved. Schlesener, who contradicts Heller on the identity of the exhibit "Heller Butt-Adjuster," and says that he and Heller put it on his machine in 1880, corroborates him in regard to a butt-adjuster, with extension, being on Heller's machine in 1878. My conclusion is that there is no infringement by the Winona Company of these claims.

Webster Patent, No. 251,147, dated December 20, 1881.—Infringement by the Winona Company of the four claims alleged. This patent describes a mechanism for raising and lowering and fastening the grain platform. The object of this invention was to arrange mechanism to hold the grain end of the platform at any desired height from the ground, and permit of the easy adjustment of the platform to different heights. The parts are so combined and arranged that the operator can use the hand, which disengages the pawl, to assist, also, in raising and lowering the platform. This device, performing the same function in a different situation, has been in use for many years preceding Webster. It is found in a patent to Bacon, granted in 1838, for raising, lowering, and fastening windows, having the ratchet standard, the pawl, spring, and lifting handle, operating in substantially the same way as in Webster. The act of lifting disengages the pawl, and releasing of the hold upon the handle permits the pawl to engage. Such a device is used upon the windows of railway cars; and in addition to the notched window casing, for which the ratchet standard is the equivalent, and the pawl and its handle, there is a handle at the top of the window frame to aid in raising. There is no mechanical difference between the function of the two devices in Bacon and Webster, and there is no invention in using the sash-fastener mechanism for raising, lowering, and fastening a grain platform by making the parts larger and stronger. A combination of parts to perform a certain function, when patented, entitles the patentee to that combination in all situations for all analogous purposes. The alleged infringement cannot be sustained.

My conclusion, therefore, is that the bill against the defendant the McCormick Harvesting Machine Company must be dismissed, and the complainant is entitled to a decree only against the Winona Harvester Works and others for an infringement of the knotter patents, No. 278,639 and No. 301,190, and it is so ordered.

UNITED STATES v. KOCH.

(Circuit Court, E. D. Missouri, E. D. September 27, 1889.)

TRADE-MARKS—STATUTES—REVIVAL.

In 1870 congress passed a statute providing for the registration of trade-marks, and in 1876 a statute imposing penalties for trespass upon the rights obtained by such registry. The statute of 1870 having been declared unconstitutional, in 1881 a valid statute was enacted, touching the same subject, which did not re-enact the penal statute of 1876, and made no reference thereto. *Held*, that the penal statute fell with that of 1870, and did not remain suspended; to become operative under the statute of 1881.

At Law. On demurrer to indictment.

George D. Reynolds, U. S. Dist. Atty., and Warwick M. Hough, for plaintiff.

John M. Holmes, for defendant.

BREWER, J. This is an indictment under the trade-mark statutes of the United States. The indictment was certified up from the district to this court, and to it there has been filed a demurrer. On the argument of that demurrer many questions were presented. I shall notice but one.

The history of trade-mark legislation is this: In 1870 congress passed a statute providing for the registration of trade-marks,—a statute general in its operation. In 1876 it passed another statute imposing penalties for trespass upon rights obtained by the registering of trade-marks. Under those statutes indictments were found, and, on a certificate of division of opinion between the district and circuit judges, cases came to the supreme court, and in what is known as the *Trade-Mark Cases*, reported in 100 U. S. 82, the supreme court decided that the act of 1870 was beyond the power of congress. It suggested in the opinion that under the "commerce clause," perhaps, congress had the power to legislate with reference to trade-marks used in commerce between this country and foreign nations, between the states, and with the Indian tribes. Immediately thereafter the act of 1881 was passed by congress, providing for the registering of trade-marks which might be used in foreign commerce and commerce with the Indian tribes. It did not re-enact the penal statute of 1876, and the act of 1881 contains no direct reference to that penal statute.

Now, the contention of the government is that although the act of 1870 had no existence,—never had any; having been declared beyond the power of congress,—and that although by reason of that fact the penal statute of 1876 had nothing upon which it could operate, yet it stood as a valid enactment, suspended in operation until the act of 1881, providing for trade-mark registration, when it was vivified, and became an act imposing penalties for trespass upon rights given by the act of 1881.

In the *Trade-Mark Cases*, Mr. Justice MILLER closed the opinion of the

court with some reference to the penal statute of 1876, and his language is this:

"While we have, in our references in this opinion to the trade-mark legislation of congress, had mainly in view the act of 1870, and the civil remedy which that act provides, it was because the criminal offenses described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade-marks which were registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it."

Now that language is general, comprehensive, and if taken in its ordinary meaning, and as respecting a matter then rightfully before and rightfully passed upon by the supreme court, it is a decision of that court that the penal act of 1876 fell with the civil act of 1870. But it is contended by counsel that the language does not require such interpretation; that all that was pending, and therefore all that was meant to be decided, was that the penal act had then no force,—nothing to act upon,—because the civil act which it was passed to uphold had no existence. Assuming that that is true, and that the question has never been considered and decided by the supreme court as now presented,—for the act of 1881 had not then been passed,—a question arises whether a penal statute can be upheld denouncing trespass upon a merely statutory right, when there is in existence no such statutory right, and when whether there shall ever be depends upon the will of succeeding congresses. It would not be doubted that if an act were passed giving a statutory right, and in the same act was a section imposing penalties for trespass thereupon, when the portion of the act giving the right fell, the whole statute would fall. And is the rule any different when the penal provisions are in an independent statute enacted by a subsequent legislature? Of course statutes having reference to the same subject-matter, though enacted at different times, are to be considered as *in pari materia*, and this is thus laid down by Dwarria in his work on Statutes, (Potter's Dwar. St.) p. 189: "It is therefore an established rule of law that all acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view;" citing certain cases. "If one statute prohibit the doing a thing, and another statute be afterwards made whereby a forfeiture is inflicted upon the person doing that thing, both are considered as one statute." *Stradling v. Morgan*, 1 Plow. 206.

That fits this case. Where the right is created by one statute, and the penalty inflicted by a subsequent, they are to be considered as one statute.

But it is said that the first statute never had any existence. We are to look at this question as if there had been only the penal statute enacted. Now, if valid, whether such a penal statute has any operative force depends upon subsequent legislation. It cannot be doubted that congress may legislate with reference to the happening of future events. Its

legislation may be prospective, and contingent upon future events. In case of a civil war congress might pass, doubtless, a valid enactment that upon the close of that war certain taxes should be collected. But the condition in this case is not something depending upon outside and probable occurrences; it is a condition depending entirely upon the will of succeeding congresses. There is no succession of time, no possible change in outward events that can bring the condition to pass. It is a condition that depends solely upon the succeeding congress. If such legislation be not absolutely invalid, it is certainly very unfortunate.

Further than that, while the act of 1870 was a nullity, it must be assumed as a matter of fact that in framing the act of 1876 the penalties imposed were with reference to the terms of the statute of 1870. Can it be assumed that congress would have imposed such penalties upon trespasses upon the registration of trade-marks, if the broad, general, and comprehensive act of 1870 had not been supposed to be in force? In this trade-mark case it was pressed upon the supreme court that, as congress had power to legislate in reference to trade-marks in limited cases, the court should uphold the statute as good in reference to such cases; but it properly answered that it could not assume that if congress had known that it had no general power, but only in limited cases, it would have passed any act. So, and with more force, must it be held that if congress is legislating in respect to penalties upon the theory that it has general and comprehensive power, it cannot be assumed that it would impose the same penalties, provided it knew that it only had a limited and narrow power.

Again, when the act of 1881 was passed, if congress had intended that penalty should be imposed for a trespass upon the rights conferred by that statute, or if it had intended that the act of 1876 should be revived and operate upon the act of 1881, it was very easy to say so. Its silence in this respect is cogent evidence that it did not understand or intend that the penal statute should be considered a part of present and valid law. And that assumption is strengthened by the fact that it had before it for consideration this passage from the opinion of the supreme court in which it is broadly stated that the act of 1876 had fallen with the act of 1870. Whatever may be true as to the full meaning of that decision, or as to the general power of congress to impose penalties for trespasses upon rights having no existence, it had before it the general affirmation by the court that the law of 1876 had fallen, and it must be assumed that if it meant that it should stand and be revived, or that any penalties should be imposed for violations of the law of 1881, it would have so stated.

These considerations convince me very strongly that the act of 1876 has, as the supreme court said, fallen with the act of 1870, and it is as much a dead letter as the act of 1870, and was not revived or given operative force by the act of 1881. Of course in that view of the law the demurrer will be sustained. I have not considered the other questions raised by the demurrer. Expressing my opinion upon this one must not be taken as implying any dissent from the views expressed by my

Brother THAYER in the opinion heretofore filed by him. *U. S. v. Braun*, 39 Fed. Rep. 775. I have chosen to rest my opinion upon this question of the invalidity of the act of 1876, because, if that be true, there can be no remedy by changing the form of the indictment. There being no penal legislation by congress, there can be no indictment found.

AITCHESON *et al.* v. THE ENDLESS CHAIN DREDGE *et al.*

(District Court, E. D. Virginia. October 17, 1889.)

1. ADMIRALTY—JURISDICTION—STEAM-DREDGE.

A steam-dredge, which is a floating scow fitted with appliances for deepening channels of navigation, is a subject of admiralty jurisdiction.

2. SAME—POTOMAC RIVER—SERVICE OF PROCESS.

By the eleventh article of the compact of 1785 between Maryland and Virginia it was provided that "process from the state of Virginia may be served on any part of the said [Potomac] river upon any person or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury by him committed." Defendant was a citizen of Virginia, and the vessel seized was seized on that part of the Potomac river lying between the District of Columbia and that portion of Virginia contained within Alexandria county, which had been originally ceded by Virginia to the United States as part of the District of Columbia, and retroceded to Virginia by the United States in 1846. *Held*, that under the cession from Maryland to the United States of the District of Columbia, and by implied cession from the District of Columbia, admiralty process from the eastern district of Virginia might be validly and effectively served on the Potomac river, where the vessel was seized.

3. MARITIME LIENS—MATERIALS AND REPAIRS—NON-DELIVERY.

Materials and repairs were contracted to be furnished to a steam-dredge by libelants, which were actually furnished and paid for in chief part. The manufacture of the remaining materials was almost finished, and would have been ready for delivery, when work was suspended, and delivery not made, owing to a sale of the dredge without any provision for the acceptance of the materials or for the payment for their manufacture having been made. *Held*, that a lien attached to the dredge for the materials, notwithstanding they had not been delivered.

4. SAME—VESSEL IN HOME PORT.

Although the vessel libeled was a domestic vessel, built at and belonging to the port of Alexandria, she was liable to admiralty process for materials and repairs furnished in her home port. The general rule that vessels are not so liable in their home ports is qualified by excepting the vessels of those states which by express legislation have given a right of action *in rem* for materials and repairs furnished them at home, which right of action is conferred by Code Va. § 2963.

In Admiralty. Libel for materials and repairs.

Francis L. Smith and *Edmund Burke*, for libelants.

Samuel G. Brent, for respondents.

HUGHES, J. This is a libel *in rem* and *in personam* against a dredge called "The Endless Chain Dredge," now lying in the Potomac river, above the long bridge which crosses the Potomac from Washington city; and against "The River & Harbor Dredging Company," which built the dredge at the city of Alexandria, and was its owner, and as such entered into the contract which is the subject of this libel. "The River & Harbor Dredging Company" is a corporation of the state of Virginia. The libelants are citizens of Alexandria. The libel is for materials and re.

pairs furnished and contracted to be furnished by the libelants to the Endless Chain Dredge. Some of the materials were actually furnished, and paid for in chief part. But most of the materials were of form and character peculiarly suitable to the endless chain dredge, and of no value to any other vessel. The manufacture of these materials had been well-nigh completed, and would have soon been ready for delivery; but work on them was suspended, and delivery of them not made, in consequence of a sale of the dredge, without any provision for the acceptance of the materials mentioned, or for paying for their manufacture, having been made, either by the purchasers of the dredge, or by its first owners, "The River & Harbor Dredging Company." The purchasers of the dredge had previous notice of the claim of the libelants. Such is the state of affairs out of which this libel has grown.

The respondents resist the claim of the libelants on three grounds, viz.: (1) That a dredge is not a vessel liable to admiralty process; (2) that the materials libeled for were never delivered to the dredge, and that in consequence no lien attached in favor of the libelants upon the vessel for them; (3) that the Potomac river, in which the dredge lies, is wholly within the jurisdiction of the District of Columbia by cession from Maryland, the proprietary right of Maryland having always embraced the river to low-water mark on its southern bank.

1. As to the question whether a steam-dredge, which is a floating scow fitted with steam appliances, buckets, and scoop, for deepening channels of navigation and like purposes, is a subject of admiralty jurisdiction, there have been repeated decisions in the United States and Great Britain in the affirmative. See *The Hezekiah Baldwin*, 8 Ben. 556; *The Alabama*, 19 Fed. Rep. 544, affirmed on appeal, 22 Fed. Rep. 449; *The Pioneer*, 30 Fed. Rep. 206; *Woodruff v. A Scow*, Id. 269; and *The Mac*, L. R. 7 Prob. Div. 126. This court has also held likewise, incidentally, in *Maltby v. A Steam Derrick*, 3 Hughes, 477; and *Coasting Co. v. The Commodore*, post, 258, (which was a dredge case, decided by me at Norfolk.)

2. As to the question whether what is improperly called a "lien" in admiralty attaches to a vessel on a contract for materials and repairs which have not actually been delivered on board of her, there can be no doubt on principle that the liability exists. In admiralty the vessel is regarded as the contracting party. She is treated as a sentient being. She is sued in her own name, and process is awarded against her as the defendant who has made the contract on which the libel is brought. True, that the owner may also, on the same contract, be sued *in personam* in the same libel in which the vessel is sued *in rem*; but this remedy is only cumulative. The suit in chief is the libel against the vessel *in rem*, and the other proceeding is incidental. The vessel being the contractor, when she orders machinery, materials, and repairs, she puts it out of her power to refuse to accept, or by a subsequent sale to obstruct the delivery of, the things contracted for. It is her contract for the materials which binds her, without any reference to the delivery or non-delivery of the articles bargained for. The right of a libelant to sue and

arrest the ship herself is the *privilegium* which admiralty law (which is a law of the world) gives to the person with whom she has contracted; and the *privilegium* exists whether the conditions of an ordinary lien, under the local common or statute law, obtain or not. This *privilegium* to sue and arrest a vessel arises on her contracts whether the claim be *ex contractu* or *ex delicto*, whether it arises on contract or in tort. In the case against the dredge, the Commodore, last above cited, that dredge had been engaged in opening a channel to a basin of water at Cape Charles city, Va. She had used an anchor, which she had planted at the mouth of the channel while engaged in her work, and, after its completion, had negligently left the anchor at the bottom of the mouth of the channel, and had gone away to some other locality. The steamer Jane Moseley, in afterwards entering that channel, had been badly snagged and damaged by the anchor, and libeled the dredge for the tort. In that case I held that a dredge was subject to the admiralty jurisdiction, and was liable to arrest and decree for the tort. She would have been just as liable for a contract as for a tort.

3. As to the question whether admiralty process from the eastern district of Virginia may be validly and effectively served on the waters of the Potomac below Georgetown, this right exists by cession from Maryland, and indirectly, for the purposes of the case at bar, by implied cession from the District of Columbia. I avail myself largely of the learned note of counsel for libellant in what I shall say on this subject. The claimants, in their answer, as matter of defense deny the jurisdiction of the court, because the vessel arrested was seized upon that part of the Potomac river lying between the District of Columbia and the portion of Virginia contained within the boundaries of Alexandria county. This territory was ceded by Virginia to the United States, and formed a part of the District of Columbia. On July 9, 1846, the congress of the United States retroceded this territory to Virginia, by an act, of the first section of which the following is a copy:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that, with the assent of the people of the county and town of Alexandria, to be ascertained as hereinafter prescribed, all of that portion of the District of Columbia ceded to the United States by the state of Virginia, and all the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the state of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon." 9 St. at Large, 35.

So that the contention here is as to the jurisdiction over the waters of a public navigable river, lying between two sovereign powers. The title of the United States to the District of Columbia, as now constituted, rests upon a grant and cession made by the state of Maryland. The United States, as to such territory, did not and could not acquire any greater rights, jurisdiction, or authority than were possessed by the state of Maryland at the date of such grant and cession. Before the acquisition by the United States of the District of Columbia, the sovereign states of Virginia and Maryland entered into a solemn treaty and convention,

by which the navigation and use of, and jurisdiction over, the river Potomac were mutually settled and determined. The rights of the United States being derived by grant from the state of Maryland, as to that portion of the state of Maryland constituting the District of Columbia, were acquired in subordination to such convention and treaty, which has ever since remained in full force and vigor, and which, in addition, has received the recognition of the congress of the United States. See 20 St. at Large, 481. Without reference to said compact, the Potomac river being a great tide-water stream and estuary, presenting in many respects an uncertain boundary between two sovereign states, a concurrent jurisdiction of necessity originally arose over its waters. It has been said by a writer upon American international law that it is "a principle of American public law that, where the middle of a navigable river or lake or bay forms the dividing line of states, or an intangible line upon their waters, a concurrent jurisdiction, civil and criminal, arises over such waters to the states upon the opposite shores. It extends over the whole of the dividing waters, unless it was otherwise stipulated, before the adoption of the constitution of the Union, by state compact, or since, by such compact, with the assent of congress." Gard. Inst. 209; *Church v. Chambers*, 3 Dana, 278; *Handly's Lessee v. Anthony*, 5 Wheat. 374; *Carlisle v. State*, 32 Ind. 55; *Sherlock v. Alling*, 44 Ind. 184; *People v. Railroad*, 48 Barb. 478. The same principle was applied to all cases among nations where their boundaries divide navigable waters. The line being incapable of sight and ready perception, a concurrent jurisdiction must exist on the dividing waters. Gard. Inst. 209, 210. Such being the law of nations, applicable to states, the following articles of convention and treaty will be found in the compact of 1785 between the contracting states, Maryland and Virginia:

1 Rev. Code Va. 18th 9, p. 53: "*Sixth*. The river Potomac shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland."

It is apparent by the terms of this article of the treaty that each of the parties to the compact was entitled to such authority, jurisdiction, and power over the waters of the river Potomac as would entitle their respective judicial tribunals to exercise admiralty jurisdiction in said waters. By the express terms of this article of the treaty the said river was to be a common highway of navigation and commerce for the citizens, not only of the two contracting states, but of the citizens of all the United States, and of the citizens of all nations in amity with them. Admiralty jurisdiction is the life of navigation and a constituent element of commerce, for without the power to enforce maritime liens commerce would decay, and navigation be rendered impossible. Moreover, "a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in case of distress, or for other necessary purposes, etc. This principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted."

Wheat. Int. Law, § 202. The following is an extract from the eleventh article of the compact of 1786:

"And process from the state of Virginia may be served on any part of the said rivers upon any person, or property of any person, not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed."

That is to say, process *in personam* and process *in rem* may each be served, either on claims arising in contract or in tort. The defendant at bar, the River & Harbor Dredging Company, chartered under the laws of the state of Virginia, is a citizen of Virginia, and being such citizen, is not embraced in the exception provided in the eleventh article in favor of citizens of Maryland; and hence this case, by the express terms of said compact, is one in which this court has jurisdiction. Process can only emanate from judicial tribunals, and the expression "persons or property" show it to have been the intention of the treaty that the process should issue in proceedings *in rem* as well as *in personam*. Proceedings in admiralty were necessarily in the contemplation of the treaty-making parties, as well as the ordinary proceedings at common law; for at that time the states had not been divested of their admiralty jurisdiction, the federal constitution not having been ratified until 1787-88. The federal constitution vested in the federal tribunals all the admiralty jurisdiction theretofore possessed by the states, and this court possesses all the admiralty jurisdiction which the state of Virginia had possessed prior to the adoption of the constitution of the United States, and all such other admiralty jurisdiction as may have been conferred by said constitution and laws made in pursuance thereof. If this court were without jurisdiction on the vast area of navigation formed by the Potomac river from Georgetown to the Chesapeake bay, the commercial classes would be remediless in a large number of cases of maritime torts and contracts, because of the fact that the state of Virginia is without constitutional authority to endow its tribunals with admiralty powers. It was never contemplated that such a state of affairs could by possibility exist, for the prime object of our government was to secure to all citizens an equal distribution of public protection, rights, and blessings.

A fourth objection to the proceedings in this case, raised in a brief very lately received from respondent's counsel, is that the Endless Chain Dredge is a domestic vessel built at and belonging to the port of Alexandria, and that, under several decisions of the supreme court of the United States, she is not liable *in rem*; the general rule being that a vessel is not liable to admiralty process in her home port for materials and repairs furnished there. It is true that the supreme court has held generally that vessels are not so liable in their home ports; but it has qualified the general ruling by excepting the vessels of those states which, by express legislation, have given a right of action *in rem* against home vessels for materials and repairs furnished them at home. The general ruling was founded on the presumption that in a home port materials and repairs would naturally be furnished on the credit of the owner, not on the credit of the ship; and the exceptional ruling was founded on the

equally natural presumption that, if a state gave material-men a right of action against the vessel *in rem*, these men would furnish materials and repairs on the credit of the vessel, rather than of the owner. Hence the supreme court necessarily held that the admiralty courts could properly, in states which give the *privilegium*, entertain libels *in rem* against domestic vessels.

It is hardly necessary for me to cite section 2963 of the Code of Virginia as showing that this state has given the right of action and lien under consideration upon steam-boats and other vessels, rafts and river craft, owned or found within the jurisdiction of Virginia.

There are some credits due upon the account of libelants, filed with their libel. These admit of easy adjustment between counsel, otherwise I will refer the accounts to a commissioner for settlement. I will then decree for the libelants.

INLAND & SEA-BOARD COASTING CO. v. THE COMMODORE.

(District Court, E. D. Virginia. August 19, 1887.)¹

SHIPPING—LIABILITY OF VESSEL FOR TORT.

A steam-dredge, which negligently leaves its anchor in a navigable channel where it had been at work, is liable in admiralty for damages caused to a vessel which runs into the anchor.

In Admiralty. Libel for damages.

Sharp & Hughes, for libelant.

Harmanson & Heath, for respondent.

HUGHES, J. On the morning of the 21st December, 1884, a steamer of the libelant, the Jane Moseley, after backing out from the cut which has been dug from the wharves at Cape Charles City to the channel of Cherrystone river, in rounding into the channel with bow to the southward, struck an anchor which was lying on the bottom where she passed, was sunk, and sustained damages, which are the subject of this libel. The Moseley had been pulled out through the cut from the wharf into the channel, by a tug, before running upon the anchor. The anchor had been originally used at or near that place by the master of the dredge Commodore, for holding the dredge fast while at work there; was afterwards left there, with a buoy attached, to mark the southern side of the entrance of the cut into the channel; and had not been removed after the clump of piles now standing there had been put in that place. The anchor was lying under the water, with or without a buoy attached, when the Jane Moseley ran foul of it on the morning which has been mentioned.

¹Publication delayed by failure to obtain copy.

The case turns upon two questions, viz.: (1) Whether the anchor was in a place to obstruct navigation; and, (2) if so, whether the steam-dredge Commodore, is liable for the damages resulting from the accident in question.

The clump of piles now marking the southern side of the entrance of the cut from Cherrystone channel was placed there before the accident, and stood there at the time of it. Bowman, the engineer who had charge of the work at Cape Charles City, places this clump in eight feet water on the map he has filed in the cause, and which I mark "Map B." He marks the spot where the anchor lay at the time of the accident in water of not less than eight feet, just north and north-west of the clump of piles. Indeed, the anchor must have been in nearly the position marked on Bowman's plat, in order to have been struck by the Moseley, which cleared or was clearing the clump of piles at the time of the accident. It is impossible that it could have been some distance within and south-east of the clump of piles in five feet water, as stated by Turner, and marked by him on the plat which he filed, and which I mark "Map C." If it had been where Turner locates it, the Moseley would have been kept off by the clump of piles; and, even if the piles had not interposed, it would have been difficult for a vessel drawing seven feet of water, as the Moseley did, to have run upon an anchor lying in five feet water. I am conclusively of opinion that the anchor lay where the Moseley struck it before striking the clump of piles lying beyond, and that it lay where any vessel navigating the water there was liable to run foul of it.

As to whether the anchor was put where it was, or in that vicinity, by the direction of Field, the master of the Commodore, I think that point is settled by the testimony of respondents, especially of Colton. Field was responsible for the original deposit of the anchor there, for any removal of it subsequently by persons subject to his orders, and for its not having been taken up after the piles had been put up near it. It is quite immaterial whether the anchor was marked by a buoy. It ought not to have been there at all.

The only question left to be considered is whether the negligence of Field, master of the Commodore, bound the dredge. Field is known in the transaction solely as the master of the dredge. The anchor that was negligently left at the bottom of an important channel of navigation was a part of the apparel and outfit of the dredge, and was used by the dredge in the work she was engaged in. The tort was the tort of the dredge; the negligence which caused the tort was the negligence of the dredge. Respondent's counsel lay no stress upon this point, and I think they cannot do so with reason or success. I will sign a decree for the libellant.

SCOTT v. FOUR HUNDRED AND FORTY-FIVE TONS OF COAL.

(Circuit Court, D. Connecticut. October 30, 1889.)

SALVAGE—COMPENSATION.

A schooner laden with coal struck and sank in very dangerous water at the entrance of Long Island sound, only the main rail being out of water. The locality was an exceptionally bad one in which to save either vessel or cargo. Libellant, the owner of a wrecking equipment, offered to save the top-hamper for 50 per cent. of its value, if successful, and subsequently offered to save it for 40 per cent., if he could have 75 per cent. of the cargo also as salvage service. The agent of the vessel's owners accepted this proposition. The libellant communicated this offer to the consignees and insurers, without receiving any reply. Libellant took a lighter, a tug, and 12 men, and in 2 days had the top-hamper ashore safely. He secured the services of a large steam wrecking vessel, having a foreman and 2 men, and with his own lighter and tug proceeded to pump the coal out of the hull. After getting a small part out, by the aid of the current the vessel was raised and, with difficulty, gotten ashore on the same day. Shortly afterwards the coal was removed. The top-hamper alone was worth \$500 to \$1,000, and the schooner and hamper were worth \$1,200 to \$1,500, and the coal was worth \$1,575. The owners of the vessel paid libellant \$600 more than 70 per cent. of his estimate of the value, and the insurers offered him their interest in the cargo for \$600. The steam wrecking vessel usually earned \$100 per day, and libellant paid her owners \$600 for her services, which were indispensable to the saving of the vessel and cargo. *Held*, that \$1,000 should be allowed to libellant for his salvage service upon the cargo. Affirming 39 Fed. Rep. 285.

In Admiralty. On appeal from district court. 39 Fed. Rep. 285.

Libel for salvage by Thomas A. Scott against Four Hundred and Forty-Five Tons of Coal; the China Mutual Insurance Company, claimant and appellant.

Samuel Park, for libellant.

Walter C. Noyes, for claimant.

LACOMBE, J. The amount of salvage fixed by the district court should not be disturbed except where some clear and palpable mistake or gross overallowance is shown. *Hobart v. Drogan*, 10 Pet. 119; *The Camanche*, 8 Wall. 448. In view of the situation of the vessel when the salvage service was entered upon, and the large amount of money (large in proportion to the value of the property sought to be saved) which the libellant put at risk, it cannot be seriously claimed that there has been any gross overallowance. It is argued by the appellant that the district judge by mistake took into consideration items of charge for services rendered subsequently to the acceptance of the coal by the insurance company, and at their request, and for which, irrespective of the decision of this case, he has a cause of action against the insurance company. The record, however, does not disclose any such contract with the insurance company as would support an independent action for these items. Nor does it appear that the amount awarded by the district court was increased in consequence of the proof of these items. In the undisputed items of expense, and the situation of the vessel, there is quite sufficient to sustain the award. Nor has any different ratio of salvage for vessel and for cargo been assessed by the district judge. He has determined what was a proper compensation for the service rendered to the

cargo, and declined to alter his finding because it appeared that the vessel owner and salvor agreed out of court upon a different ratio for this vessel. Decree affirmed.

BAKER SALVAGE CO. v. THE TAYLOR DICKSON.

(District Court, E. D. Virginia. April 18, 1888.)

1. SALVAGE—RELEASE OF RIGHT TO COMPENSATION.

A towing company hired a tug to a salvage company for a compensation of so much per day whether at work or not, each party to be at liberty to terminate the service at its own pleasure. At the beginning it was not definitely settled whether the tug was to work exclusively in connection with a vessel which the salvage company was trying to save, but for three weeks the tug was used in the general service of the salvage company. The tug was then ordered to go to the assistance of the D., which was in distress, and bring her into port. It went to the D. as the avowed agent of the salvage company, brought her in safely, and turned her over to that company, and, after the service was completed, presented and collected a bill for the *per diem* compensation for the entire time. *Held*, that the towing company was precluded by their contract from claiming any of the award for the salvage of the D.

SAME—SEAMEN.

But as the master and crew of the tug were employed for the ordinary business of the towing company, when it authorized the tug to be sent out in stormy weather for the purpose of rescuing a vessel there arose an implied permission on the part of the owners to the crew to receive the usual proportion of the salvage award; and as, under Rev. St. U. S. § 4535, seamen are rendered incapable of releasing their right to participate in the award, they are entitled to their proportionate share, viz., one-third, after deducting costs.

In Admiralty. On the intervening petitions of the owners and master and crew of the steam-tug Sampson.

On the 25th of December last, the steam-tug Sampson, Capt. Joseph Delano, pursuant to orders received from the Baker Salvage Company of Norfolk, left this port to go after the schooner Taylor Dickson, then lying off Chicamomico, on the North Carolina coast, flying signals of distress, with main and mizzen masts carried away. The Sampson's orders were to proceed until she met the Victoria J. Peed, a strong wrecking steamer of the libelants, which they intended sending to the rescue of the Taylor Dickson, and to receive the rescued vessel from the Peed and tow her into Norfolk. But the Sampson was ordered that, if the Peed should not have gone to the Taylor Dickson, then to go herself, say to her master that the Sampson had been sent by the Baker Salvage Company to take charge of her, and bring her into port. The Peed was at the time lying off the coast between Cape Henry and Chicamomico, waiting on the wrecked ocean steamer Kimberly; and the weather proved to be such that orders could not be sent to the Peed, as contemplated when the Sampson left Norfolk, and the Peed did not go to the Taylor Dickson. It resulted that the Sampson went herself, took the schooner in tow, and brought her to Norfolk, where she arrived on the 27th December. A libel was filed in this court on the 6th of January, 1888, by the Baker Salvage Company against the Dickson for salvage.

On the 20th January the American Towing Company of Baltimore, which is owner of the tug Sampson, filed a petition in the same cause, claiming that, out of the proceeds arising from the sale of the schooner Taylor Dickson and her cargo when sold, it should be paid "a liberal reward and compensation for having, with its tug and the officers and men employed by it, saved the said schooner, her cargo and crew, from loss and destruction." On the 27th of January another petition was filed in the same cause, in which the master and crew of the tug Sampson pray that they may be allowed to intervene for the assertion of their rights, and claiming a portion of the reward and salvage which may be decreed by the court in compensation for their own services rendered in saving the said schooner. By consent between libellant and petitioners the cause was first tried on the question of salvage, and the amount to be awarded; and a decree was rendered on the 9th of February allowing a gross sum of \$3,600, of which the salvage reward was fixed at \$3,000. See 33 Fed. Rep. 886. The case is now heard on the question of the distribution of this award.

The claim of the American Towing Company, owner of the Sampson, to any part of the award is resisted by the libellants, the Baker Salvage Company, on the ground that the Sampson was, at the time of rendering the service to the Taylor Dickson, under a general contract of charter with the Baker Salvage Company to render general salvage service at the rate of \$100 a day; that the Sampson had been engaged in such service since the night of the 3d of December, and continued afterwards to be so engaged until the 27th of January, charging \$100 a day for the whole period; that in pursuance of such contract the Sampson, when ordered to the rescue of the Taylor Dickson by the wrecking company in whose service it was, obeyed the order without protest, informing the master of the Dickson, on reaching her, that she was there by orders of the Baker Salvage Company; and that when the Sampson brought the Dickson into the port of Norfolk she delivered her to the Baker Salvage Company. On the other hand, the American Towing Company insist that the service for which they contracted with the salvage company was a special service of towing, to be rendered in connection with the wrecked ocean steamer Kimberly, then lying on the beach at False cape, and that alone; that the service rendered to the schooner Taylor Dickson was not embraced in their contract; and that they have a right to compensation for saving the schooner as a distinct and separate service from that which they had contracted to render to the Baker Salvage Company in connection with the Kimberly.

Counsel for the American Towing Company seem to have tried and argued the case on the hypothesis that, if the contract was for special service to the Kimberly alone, then the Sampson has a right to special compensation for saving the schooner; and, on the other hand, if the contract was that the Sampson should render service generally as it should be required by the Baker Salvage Company, then the \$100 a day, charged for 53 days, should be treated as covering the compensation due for all service rendered by the Sampson. Let it be premised that about the

1st of December, 1887, the British steam-ship Kimberly, with a large cargo of cotton and grain, was beached on the Atlantic coast south of Cape Henry, near False cape, and that the Baker Salvage Company was on the 3d and 4th of December, and until the 27th of January, engaged in taking off her cargo and bringing it to Norfolk, and in hauling the steamer off from her perilous position, and towing her into port. It may also be premised that the American Towing Company owned, among other property, two steam-tugs,—the Raleigh and the Sampson. They were differently constructed; the Sampson being adapted exclusively to the purpose of towing, while the Raleigh was not only a sea-going towing steamer, but could also carry a moderate amount of freight, and was well adapted to the purpose of lightering vessels of their cargoes.

The business of the Baker Salvage Company was primarily that of general wreckers and salvors on the high seas, and they engaged in towing only as incidental to their wrecking and salvage operations. The business of the American Towing Company was primarily that of towing in Chesapeake bay, and adjacent waters; incidentally to which they occasionally engaged in saving vessels in distress in those waters. When the Baker Salvage Company found themselves, on the 3d of December last, in charge of the wrecked ocean steamer Kimberly and her cargo, it became necessary for them to increase their force of steam and sail vessels, and they addressed themselves at once to that necessity. Accordingly their secretary, Mr. George McBlair, telegraphed to the owners of two very strong steam-tugs in Philadelphia,—the Rattler and Battler,—and to the American Towing Company in Baltimore, owners of the Raleigh, inquiring on what terms they could obtain the use of those tugs. The Raleigh was desired on account of its capacity to carry a moderate amount of freight, as well as its capacity as a tug. On the same day on which McBlair sent his telegram relating to the Raleigh, the tug Sampson had come into Norfolk for the purpose of towing a raft of logs from there to Baltimore; but the weather was unfavorable for such work, and Capt. Delano, master of the Sampson, was willing, while waiting for better weather, to engage in other work which might present itself. On the 3d day of December, 1887, H. H. Petze, secretary of the American Towing Company, residing in Baltimore, received the telegram which has been mentioned, as sent by McBlair, secretary of the Baker Salvage Company, saying: "Wire what price you will furnish steamer Raleigh for lightering steamer Kimberly, quick." On the same day Petze answered by telegram that the Raleigh could not then be had. The master of the Sampson, Captain Delano, then in Norfolk, as has been stated, had telegraphed on the same day to Petze as follows, but without the knowledge of McBlair: "Raft ready this afternoon; wind east; cannot start; salvage company offer hundred dollars per day to wait on wrecked steamer. Answer." To this telegram of Delano, Petze answered next day, the 4th: "I would advise to accept offer of Baker Salvage Company." On the same day, the 4th December, McBlair telegraphed to Petze as follows: "What will you charter

Sampson for, week or ten days? Put it low. She is now towing schooner to wreck for us." Petze answered at once, "If Capt. Delano can arrange to have raft wait day or so for Hercules, will charter Sampson for \$100." Not hearing from McBlair on the 4th, Petze telegraphed him on the 5th: "Is Sampson engaged on wreck? Answer quick, so that I may arrange about raft." To this McBlair answered on the 5th as follows: "Engaged by Salvage Company probably for some time. Send for raft." These three last telegrams, of the 4th and 5th December, viz.: the inquiry from McBlair, the answer from Petze, and the rejoinder from McBlair, determine whatever contract there was between the two companies at the outset of the chartering of the Sampson, which lasted for 53 days. Before these telegrams had been sent and received, Capt. Delano, of the Sampson, and Mr. Turner, president of the Baker Salvage Company, had, on the afternoon of the 3d December, concluded a negotiation for a mere temporary service of the Sampson. Capt. Delano testifies substantially in regard to this negotiation as follows:

"I cannot recollect exactly the words me and Mr. Turner had. On the afternoon of the 3d of December the office boy of the Baker Salvage Company came to the Sampson and told me that Mr. Turner wanted to see me. I went to the Old Dominion pier, and met Mr. Turner there. He asked me what I would tow the schooner Emily Johnson to the steamer on Currituck [the Kimberly] for. At first I asked him \$12 an hour; but he said he thought that was quite steep, and he did not know there would be anything in it, but wanted to send the schooner down there. Then I told him that I came to Norfolk for a raft, and that the wind was blowing, and I did not think I could start it for two or three days, and that we had another tug, and that I would take this schooner down for him at one hundred dollars per day until I got back. Then Mr. Turner said it would probably last for a few days, and that he was satisfied at a hundred dollars; that that was what he had paid the Slater and others. I told him when he was ready to send orders; that I had steam, and was ready to go any time. So that night, about ten or eleven o'clock, I left Norfolk with the Emily Johnson for the steamer Kimberly, as it turned out to be, and then was when I sent the telegram, [alluding to the telegram heretofore mentioned as sent from him to Petze in Baltimore on the 3d December, saying that salvage company offer \$100 per day to wait on wrecked steamer.]"

Capt. Delano further testified that he considered he was engaged especially to work on the Kimberly. Mr. Turner says, substantially, on this subject, as follows:

"On or about the 3d December I found that the exigencies of the service required that we should have more tug-boat service. I understood that Capt. Delano's tug was in the harbor, and, knowing him from his having done other work for us at different times, I sent for him to come to the office, and told him that I needed extra service,—that is, more tug service; that the Kimberly was ashore, and, in connection with that, we expected to have to tow and lighter her cargo. I asked him what he would charge me to enter into the service of the Baker Salvage Company. He said something about \$12 an hour; but I said that would not do,—was too stiff,—and he finally agreed that he would hire himself to the Baker Salvage Company for one hundred dollars a day, boat and crew, and he was to furnish fuel. Then I said all right; that the terms seemed satisfactory; and that I would engage him, and let him know when ready, and as soon as we ordered him the pay

will begin. This was during Saturday afternoon, 3d December. I spoke about the schooner Emily Johnson, as I had already engaged her for lightering the cargo of the Kimberly, and about 11 or 12 o'clock that night, after the arrival of Mr. McBlair, the secretary, the tug was given the schooner Emily Johnson, and started for the Kimberly. I fully understood that the steamer Sampson was chartered for the Baker Salvage Company, and would have unhesitatingly started her on any service. The Sampson was chartered by the Baker Salvage Company per day for an indefinite period. We could stop when we liked,—one or the other could; and I understood the charter was to do any service that we might direct it to do."

Such had been the negotiations under which the Sampson went to work for the Baker Salvage Company. Between the 3d and the 25th of December she was principally engaged in towing schooners out to the Kimberly and in from there, bringing away cotton from the Kimberly. The season was stormy, and the Sampson did nothing on a number of days when wind and tide prevented the work of lightering the Kimberly from going on. Whenever the Baker Salvage Company had other work for the Sampson to do when thus disengaged, they called upon her to do it. She did the work, and the bills for such service were collected by the Baker Salvage Company. Several jobs of towing were thus done by the Sampson in Norfolk harbor. On one occasion she went below Lambert's point, and pulled the Old Dominion steamer Roanoke off shore where she had grounded. She also towed a large vessel (the Harvester) from Lynnhaven bay, where she was in distress, to anchorage near Thimble Light in Chesapeake bay. She did every job of this sort whenever called upon by the Baker Company; making no objection that she had been employed only to work on the Kimberly, and making no claim to the earnings which the Baker Salvage Company were collecting for such jobs. On the 25th December the Baker Salvage Company received intelligence of the distress which the schooner Taylor Dickson was in off Chicamicomico. The Baker Salvage Company's wrecking steamer Victoria J. Peed was then off False cape, pulling on cables from the Kimberly whenever practicable, and waiting on the Kimberly, engaged in the work of saving ship and cargo. Mr. McBlair, on hearing of the condition of the Taylor Dickson, determined to order the Peed to proceed from False cape to Chicamicomico to her assistance, and then to bring her on up the coast until she should meet the Sampson, when the Sampson should receive her from the Peed, and bring her to Norfolk. Capt. Delano was sent for by Mr. McBlair on the 25th of December, informed of the condition of the Taylor Dickson, instructed as to McBlair's design of sending the Peed to the Dickson, and directed to get up steam and proceed out to sea until he should meet the Peed, and to receive the Dickson from the Peed and bring her to Norfolk. He was further directed that, in the contingency that the Peed should not go to the Dickson, he should himself go after her, and, on arriving where she was, to say to her master that the Sampson was sent by the Baker Salvage Company, and to make no contract with her. Capt. Delano accepted these orders, at once set about executing them, was furnished with a reliable hawser by the Baker Salvage Company, (the

Sampson's hawser not being long enough or safe,) and went to the Dickson, informed her that he was there by orders of the Baker Salvage Company; took her in charge on the 26th of December, brought her into Norfolk on the 27th, and delivered her over to the Baker Salvage Company here. The charter of the Sampson terminated on the 26th of January following, when the wrecked steamer Kimberly was finally brought into this port. The master of the tug-soon after presented his account to the Baker Salvage Company for the service of the Sampson, 53 days from the 3d of December, at \$100 per day. This bill was sent by McBlair to Petze, but although called for was not produced in evidence. By the 7th of January, 35 days after the commencement of work by the Sampson, Petze had drawn for or had been paid as much as a total of \$2,500, and seemed to be disposed to draw for another \$1,000. In this correspondence Petze made no claim to share in the salvage for the Dickson. This \$3,500 would have been the compensation due up to that time at \$100 per day, for a period which included the days of the Sampson's trip to Chicamicomico. On the 4th of February Petze was paid an additional \$1,000 to the \$2,500 previously received, which leaves \$1,800 still due the owners of the Sampson. There seems to have been no dispute of accounts between the two companies. The American Towing Company has never deducted the *per diems* which would not have been earned if the Sampson had not been in the service of the Baker Salvage Company during her expedition after the Taylor Dickson on the 25th, 26th, and 27th of December.

Thos. H. Willcox, Harmanson & Heath, and A. R. Hunkle, for petitioners.

Sharp & Hughes, for Baker Salvage Co.

HUGHES, J., (after stating the facts as above.) From this epitome of the testimony taken in the case, I am of the opinion that at the beginning of the service of the Sampson there were but two points of contract mutually agreed upon and understood between the Baker Salvage Company and the American Towing Company,—which were, that the compensation of the Sampson was to be \$100 a day, whether at work or not; and that each party was at liberty to terminate the service at its own pleasure. I am also of the opinion that at the beginning the question whether the Sampson should work exclusively on the Kimberly job, or was to do whatever the Baker Salvage Company should have for her to do in the way of towing and wrecking, was not definitely settled, upon a common understanding of both parties. I am of opinion, moreover, that in the progress of the service, and quite early in its progress, the acts of the parties tacitly decided this unsettled question; for I think that the frequent orders of the Baker Salvage Company to Capt. Delano to perform work that had no relation to the Kimberly, and his performance of such work without objection during a period of three weeks between the 3d and the 25th of December, put an interpretation upon the contract which the American Towing Company cannot now reasonably dispute. By the 25th of December it had become settled by the acts of

both parties that the Sampson was employed in the general service of the Baker Salvage Company, and not exclusively in the business of lightering the cargo of the Kimberly; and I think this was so, independently of the fact that no person connected with shipping and navigation in the Chesapeake and its waters could fail to know that the Baker Salvage Company was a wrecking, as distinguished from a towing, company, and was principally engaged in wrecking enterprises on the outer waters of the Atlantic. An engagement to serve a company thus habitually engaged, for an indefinite period, at the price of \$100 a day, work or no work, would seem necessarily to imply service in more than one enterprise; would seem necessarily to imply service in the general wrecking business of that wrecking company. But, independently of this cogent consideration, and even although it were at first in the mind of the Sampson's owners that she should serve exclusively in the Kimberly enterprise, still the acceptance and execution of orders to do other work for a period of three weeks, without objection or protest, seems to me to establish the conclusion that the service was a general service, and not a particular one only. The service having gone on upon this basis for three weeks, then came the order to the Sampson to go out to meet the Peed, and to take from her the Taylor Dickson; or, if the Peed should not have gone to Chicamomico, then to continue on to that point herself, and save and bring in the Taylor Dickson. The acceptance and performance of this service by the Sampson, without objection or protest, was an additional proof that the service in which the Sampson was engaged was the general service of the Baker Salvage Company. The master of the Sampson was at liberty, under the contract, to terminate the service at the time of receiving the order to go for the Taylor Dickson. He did not terminate it, but continued the service. He went to Chicamomico as the avowed agent and servant of the Baker Salvage Company. He saved and brought in the schooner at the command of the salvage company, and delivered her to that company. In presenting his bill for his whole service, ending on the 26th January, Capt. Delano treated the period of his trip to Chicamomico as part of the time for which the compensation of the Sampson was \$100 per day. The correspondence between Petze and McBlair on, and a few days after, the 7th of January, proceeded on the basis of \$100 a day being due up to that time, and no claim was made or intimated by Petze that for any of the days constituting the period between 3d December and 7th January the \$100 was not due. In fact no intimation was given either by Capt. Delano or by Petze, before the filing of their petition, that any exceptional service had been rendered by the Sampson that was not covered by the contract for \$100 a day.

It is clear to me, therefore, that the owners of the Sampson are precluded by their contract with the libelants, as well as by the equities of the case, and the ordinary considerations of fair dealing, from claiming, as against their employers, the Baker Salvage Company, any portion of the salvage award that has been decreed in this cause, and I will so decree.

The claim of the master and crew of the Sampson, set up in their petition, stands, I think, on a better footing. The ordinary business of the American Towing Company of Baltimore, of which the master and crew of the Sampson were employes, was that of towing in the Chesapeake bay, and the rivers and harbors tributary to the bay. Their contract with the company was in contemplation of such service,—that of towing vessels within the capes. As long as the Sampson was employed in these inland waters, no extraordinary labor, skill, or risk was involved; but, when the owners of the Sampson authorized her to be sent outside of the capes, on extraordinary service, down the coast in stormy weather, for the purpose of rescuing a vessel in distress, and in fact engaging in a wrecking and salvage service, all without consulting the crew of the Sampson, there arose, independently of any existing statutes on the subject, an implied permission on the part of the owners to the crew to demand and receive the usual proportion of whatever salvage money might accrue from such expedition. While the owners of a ship may release, by express or implied contract, a claim for salvage, yet the seamen of a vessel which saves another are rendered incapable, by section 4535 of the Revised Statutes of the United States, of releasing their claim to participate in any salvage that may accrue from the enterprise. A decree may therefore be taken in favor of the master and crew of the Sampson for one-third of the reward of \$3,000, after deducting costs, which was decreed in this cause on the 9th February last.

On appeal to the circuit court, the foregoing decision was affirmed.

THE AINA.¹BOYSEN *et al.* v. THE AINA.

(District Court, E. D. New York. September 20, 1889.)

1. MARITIME LIENS—PRIORITY—ADVANCES.

The lien of shipping merchants for advances made in attending to the business of a vessel at the end of her voyage takes precedence of the lien of a bottomry lender.

2. SAME.

A lien on the ship exists for advances made for the purpose of paying the following charges, viz.: Hospital charges for attending the sick of the crew while the vessel is in port; surveys to ascertain the ship's condition; expenses of cabling owners; consular; and services attending the entry of the vessel at the custom-house.

3. SAME—RIGHTS OF JUNIOR LIENOR—PRACTICE.

After a lienor has obtained an interlocutory decree against a vessel by default, it is not open to a second lienor to contest the first lien. The only question open is the question of priority.

In Admiralty. On application to determine the priority of liens.

Butler, Stillman & Hubbard, (*Edward Kent*,) for libelants.

Biddle & Ward, (*Charles M. Hough*,) for holders of bottomry bond.

BENEDICT, J. This action was brought by shipping and commission merchants to recover of the brig Aina the amount of certain advances made by them under the following circumstances: The Aina was a foreign vessel, which put into the port of New York in distress. Her master having died on the passage, the mate was in charge in his place. Upon arrival, she was surveyed, and found to be leaking and to require repairs, to do which it was necessary to land the cargo. After the cargo was landed, she was again surveyed, and found to be unworthy of repair, and she was condemned by the port-wardens. Upon the arrival of the vessel in New York, the master, being without funds to defray the ship's expenses, placed her in the hands of the libelants, with a request that they advance any sums that might be necessary for the ship. The libelants accordingly attended to the business of the vessel, and made certain advances. When the result of the survey showed the vessel was not to be repaired, the vessel was libeled by her crew, and the libelants filed a libel against her to recover the amount of their advances. Another action was also commenced against her by the holders of a bottomry bond. No one appearing on behalf of the vessel, the libelants obtained, by default, an interlocutory decree condemning the vessel to be sold by the marshal, and directing a reference to ascertain the amount due them. The proceeds of the sale amounted to the sum of \$2,000, out of which has been paid \$87.40 for the crew and costs. The amount reported by the commissioner as due the libelants is \$1,260.48. In this state of the case, it was brought before the court upon

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

an application in behalf of the libelants to determine the question of priority between the claim of the libelants and the claim of the bottomry holder. Upon the hearing, however, the question of priority was not argued, but only the question of lien; and the court was asked by the bottomry holder to reduce the claim of the libelants by striking from the libelants' bill certain items, upon the ground that advances to pay such items do not subject the vessel to a lien. This method of obtaining an adjudication on the right of the libelants to recover their demand is irregular. After the interlocutory decree in favor of the libelants by default, it was not open to any person to contest the question of lien. After the entry of the interlocutory decree in favor of the libelant, the only question open to the holders of the bottomry bond was the question of priority, and upon that question there is no dispute. The libelants' demand, of course, takes precedence over the bottomry bond. Notwithstanding the irregular method in which the question of lien has been presented,—a method which is not approved,—inasmuch as the question has been argued by both sides, it will be disposed of now, to save the parties further trouble and expense.

The first question is whether the libelants have a lien upon the vessel for seven dollars paid by them to the Long Island College Hospital. The proof as to this item is that it was a charge made by the hospital for attending to sick of the crew while the vessel was here in port. Upon this evidence, it must be found that the item constituted a lien upon the ship. Caring for the crew is a necessary expense of the ship, for which the ship herself is chargeable.

The next question is whether the item of \$102.50, being sums paid the persons who made the surveys upon the vessel to ascertain her condition after her arrival in New York, is a lien. No question arises as to the reasonableness of the charges of the surveyors or as to the propriety of holding the surveys. The usage of maritime nations requires such surveys to be held. They are strictly in the interests of the vessel. Upon their result depends the question of whether the vessel is to be condemned, or to continue her voyage; and I see no reason why one who, on the request of the master, holds a survey upon a ship, should not be entitled to a lien upon the ship herself for the value of his services. That being so, the libelants are entitled to recover the amount advanced by them to pay the charges made by the surveyors.

The next item objected to is the sum of \$45.96, paid for the expenses of cabling to the owners respecting the affairs of the ship. It was certainly proper, under the circumstances, for the master to communicate with his owners in regard to the disposition to be made of the ship. It was equally proper for the libelants, upon the request of the master, to do the same thing. The expense incurred was for the benefit of the ship, and, it seems to me, constitutes a proper charge upon the ship herself.

Another item is \$3.18 for consulage. Such an item was before the supreme court in the case of *The Emily Souder*, 17 Wall. 666, and was allowed.

Another item is the libelants' charge for services attending the entry of the vessel at the custom-house, \$18.35, and \$200 for their other services in behalf of the vessel after her arrival in this port. It was necessary that such services as the libelants rendered should be rendered by some one, and they inured to the benefit of the ship. Such services differ, as it seems to me, from services rendered in procuring a charter for the ship, in that they are compelled by the necessities of the ship herself. I think they constitute a lien. Similar charges were allowed in the case of *The Emily Souder*, above cited.

DOWNES v. THE EXCELSIOR.

(Circuit Court, S. D. New York. October 10, 1889.)

1. COLLISION—STEAMER AND CANAL-BOAT—EVIDENCE.

Where the testimony is conflicting and irreconcilable as to whether a steamer which collided with a canal-boat moved from her berth in her own water, or allowed her stern to swing so far from the pier as to cause the collision, the conclusion of the district judge, who saw and heard the witnesses, will be accepted by the circuit court.

2. SAME—DUTY OF STEAMER.

If a steamer at a pier in a slip is so situated that she cannot haul out under her own power, even with the exercise of due care, without swinging outside of the open water, through which she undertakes to maneuver, she is liable for a collision with a canal-boat resulting from the swinging of her stern outside of her own berth.

3. SAME—DUTY OF CANAL-BOAT.

When a canal-boat is cast off from a steamer in a slip, and from all connection with the lower pier, and is made fast to boats which are themselves fastened to the upper pier, the boat thus forming the outermost of a tier which reached more than half-way across the slip, and within four feet of a steamer, it is the captain's duty, when he knows that the steamer is about to start, to seek some other place within the slip, or to betake himself elsewhere, and, if necessary, to ask assistance therefor.

In Admiralty. Libel for damages. On appeal from district court.

Hyland & Zabriskie, for Downes.

Chas. H. Tweed and *R. D. Benedict*, for the Excelsior.

LACOMBE, J. As to the steamer. The controlling question is whether or not she moved out from her berth in her own water, or allowed her stern to swing so far off from the pier as to bring her propeller into collision with the canal-boat. Upon this point the evidence is conflicting; witnesses for the steamer insisting that she did not swing off, and witnesses for the canal-boat claiming, with equal positiveness, that she did. The evidence is irreconcilable; one side or the other has misconceived, misremembered, or misstated the facts. In such circumstances the conclusion reached by the district judge, who saw and heard the witnesses,

and has thus had the opportunity of observing their demeanor under examination, will be accepted. He found that there was a change of the Excelsior's stern, caused by its movement outward from the dock, and that the collision occurred in consequence of such movement. If this movement was caused by any carelessness on the part of those controlling the steamer's motions, she is of course to be held liable. If the situation at the time she started was such that, even with the exercise of due care, she could not haul out under her own power without swinging outside of the open water, through which she undertook to maneuver, she should not have undertaken such maneuver in so contracted a space.

As to the canal-boat. The testimony is conflicting as to the number of boats and their respective positions in the slip at the time the Excelsior started out. The fact, however, which seems undisputed, that immediately after the collision an effort was made to haul the Fowles over towards the dock on the upper side of the slip, indicates that there was a place within the slip more remote from the Excelsior which the captain of the canal-boat might have sought before the steamer started. If, when he was cast off from the steamer, and from all connection with the lower pier, he made fast to boats which were themselves fastened to the upper pier, his boat thus forming the outermost of a tier which reached from its dock more than half-way across the slip, and as close to the Excelsior as he claims, (four feet,) it was clearly his duty, when he knew the Excelsior was about to start, to seek some other place within the slip, or to betake himself elsewhere. If he could not move his boat without assistance, it was his duty at least to ask for it; and even this he did not do.

The decree of the district court is affirmed, but, as both sides have appealed, without costs.

SCHOFIELD v. DEMOREST.

(Circuit Court, S. D. New York. July 10, 1889.)

REMOVAL OF CAUSES—CITIZENSHIP.

Under removal act Cong. 1888, § 2, cl. 3, providing for the removal of causes where the controversy is between citizens of different states, a defendant sued in a court of his own state cannot remove the cause to a federal court.

At Law. Application to remand cause.

This cause was removed from the state court under the third clause of section 2 of the removal act of 1888, which provides as follows:

"When in any suit mentioned in this section there shall be a controversy between citizens of different states which can be fully determined as between them, either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The plaintiff is a citizen of Connecticut; the defendant a citizen of New York. The plaintiff moves to remand.

Rabe & Keller, for plaintiff.

Carlisle Norwood, Jr., for defendant.

LACOMBE, J. If anything seems plain in the removal act of 1887 it is that a defendant sued in a court of his own state cannot remove the cause into the federal courts, and to that effect are the cases cited on the argument. The motion to remand is granted.

BRISCOE v. SOUTHERN KAN. RY. CO.

(Circuit Court, W. D. Arkansas. October 5, 1889.)

1. COURTS—WESTERN DISTRICT OF ARKANSAS—SOUTHERN KANSAS RAILROAD COMPANY IN INDIAN TERRITORY.

The act of congress of July 4, 1884, gives to the circuit or district court of the western district of Arkansas jurisdiction over suits by or against the Southern Kansas Railroad Company, such company having a right, by the act of congress, to build its road and operate the same in the Indian country.

2. SAME—CITIZENSHIP.

The claim of jurisdiction of this court must be based on the subject-matter, and cannot depend on the citizenship of the parties.

3. SAME—FEDERAL QUESTION.

The court has jurisdiction because this is a suit arising under a law of the United States. When is a suit one arising under a law of the United States? When it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of a law of the United States, or sustained by the opposite construction.

4. SAME—TORTS IN INDIAN COUNTRY.

Prior to the act of July 4, 1884, the plaintiff could have had no remedy in the Indian country for the injury caused by the tort of defendant; therefore, he had no remedy anywhere.

5. SAME.

When that act of congress gave for the first time a remedy, the right of plaintiff became for the first time a perfect right.

6. SAME.

Until this time it was a remediless right, and, practically, was no right, as a right without a remedy is no right. This law of congress gave the plaintiff a right or privilege for the first time.

7. SAME.

Jurisdiction exists in a court of the United States as well where an act of congress for the first time gives a right of action, thus affording a remedy, as where it creates a right. In either case it is the existence of a claim to a right or privilege that is founded on a law of congress, and is therefore a case arising under a law of the United States,—one where a party comes into court to demand something conferred on him by a law of congress.

8. RAILROAD COMPANIES—LEASES—LIABILITY FOR TORTS.

In a case where a railroad company has legal authority to lease its road, and does lease it, and turns over the whole control and management of the road to the lessee, it would not be liable for damages caused by the torts of the lessee. To absolve the lessor from liability the lease must be authorized by legislative authority.

9. SAME.

A corporation cannot absolve itself from the performance of its obligations to the public without the consent of the legislature expressly given.

10. SAME.

The lessor is absolved from liability by legislative authority, in effect, when the lease is authorized by law.

11. SAME—RECOGNITION OF EXISTENCE OF COMPANY.

The authority is not given by the act of congress of July 4, 1884, to the Southern Kansas Railroad Company, to lease its road situated in the Indian country. This authority to lease must be expressly given. Congress simply recognized the Southern Kansas Railroad as a Kansas corporation, having an existence under the laws of Kansas, and gave to it certain rights in the Indian country, such as the right to build its road through that country and exercise all the ordinary powers incident to the ownership, construction, and operation of its road.

12. SAME—FOREIGN CORPORATIONS—STATE CHARTERS.

A state, by chartering a corporation, cannot confer upon it a legal right to act within the jurisdiction of another state.

13. SAME.

Every power which a corporation exercises in a state other than the one creating it depends for its validity upon the laws of the sovereignty in which it is exercised.

14. SAME—CONFLICT OF LAWS.

Courts of justice of a country have always expounded and executed contracts according to the law of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country.

15. SAME—COMITY AS TO POWERS OF FOREIGN CORPORATIONS.

By the comity of nations foreign corporations are allowed to make contracts, within their respective limits, not contrary to their known policy, or injurious to their interests.

16. SAME.

By this principle a railroad corporation has the right to exercise all of its ordinary powers in a state other than that which created it,—such powers growing out of its franchise,—such as making contracts in regard to the transaction of its business, etc.

17. SAME.

But under such a principle of comity a railroad company cannot exercise, out of the state which created it, an extraordinary power, such as is involved in leasing its road which is situated out of said state; and, when the only authority to lease it is contained in its home charter, it cannot lease a road owned by it situated beyond the limits of the jurisdiction of such home charter, so as to get rid of its responsibility to the public, which it assumed when it accepted the franchise. The leasing of its road by a railroad company is the exercise of an extraordinary power, which cannot be exercised by such company unless express authority is conferred on it.

18. SAME.

Railroad companies being public corporations so far as to be subjected to control by legislative action, they can do no act which would amount to a renunciation of their duty to the public, or which would directly and necessarily disable them from performing it. They cannot, therefore, without express authority, convey away

by lease for a long time their franchises and corporate rights. But they may contract debts, purchase on credit, and mortgage their personal property not affixed to the road, though used in operating it, as doing these things would be but the exercise of ordinary powers. The laws of Kansas granting to defendant the right to lease its road cannot operate beyond the sovereignty of Kansas.

(Syllabus by the Court.)

At Law.

This is a suit brought by plaintiff to recover damages of defendant for the killing of his horses by the carelessness and negligence of defendant's agents or servants in running its engine and train of cars over said horses, when the same could have been avoided by the exercise of reasonable care on the part of such agents or servants. The defendant filed its answer, denying the allegations of plaintiff's complaint as to the negligent killing, and setting up that before the killing of said horses defendant had leased its road for 99 years to the Atchison, Topeka & Santa Fe Railroad Company; that the control and management of said railroad was entirely in the hands of the lessee, and the running of trains over it was by the agents and servants of the lessee, and the defendant had nothing to do with such control, management, or the running of trains on said road. The case was tried. Verdict for plaintiff. Defendant filed its motion for new trial, and in it complained specially that the court erred in instructing the jury that the lease of defendant to the Atchison, Topeka & Santa Fe Railroad Company was unauthorized by law, and therefore void, and that, such lease being void, the lessor was not free from liability for the negligent acts of the lessee. The motion for new trial was overruled. The other points raised in the case fully appear in the opinion of the court.

Barnes, Mellette & Boudinot, for plaintiff.

Duval & Cravens, Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for defendant.

PARKER, J., (after stating the facts as above.) The first question is, did the eighth section of the act of congress of July 4, 1884, give the plaintiff the right to bring a suit in this court? The section is—

"That the United States circuit and district courts for the western district of Texas, the western district of Arkansas, and the district of Kansas, and such other courts as may be authorized by congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Southern Kansas Railroad Company and the nations and tribes through whose territory said railway shall be constructed. Such courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act."

Counsel for defendant contend that the last clause of the section, to-wit, "so far as may be necessary to carry out the provisions of this act," is a limitation to the section of such a nature as to limit the jurisdiction of the federal courts to such controversies as may arise between the

tribes or nations through whose territory the road is constructed and the inhabitants of such tribes and nations to matters necessary to carry out the provisions of the act,—in other words, it limits it to such suits between the tribes and nations, or members of the tribes and nations, and the railroad company, as may arise under the act granting the right of way, and pertaining to the right of way, and damages for the same; and that the same cannot be extended to a suit to recover for a common-law tort, a recovery upon which depends in no manner whatever upon the construction of the act granting the right of way to the railroad company. If this proposition is true, the nation or tribe, or the inhabitants thereof, were left by congress without any remedy for torts committed by the railroad company; for, as there is no remedy for torts such as was sued for in this case at the place where the same was committed, there could be no remedy anywhere. As the plaintiff could not sue in the Indian country, he could not sue anywhere. *Le Forest v. Tolman*, 117 Mass. 109. It is there decided, by Justice GRAY, that to maintain an action of tort founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must be actionable or punishable by the law of the place in which it is done. The latest case on this subject is *Carter v. Goode*, 50 Ark. 156, 6 S. W. Rep. 719, where the doctrine that is well sustained by American and English law, as announced in the case of *Le Forest v. Tolman*, was fully and clearly recognized. Then the plaintiff was remediless, unless the provisions of this act gave him a remedy. The nations of Indians through whose lands the 120 miles of the Southern Kansas Railroad passes have many rights that may be destroyed or affected by the tortious acts of the defendant. There are many resident Indians, and many lawful residents in these nations who are not Indians. They have rights that may be affected or destroyed by the torts of the defendant. Did congress intend that this road should obtain from the United States the franchise which gave it the right to build its road, own it, run it, and receive its earnings, and the lawful residents of this country, for a distance of 120 miles, were to be left without a remedy for an injury to personal property, no matter how great the same might be, caused by the negligent and tortious conduct of defendant's agents? This is hardly to be presumed. Unless there is an entire absence of any language in the act which will, by a reasonable construction, warrant the conclusion that it was the purpose of congress to afford a remedy, the act must be construed to harmonize with the purpose of congress to promote the right and secure justice by affording a means of redress to the lawful inhabitants of these nations for a tortious act committed by defendant. The language of the eighth section is: "Such courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company." Over all controversies is very comprehensive. This is one of the provisions of this act, to which jurisdiction, without distinction as to citizenship of parties, is extended to the courts to carry out. Mr. Briscoe, the plaintiff, upon the proof, is an in-

habitant of the Chickasaw nation. His status as such is defined by Bouvier, (volume 1, p. 709,) where he says: "An inhabitant is one who has his domicile in a place." Briscoe had his residence at Purcell, in the Chickasaw nation, and it was a legal residence, as he was living there upon a permit. That was his fixed abode. He had none other. Therefore he was an inhabitant by authority of the case of *In re Wrigley*, 4 Wend. 603, and in fact by all the authorities.

To give this court jurisdiction, the right to claim it must grow out of the subject-matter. It must be a suit or a case arising under a law of the United States. When is it a suit arising under a law of the United States? When it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of a law of the United States, or sustained by the opposite construction, the case will be one arising under a law of the United States, and one of which the federal courts have jurisdiction, regardless of the citizenship of the parties. *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. Bank*, 9 Wheat. 758; *Starin v. New York*, 115 U. S. 257, 6 Sup. Ct. Rep. 28, and authorities there cited; *Insurance Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. Rep. 260.

As far as this defendant has rights in the Indian country, it is equivalent to a corporation created by an act of congress; or, if this cannot be said to be true, it is a recognition, to the extent provided by the act of congress, of a corporation in existence, having been created under the laws of Kansas; and upon this corporation, by this act of congress, there is conferred the right to build and run its road through the Indian country, and exercise all the ordinary powers incident thereto. Every right defendant has in the Indian country it obtained from the act of congress. This, by the doctrine of the case of *Osborn v. Bank*, 9 Wheat. 739, raises a federal question. I think this doctrine is abundantly sustained by the *Removal Cases*, 115 U. S. 11, 5 Sup. Ct. Rep. 1113. Mr. Justice BRADLEY, in these cases, said:

"The exhaustive argument of Chief Justice MARSHALL, in the case of *Osborn v. Bank*, 9 Wheat. 738, * * * renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States."

The case is one arising under a law of the United States, and consequently there would exist a federal question. If a federal question exists when the corporation is one created under the laws of the United States, when a corporation already created under the laws of a state is permitted by an act of congress to enter a country over which the United States has jurisdiction, and there to exercise the ordinary powers of a railroad corporation, this would create a federal question, as well as in the other case. But the fact that a federal question exists in the case has a more reasonable foundation than this. Here is a right that for the first time becomes a perfect right by its receiving a legal recognition by the provision, for the first time, of a remedy by this act of congress. Until this time it was a remediless right, and, practically, was therefore no right, as a right without a remedy is practically no right. Here a remedy

was for the first time given by a law of the United States, and thus the right, as having an existence, was for the first time recognized by the law-making power, and provision was made by such power for its enforcement. This gives the plaintiff a right or privilege which arises under a law of the United States, and gives him the right to come into the federal court to enforce the right, the same as though the right itself had been created by an act of congress. Why does not jurisdiction exist in a court of the United States as well where the act of congress for the first time gives a right of action as when it creates a right? In either case it is the existence of a claim to a right or privilege that is founded upon a law of congress. In either case it is a case arising under a law of the United States. In such a case a party comes into court to demand something conferred on him by a law of congress.

The proof in this case shows that, before the killing of the horses of Briscoe, the Southern Kansas Railroad Company had leased, for a period of 99 years, its road to the Atchison, Topeka & Santa Fe Railroad Company, a corporation created under the laws of Kansas; that the management of the said Southern Kansas Railroad, and the running of the same, was by the employes of the Atchison, Topeka & Santa Fe Railroad Company; that the defendant had nothing to do with the running of trains or the management of the road in the Indian country; that for this reason the defendant is not liable to plaintiff. If the Southern Kansas Railroad Company had the proper legal authority to execute the lease made by it to the Atchison, Topeka & Santa Fe Railroad Company, and in pursuance of such authority it had made the lease, and turned over the control and management of the road to the lessee, I believe the true doctrine is that it would not be liable for damages caused by the torts of the lessee. An authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road, over which the lessor could have no control. *Nugent v. Railroad Co.*, 6 Amer. St. Rep. 151, 12 Atl. Rep. 797. A railroad company whose road is operated by a lessee in the name of the lessor is liable to third persons for the lessee's negligence, unless absolved therefrom by legislative authority. A railroad company has no power to lease its road so as to relieve itself from liability for the non-performance of duties devolving upon it, in the absence of legislative authority, expressly given. *Railroad Co. v. Dunbar*, 71 Amer. Dec. 291. The franchises of a railroad company are intended to be exercised for the public good. This is why they are granted. A corporation cannot absolve itself from the performance of its obligations to the public without the consent of the legislature, expressly given. *Singleton v. Railroad Co.*, 48 Amer. Rep. 574; *Railroad Co. v. Barron*, 5 Wall. 90. That the lessor is absolved from liability by legislative authority, in effect, when the lease is authorized by law, I believe to be the true doctrine.

It is claimed by defendant that it had authority to make the lease; that this authority is derived from the act of congress which authorized the building of the road through the Indian nations; and, if the author-

ity is not to be found there, that it existed by virtue of the authority of the laws of Kansas, under which it held its charter. It is clear to my mind that the authority to lease is not given by the act of congress of July 4, 1884, which gave the defendant the right to build its road through the lands of the Indian nations. This authority, under this act, is claimed by virtue of the tenth section thereof. This section declares that—

“The said Southern Kansas Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort tending towards the changing or extinguishing of the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant of land, or its occupancy, than is hereinbefore provided.”

This is the only part of the act that mentions the word “assigns.” There is no express power to lease the road in the act. The use of the words “assigns” and “successors” in the tenth section of the act does not necessarily imply that the corporation can transfer all of its property and franchises to another corporation by lease. *Railroad Co. v. Railroad Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409; *Thomas v. Railroad Co.*, 101 U. S. 71; *Railroad Co. v. Railroad Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094. By these authorities the principle is enunciated—

“That, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company for a long period of time its road, and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to secure and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and it is not to be presumed from the usual grant of powers in a railroad charter.”

Under this rule there is clearly no right given to the Southern Kansas Railroad Company by the act of congress to lease its road. It simply recognized the existence of this company as a Kansas corporation, and gave it certain rights in the Indian country,—such as the right to build its road through such country, and exercise all the ordinary powers incident to the ownership, construction, and operation of its road.

But it is claimed that its Kansas charter gives it the right to lease its road. If this road was in Kansas, the position would be well taken. The power to lease the road in Kansas would exist.

“A state cannot, by chartering a corporation, confer upon it a legal right to act within the jurisdiction of another state.” 2 Mor. Priv. Corp. § 958.

It is a fundamental principle that the laws of a state can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the state enacting them. Section 959, Id. The charter of this road, or the laws of Kansas under which it exists, does not give it the right to exercise its powers beyond the state of Kansas. Its powers under its Kansas charter cannot be exercised in the Indian country unless permitted to be exercised by the act of congress; and they can be exercised only

to the extent so permitted. In the case of *Runyan v. Coster's Lessee*, 14 Pet. 122, and in *Bank v. Earle*, 13 Pet. 519, the supreme court of the United States said:

"Every power which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised."

It was further held, in the above cases, that a corporation can make no valid contract without the sanction, express or implied, of the laws of such sovereignty. It is decided in *Bank v. Earle*, 13 Pet. 524, that courts of justice have always expounded and executed contracts according to the law of the place in which they were made, provided that the law was not repugnant to the laws or policy of their own country. The court, in the above case, held the rule to be "that, by the comity of nations, foreign corporations are allowed to make contracts under their respective limits not contrary to the known policy of such nations, or injurious to their interests." This gives a railroad corporation the right to exercise all its ordinary powers growing out of its franchise, such as making contracts in regard to the transaction of its business, as was the case in *Railroad Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. Rep. 363. But when it undertakes by a lease of its road to get rid of its responsibility or liabilities to the public, which it assumed when it accepted the franchise, it would be exercising an extraordinary power, which may be greatly prejudicial to the public, and therefore is contrary to the known policy of a state, and injurious to its interests, and cannot be exercised unless the state, by express authority conferred, authorizes it to be done.

The execution of a contract of lease by the defendant by which it parted with its franchise for three generations is not among its ordinary powers. I take the rule to be, in this country, that the ordinary powers vested by the law of its creation may be exercised anywhere by the rule of comity. The granting of this franchise in the Indian country by congress was the granting of a right in which the public has a large interest. Railroad companies being public corporations so far as to be subjected to control by legislation, they can do no act which would amount to a renunciation of their duty to the public, or directly and necessarily disable them from performing it. They cannot, therefore, convey away their franchises and corporate rights. But they may "contract debts, purchase on credit, and mortgage their personal property not affixed to the road, though used in operating it," as these would be but the exercise of their ordinary powers. 1 Wat. Corp. 589. There is nothing in the act of congress authorizing the defendant to build its road permitting it to lease it. The laws of Kansas granting the extraordinary power to defendant to lease its road cannot operate beyond the sovereignty of Kansas. Before defendant could lease its road in the Indian country it must have the consent of the other party to the contract,—the United States. This consent must be expressly given. It might be given by the act of congress directly, by the use of appropriate words in the act, or by the adoption of the power in the Kansas charter; but it has done neither, and therefore, as far as the public is concerned, it does not exist. I am not deciding what these two companies may do as affecting

each other, but simply, as far as the public is concerned, this act of leasing is an unauthorized lease. This being so, the defendant company is liable to third parties for damages occasioned by the tortious acts of the lessee of defendant. The motion for new trial, for the reasons above given, must be overruled; and it is so ordered.

JONES v. BOND.

(Circuit Court, S. D. Mississippi, E. D. September 25, 1889.)

1. RAILROAD COMPANIES—NEGLIGENCE—RUNNING OVER DOG.

In an action for damages for the killing of a dog by a railway train, the engineer testified that while rounding a curve, in a deep cut, on a down grade, he saw the dog ahead, and immediately reversed his engine, sounded the alarm whistle, and did all he could to avert the accident, and the fireman corroborated him. Witnesses for the plaintiff testified that they heard the whistle, but supposed it to be for the town the train was approaching. The only witness on the part of the plaintiff who saw the accident, testified that the dog was running along the track. The engineer testified that she was crossing the track. The dog was cut in two parts about the middle of the body. *Held*, that plaintiff was not entitled to recover.

2. SAME—EVIDENCE.

Under Code Miss. § 1059, providing that, in actions against railroad companies for injuries to person or property, proof of the injury inflicted by the running of locomotives of cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of its employes, the presumption created by the statute ceases when the *prima facie* case made out by proof of injury is rebutted by evidence on the part of defendant.

At Law. Action for damages.

Harry Peyton, for plaintiff.

W. L. Nugent, for defendant.

HILL, J. This cause was submitted to the court, upon the questions of fact as well as law, upon petition, answer, and proofs. The petition, in substance, alleges that petitioner was the owner of a very valuable bitch, of the setter tribe, from which he semi-annually obtained a large number of puppies, that he sold for a large sum; that said bitch was of the value of \$150; that on the 19th day of January, 1889, she was on the track of the Vicksburg & Meridian Railroad, then being operated by the defendant as receiver under the orders of this court, and that, through the carelessness and negligence of said employes, the locomotive and passenger train, then passing over said road, ran over and killed said bitch, to the damage of petitioner \$150. The answer admits the killing of the animal, but denies that it was the result of any want of care on the part of the engineer, but, on the contrary, insists that it was unavoidable. Whether it was so or not is the only question to be decided under the proof taken and submitted by both parties. The testimony of the engineer and fireman running the train, taken together, if true, is a clear defense to the claim of petitioner. The evidence on the part of the petitioner makes a pretty strong *prima facie* case of liability. The

petitioner, by his counsel, relies upon section 1059 of the Code of 1880, which reads as follows:

"In all actions against railroad companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care upon the part of the servants of such company in reference to such injury."

The reason for this exceptional rule of evidence is that these injuries are often committed (especially on property) when no one else observes them except the employes operating the train; and this is often the case in regard to injuries done to persons. Hence, after the injury is admitted or proved, it is but reasonable that the railroad company, or the receiver, (as in this case,) having control of those who have the best opportunity to know, shall be called upon to explain how the accident or injury occurred. But I believe a fair construction of the statute is that, as soon as the *prima facie* case thus made out is rebutted by the evidence on the part of the defendant, the whole testimony is considered as in other cases, the presumption created by the statute from the fact of injury ceases, and the controversy is to be decided by the weight of the evidence on both sides. I am not aware of any ruling of the supreme court of the state to the contrary. I have, within my judicial experience, tried quite a number of cases for injuries to persons and property, against railroad companies and receivers, from alleged carelessness and negligence on the part of employes operating railroad trains, and have read the opinions of the courts in many more cases, but this is the first dog case that has been brought to my attention, and therefore I am at a loss to know what rule to apply. I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment, or escape from dangerous places, where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating the trains that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with by other circumstances at the time and place. The proofs on both sides show that there is a curve in the railroad at, or immediately east of, the place where the bitch was killed, and that the railroad at this point is in a deep cut, so that the engineer could not see her at any great distance, and that it was on a down grade. The testimony of the engineer is that, as soon as he saw her, he reversed his engine, sounded the alarm whistle, and did all he could to avert the accident; and that the animal attempted to cross the track, when she was run over and killed. The fireman testifies that he was oiling some part of the machinery, and did not see the accident, but did hear the alarm whistle, and knew that the engine was reversed. The witnesses on the part of the petitioner

testify that they heard the whistle, but thought it was the whistle giving notice of the approach to the town of Clinton, as it was about the place where such whistle is usually sounded. It is very natural that they should have reached this conclusion. It was the business of the engineer to sound the whistle; and he must be presumed to know more about it, and the purpose of sounding it, than any one else. The fact that he was the employe of the defendant is not a sufficient reason for disregarding the weight to be given to his testimony. Besides, the fireman corroborates him in the statement that he sounded the alarm and reversed the engine. There is a difference in the testimony of Simpson, the only witness on the part of petitioner, who says he witnessed the accident, and the engineer, as to whether the animal was running along the track or crossing it when the killing occurred. The undisputed fact that she was cut in two parts about the middle of her body is strong corroborative evidence that she was crossing the track. A careful consideration of the testimony on both sides satisfies me that the petitioner has not made out, by the proof, a case entitling him to damage as alleged in his petition. As the case is a novel one, he will not be taxed with the defendant's costs, but will pay all the other costs, and his petition will be dismissed.

GILES v. PAXSON *et al.*

(Circuit Court, N. D. Iowa, E. D. October 29, 1889.)

VENDOR AND VENDEE—CONTRACTS—PERFORMANCE.

Under a contract for the purchase of an interest in real estate, to the larger part of which titles were admitted to be imperfect, reserving to the purchaser the privilege of making "a further investigation of the condition of the property aforesaid, and if, upon such examination, it is not found satisfactory, and that the representations as made by the parties of the first part are substantially correct, the said purchaser has the privilege of declaring said contract null and void" by giving notice within a certain time, it is for the purchaser alone to determine whether he shall complete the purchase, and his right to refuse to complete it is not affected by any action of his in pursuance of another and independent provision of the same contract, that all of the parties thereto shall have the option of taking a *pro rata* share of land subsequently purchased by any of them.

At Law. Action on contract.

Adams & Mathews, for plaintiff.

H. C. Noyes and *Ed. P. Seeds*, for defendants.

SHIRAS, J. On the 17th day of January, 1887, the parties to this action entered into a contract in writing touching the purchase by plaintiff of an undivided one-third interest in certain lands in the states of Missouri and Arkansas, in which the defendants were interested. The contract sets forth at considerable length descriptions of the various tracts of land intended to be included within the contract; averring that "the said parties of the first part claim ownership to about 22,533 acres of

land, as perfected titles, and to about 39,694 acres more, the titles to which are subject to tax and other conditions, regarding which effort is now being made to perfect and determine against adverse claims." After describing certain lands not intended to be included in the sale, the contract further provides that—

"Whereas, the said William A. Giles, party of the second part, is desirous of purchasing an undivided one-third interest in all said above-described lands and interests, as owned by said parties of first part, (with exceptions set forth and reserved,) for the sum of eleven thousand dollars, now, therefore, it is mutually agreed by all parties hereto that said purchase and sale be made, and the same is hereby consummated, subject to the privilege given said Giles to make a further investigation of the conditions of the property aforesaid, and also of the titles thereto. And if, upon such examination, it is not found satisfactory, and that the representations as made by the parties of the first part are substantially correct, then said Giles has the privilege of declaring said contract null and void by giving notice in writing to W. Henry Williams, of Chicago, or to said Charles Paxson, at Manchester, Iowa, by registering said notice at Chicago post-office, or personal notice of his (the said Giles') intention to make void this said contract, in which case said first parties hereby promise and agree to repay to said Giles any and all moneys paid by him on this contract, with interest at six per cent. per annum after May 15, 1887, within 90 days after May 15, 1887. If said Giles, on or before said 15th day of May, 1887, decides to consummate this purchase, he shall then give due notice, and shall make in addition to the payment of (\$5,000) five thousand dollars at the time of signing and delivering this contract, the receipt of which is hereby acknowledged by parties of the first part, the further sum of six thousand dollars in cash on or before July 1, 1887, and then a full conveyance or assignment shall be made by the parties of the first part hereto to the said second party of a full undivided one-third interest of the lands and interests herein referred to in Arkansas and Missouri; it being understood that any expense and care in the management of said estate and disbursements made in perfecting titles to the same shall be chargeable and paid by parties in interest in proportion to their several interests at the time of consummating this contract. It is also agreed, in the event of further purchases of interests in Arkansas by any of the parties hereto, it shall be at the option of all parties to take a *pro rata* share in the same at net cost. All offers for the purchase of any lands herein referred to must be consented to by all parties hereto. The parties of the first part agree to furnish abstracts of perfected titles, and other evidences of title, to the aforesaid land to the party of the second part within 90 days. In witness whereof," etc.

By mutual agreement, the time allowed Giles for examining the titles and condition of the lands was subsequently extended until June 20, 1887. The defendants furnished to the plaintiff, for his examination, certain abstracts of title-deeds, and other evidences of the state of the titles, and the plaintiff went to Arkansas for the purpose of examining the lands; and on or about the 18th of June, 1887, he gave notice, by sending a registered letter to Charles Paxson, that he had concluded not to complete the purchase, and he also demanded the repayment of the \$5,000. The other parties refusing to repay this sum, this action was brought for the recovery thereof.

The right of plaintiff to recover turns upon the construction to be placed upon the contract reserving to Giles the privilege of making in-

vestigation touching the lands, and the titles thereto, and, if not found satisfactory, to then declare the contract at an end. The position of the plaintiff is that the contract made him the judge of the acceptability of the titles; so that his determination, made within the time allowed him for examination, and duly notified to the other parties, would either make the contract binding or terminate it. On part of the defendants, it is insisted that the plaintiff is bound to show a sufficient reason for his alleged dissatisfaction; or, in other words, that the plaintiff cannot terminate the contract at his own pleasure, but can do so only if good ground exists for refusing to carry it out, or that, if the facts show that he ought to be satisfied, the law holds that he is satisfied. There can be no question that as to certain kinds of contracts the rule contended for by defendants is applied. Thus, if one is induced to expend money or labor in the production of some article, or in the improvement of another's property, under a contract which binds him to do the work in a satisfactory manner, the one party cannot ordinarily retain the benefit of what has been done, and yet repudiate the obligation to pay therefor by merely claiming that the contract has not been performed in a manner satisfactory to him. If the work or labor has been reasonably performed, according to the terms of the contract, it is held that the party is bound to be satisfied therewith because he has received all he contracted for. So, in sales of real estate, if a party contracts to sell a given piece of realty, and to convey a good and satisfactory title, the contract is met if the title conveyed is sufficient, and the vendee cannot nullify the contract by claiming that he is not satisfied, or by alleging frivolous exceptions to the chain of title. The rulings in these and similar classes of cases go upon the principle that the contracts of the parties must be reasonably construed; and, so construing them, it is held that all the one party has the right to demand of the other is such a performance of the contract as is reasonable, in view of the subject of the contract. If, however, the contract is so drawn that it is plain that it was the intent of the parties that the test of fulfillment should be the judgment of one of the parties, there is no reason why such a contract should not be held binding. It is so expressly held in regard to contracts to furnish articles to serve or gratify personal convenience, taste, or the like. Suppose an artist contracts to paint a portrait or other picture, and it is expressly agreed that the other party shall not be compelled to accept the picture unless it is entirely satisfactory to him. By such a contract the artist undertakes that he will furnish a picture satisfactory to the other party, and the latter cannot be compelled to take it unless he is satisfied with it. So, if A. contracts to sell a horse to B. for an agreed price, it being stipulated that B. shall have the right to drive the animal for a given period, and then, if he is not satisfied with him, he can return the horse and terminate the contract, certainly B. cannot be compelled to keep the horse unless he is satisfied with him. In each case the question is, what is the true construction of the contract?

Taking into account the subject of the contract, and the relation of the parties thereto, and construing the language of the contract in the light

thus thrown thereon, if it is clear that the parties have agreed that the one party shall have the right to decide, after a further examination or trial, whether he is satisfied to complete the purchase, certainly the courts cannot refuse to enforce the agreement as the parties have made it. What, then, is the construction to be placed upon the contract signed by the parties to the present action? It appears that the defendants were speculating in lands in Missouri and Arkansas. They claimed that they had perfected the titles to about 22,533 acres, and claimed the ownership of some 39,694 acres additional, the titles to which were yet unsettled. It also appears that it was their purpose to continue the business of buying up tax and other titles to other lands, and to sell the same at a profit. The business was not that of buying lands for cultivation and improvement, but that of buying and selling with a view to a money profit. It was proposed that the plaintiff should become interested in these purchases to the extent of taking an undivided one-third share, paying therefor the sum of \$11,000. The interest to be acquired by Giles, and the amount to be paid therefor, were agreed upon; but there was reserved to Giles the privilege of making "a further investigation of the condition of the property aforesaid, and also the titles thereto; and if, upon such examination, it is not found satisfactory, and that the representations as made by the parties of the first part are substantially correct, then said Giles has the privilege of declaring said contract null and void," etc.; it being further provided that, in case he concluded to complete the contract of purchase, he should give notice thereof to the other parties. When this paper was signed, in effect it conferred upon Giles the right to become a purchaser of an undivided interest in the lands named. From the recitals of the paper, it is apparent that Giles had not fully committed himself to the purchase, but had reserved to himself the right to make further investigation into the condition of the lands, and the titles thereto. Counsel for defendants admit that Giles was not absolutely bound, and that, if sufficient reason therefor existed, he had the right to refuse to proceed further, and to recover back the money already paid; but their contention is that it was not for Giles to determine finally the question whether the condition of the property and the titles was or was not satisfactory, but that he was bound to be satisfied if the condition of the property and titles, upon examination, were found to be such that he ought to have been satisfied. The time within which Giles was to make the investigation, and determine whether he would nullify or complete the proposed purchase, was limited in the contract. He was required to make the investigation, and reach a conclusion thereon, within a given time, and to give notice thereof to the other parties. No criterion for reaching the conclusion, nor tribunal for deciding it, other than Giles' own judgment, is provided in the contract; and hence it is clear that it must have been the intent of the parties to leave the decision of the question to Giles' own judgment.

It is urged in argument that the principle should be applied that, if Giles ought to have been satisfied, the law will hold him bound. The facts of the case show that it would be impossible to apply this princi-

ple in the way contended for. What criterion could a court apply in determining whether Giles was bound to be satisfied? The property dealt with is real estate; and the contract itself provides that Giles is not bound to complete the purchase unless the titles are, upon investigation, found to be satisfactory. If the ordinary rule touching realty is applied, then Giles would not be bound to complete the purchase, unless the other parties furnish good titles to the entire property; for a title cannot be said to be, in law, satisfactory, unless it is sufficient to convey the property to the grantee. The defendants do not claim that the evidences of title that they furnished for Giles' inspection were such as to show a good title to the entire body of the land; and the agreement on its face shows that, as to the larger part of the lands, the titles held by the defendants were imperfect.

Upon the argument it was said that all Giles could demand was that the other parties should furnish merchantable titles; that is, titles that could be dealt in as matter of speculation. It is apparent from the contract and the evidence that the parties understood that the titles in question, and the interest of the defendants in the lands, was of a purely speculative character. Now, when Giles was asked to become a purchaser, it was not expected or represented by the defendants that they would be able to show that they held good titles to the entire number of acres. They claimed to have sufficient interest in the lands to make it an object to Giles to purchase an undivided interest therein for the price named; but it was a matter of speculation, and, before Giles would agree to finally become interested, he reserved the right to further investigate, not only the titles, but the condition of the lands, in order to determine for himself whether he would purchase an interest or not. The suggestion that all Giles could demand was merchantable titles, in the sense of titles that might be dealt in as a matter of speculation, is illusive, for it furnishes no criterion for determining whether Giles ought to have been satisfied or not. There is a no market rate for titles, nor is there any rule for determining what would constitute merchantable titles. Construing the contract, then, with reference to the subject-matter, no force can be given to its provisions giving the privilege of further investigation to Giles unless it be held that he had thereby reserved to himself the right to investigate the condition of the lands, and the titles thereto, and, having made such investigation, to then determine whether he would complete the purchase or not.

It is further urged that the right to nullify the contract does not exist in favor of Giles unless the representations made by the parties of the first part are not substantially correct. Viewing the contract as an entirety, it must still be held that the right to examine into and determine this question was reserved to Giles himself. The contract requires the entire investigation to be made within a limited time, and requires Giles to decide whether he will proceed or retract. The ultimate question reserved for Giles' decision was whether he would complete the purchase of the undivided one-third interest or not; and all the matters to be investigated, whether as to the condition of the lands, the state of the

titles, or the representations of the defendants, were to be investigated, in order that he might understandingly exercise the judgment reserved to him of deciding whether he would or would not proceed with the proposed purchase. All the questions to be investigated were reserved for his judgment, or none of them were; and, according to the fair construction of the contract, the privilege of declaring the contract null and void is reserved to Giles if, upon investigation, he should determine that the representations made were not substantially correct, or that the conditions of the property or of the titles were not satisfactory. That this was the understanding of the parties at the time that the contract was entered into is further shown by the fact that no conveyance was executed to Giles of an interest in the property, but, on the contrary, it was provided that if Giles, after investigation, decided to proceed with the purchase, he was then to give notice of such conclusion, and complete the payment of the sum specified, and then the conveyance to him was to be executed. Taking all the provisions of the agreement into consideration, it is clear that both parties understood that it was left to Giles to decide, after due investigation, whether he would proceed or not; and as it appears, from the evidence, that Giles made the investigation he was privileged to make, decided that he was not satisfied to further proceed, and gave the notice in writing of such conclusion, as provided for in the contract, no good reason is assigned why the court should hold that he is still bound as a purchaser of an undivided interest in the lands described in the contract.

It further appears in evidence that, pending the decision of the question whether Giles would complete the purchase named, he bought certain lands known as the "Bradshaw Purchase," and Williams contracted for certain other lands. In the written agreement already referred to, it is provided that, "in the event of any further purchases or interests in Arkansas by any of the parties hereto, it shall be at the option of all parties to take a *pro rata* share in the same at net cost." When Giles sent the notice to defendants of his conclusion not to proceed further with the purchase of the lands described in the contract, he also notified the defendants that he had made the Bradshaw purchase, and that they could become interested therein by paying two-thirds of the cost thereof, and, further, that he might wish to take a third interest in the lands contracted for by Williams. It is now claimed that by this action on part of Giles he nullified the notice not to proceed with the purchase named in the contract, upon the theory that the contract was an entirety, and that he could not refuse to proceed with the purchase of the named lands, and yet treat the contract as in force. The plaintiff is not claiming the right to rescind the contract on the ground of mistake, fraud, or other like fact. On the contrary, he is seeking to enforce that part of the contract which gives him the right to demand the repayment of the \$5,000 in case he should not decide to proceed in the purchase of an interest in the lands named. The right reserved to both parties to participate in the benefits of any other lands purchased in Arkansas is not, in terms, made dependent upon the ques-

tion whether Giles should or should not complete the purchase of an interest in the lands named; and hence his statement to the others, that he conceded to them the right to take an interest in the Bradshaw purchase, and claimed a like right in the Williams contract, cannot affect his right to refuse to complete the purchase of an interest in other lands. It certainly cannot be true that if, during the time Giles was investigating the titles to the 62,000 acres of land, the other parties had concluded to take an undivided two-thirds interest in the Bradshaw purchase, and Giles had conveyed it to them, thereby Giles could have lost the right to refuse to proceed in the purchase of an interest in the other lands. The fact that the other parties were satisfied to take an interest in the Bradshaw purchase would not affect the actual condition of the titles of the 62,000 acres, and could not deprive Giles of the right to investigate their condition, and, upon such investigation, to determine whether he would complete the purchase of an interest therein or not. The same is true of the corresponding right reserved to Giles of participating in the benefits of other lands purchased by any of the parties of the first part. These respective rights are merely options reserved to the respective parties, not obligations compelling them to purchase interests in other lands; and they do not limit or modify the right reserved to Giles to determine for himself, upon investigation, whether he would complete the purchase of an interest in the other named lands. This being the correct construction of the contract, it follows that Giles had the right to determine, upon investigation, whether he would complete the purchase or not. Having decided not to complete it, and having given notice of such decision to the other parties, then the latter became bound to repay him the \$5,000 received from him. Having failed to repay the amount, plaintiff is entitled to judgment therefor, with 6 per cent. interest from May 15, 1887, and also for costs.

THE KIMBERLEY.

BAKER SALVAGE CO. v. THE KIMBERLEY.

(District Court, E. D. Virginia. June 18, 1888.)

1. SALVAGE—AWARD.

The steamship *K.*, valued, together with her cargo, at \$490,000, was stranded on December 1st off False Cape shoals, Atlantic coast. The vessel was 350 feet long, 3,760 gross tonnage, and had been driven 3,000 feet from deep water, and thrown high upon the shore, broadside to the sea, and imbedded in the quicksand,—a most perilous position. The libelants came at once to her rescue, and finally succeeded in getting the vessel off on January 26th. Some nine vessels, valued at \$164,000, were employed in the service. The vessels and men incurred serious and continued risks on account of storms off that coast. A large part of the cargo was moved 2,000 feet in surf-boats; it being impossible to get a larger vessel near the *K.* The *K.* was so filled with water as to render her engines useless, and very little assistance was received from her. The libellant's actual outlay was \$46,000. Held that, in addition to the *quantum meruit* allowance, libellant was entitled to one-fifth of the value saved, viz., \$98,000.

2. SAME—INCORPORATED SALVAGE COMPANIES.

An incorporated wrecking and salvage company may be granted salvage awards as liberally as natural persons so engaged.

3. SAME—RELEASE OF RIGHT TO MERITORIOUS AWARD.

An agreement between the salvors and the agents of the vessel in distress that the salvors shall proceed to save the cargo and vessel, if possible, the compensation to be subsequently fixed by arbitration or the court, at the option of the vessel, will not bar the salvor's right to receive a meritorious award.

In Admiralty. On a libel for salvage.

Sharp & Hughes, for libellant.

Butler, Stillman & Hubbard, for the underwriters.

HUGHES, J. The steam-ship *Kimberley*, a British vessel bound from New Orleans to Liverpool, by way of Hampton Roads, for coal, laden with 8,000 bales of cotton, 15,086 bushels of corn, and 24,153 bushels of wheat, was stranded, near midnight on Thursday, December 1, 1887, in a heavy storm, on the Atlantic beach, at False Cape shoals, off Currituck county, N. C., about 1½ miles south of the Virginia state line, near the United States life-saving station No. 6, 30 miles south of Cape Henry. The ship was 350 feet long, 41 feet wide, and 33 feet in depth of hold. Her gross tonnage was 3,760, and net tonnage 2,464. She had been driven by force of wind and tide, when beached, 3,000 feet from deep water, across two reefs of sand, and thrown high upon the shore, where she lay, out of the water as to her bow, and in only five feet of water as to her stern, but imbedded in the sand 15 feet 6 inches aft, and 17 feet 6 inches forward. She lay broadside, heading southward, at an angle of 16 deg. with the beach. She lay on a bottom of quicksand, which at False cape is commixed with a broken layer of yellow clay and roots of trees, which once formed a promontory of land that has been undermined and sunk by the sea, and forms a lumpy bed, from which the extrication of a ship of large size is more difficult than from a bed of unmixed sand. The danger of going to pieces in such a position was very great to the ship. It was a season of the year when high seas were constantly running in, and breaking upon the beach. These waves, coming against the broadside of the ship, along a space of 350 feet, would part, and rush with great force around each end of the ship, washing the sand and *detritus* from under the ends, and leaving a bank under the middle parts. This action of the water on that coast subjects a loaded ship to great strain, and to the danger, under the strain, of hogging, breaking up, and going to pieces. The strain upon the *Kimberley* was very great, as explained in the evidence. I went myself aboard of her when she was lying at a wharf in Norfolk, and observed, besides the evidences of strain given by witnesses, that the upright solid iron posts, some four inches in diameter, which stand one above the other between the different decks amidships, are several of them very much bent from the pressure which they sustained. Nothing but the extraordinary strength of this strongly built iron vessel prevented her from breaking in two when lying at the beach. The presence of roots of trees and lumps of clay under the *Kimberley* lessened the danger of hogging, but made it much more difficult for the

salvors, when they took hold of the ship with their cables and winches, to slue her around, stern or bow to sea, and to draw her seaward from her perilous position. When the ship was beached, all her crew abandoned her, and sought safety in the life-saving station which has been mentioned, except her master, her mate, and two engineers, who, except the master, afterwards entered into the service of the salvors. Such is the physical condition of the country in shore at False cape that saving the cargo by landing it on shore was not practicable, or for a moment thought of. Information of the stranding was given from the life-saving station by telegraph to Norfolk, and was by the signal service officials of the United States communicated to the salvors on Friday, December 2d, the day after the disaster, after 11 A. M. Thereupon the salvors' steam-tug, the Victoria J. Peed, was dispatched to the help of the Kimberley, under command of Capt. Charles L. Nelson, a skillful and experienced wreck-master and mariner, with a full complement of seamen and wreckers and wrecking implements and appliances. On board the Peed were also Capt. Lauder, agent of the underwriters at Norfolk, and a clerk in the office of the British consul at Norfolk. The Peed duly reached the vicinity of the stranded steamer, and Capt. Nelson at once reported to the salvage company at Norfolk the situation of affairs, and indicated the measures necessary to be taken. The sea was too heavy, and the water of too little depth, for the Peed to approach within 2,000 feet of the Kimberley then, or at any time during the salvage service. On the 3d December, Saturday, the following contract of salvage was signed at Norfolk between the Baker Salvage Company and Mr. Barton Myers, agent of the Kimberley and her owners.

"NORFOLK, VA., Dec. 3, 1887.

"It is this day agreed between Barton Myers, agent for the steam-ship Kimberley and owners, and the Baker Salvage Company, that the said Baker Salvage Company shall proceed to save the cargo of the said steamer Kimberley, and to save the vessel, if possible, and, failing this, to strip her and deliver the cargo, or so much thereof as may be saved, at Norfolk, and the vessel, if saved, at Norfolk or Baltimore or Philadelphia, whichever port the owners of said steamer elect; for which services it is agreed that the said salvage company shall receive such compensation as may be hereafter awarded them by the United States admiralty court, or by a board of disinterested arbitrators, composed of three men familiar with maritime affairs; one of said board to be chosen by the Baker Salvage Company, one by the owners or agents of said steamer, and a third selected by the other two members; the award of said arbitrators, or any two of them, to be final and binding on both parties to this agreement. And it is agreed that the owners of the said steamer Kimberley shall have the right to elect whether the salvage shall be fixed by the United States court, or by said board of arbitrators, as above. It is further agreed that said salvage company shall employ such of the crew of the said steamer as may be suitable and qualified for laborers, and pay the steamer for them the same rate of wages as paid other unskilled labor, and afford free transportation to the crew to Norfolk on the salvage steamer's coming up.

"Given under our hands and seals at Norfolk on the date above written.

"BARTON MYERS, Agent S. S. Kimberley. [Seal.]

"THE BAKER SALVAGE COMPANY,

"By D. J. TURNER, Jr., Prest. [Seal.]"

From the time of the stranding until December 7, 1887, the weather was exceptionally severe, and the state of the weather and of the sea did not permit any operations under the contract. There were communications by signal between the Kimberley and the steam-tug Peed, and the Peed returned to Fortress Monroe temporarily. The salvors soon dispatched the steam-tug Sampson and the schooners Emily Johnson and Annie Collins to the place of the stranding, and the salving enterprise was put in charge of Capt. O. S. Baker; Capt. Nelson commanding the Peed. On the morning of December 7, 1887, the Peed towed the schooner Collins to within 2,000 feet eastward of the steam-ship, and anchored her there; and thereafter the following named steam-tugs and schooners were engaged in the operations hereinafter described: The Victoria J. Peed, value \$30,000, owned by the salvors, continued in service until January 26, 1888; the steam-tug Sampson, value \$30,000, chartered by the salvors; the steam-tug Slater, value \$30,000, chartered; the schooner Emily Johnson, value \$10,000, chartered; the schooner Bengal, value \$2,500, chartered; the schooner E. G. Irwin, value \$6,000, chartered; the schooner John R. Fell, value \$24,000, chartered; the schooner Minnie and Gussie, value \$18,000, chartered; the schooner Annie Collins, value \$2,500, owned by the salvors, served until the 26th of January. All the schooners, whether chartered or owned by the salvors, served as lighters. The hire of the chartered vessels covered the pay of their crew and their running expenses. The salvors also used, from time to time, as occasion required, surf-boats, steam-pumps, anchors, and other equipment belonging to themselves. On the 7th of December, Capt. Nelson, of the Peed, proceeded with some of his men to the Kimberley, and found her headed in a southerly direction, lying nearly broadside to the beach, her bow being nearer to the land than her stern, as heretofore described. She lay in a mixture of clay and sand, and was so high on the beach that at low water her star-board side, from the stem half-way to the bridge, had no water against it, her stern lying in about five feet of water. She was considerably listed to the sea. The method pursued by the libelants in saving the Kimberley and her cargo was the same as that which they had successfully adopted in the numerous instances in which they had saved vessels and cargoes on the dangerous sea-board of Virginia and the Carolinas. Their first aim is to relieve the stranded vessel from the danger of breaking up, and thumping to pieces on the bottom, by planting anchors at suitable distances out to sea, connecting the ship in distress to them by strong cables or hawsers, and then, by drawing or heaving hard upon these by means of engines and winches on board, holding the ship firm against the beating surf, and bringing her around as soon as practicable, stern or bow to seaward, placing her in a position of the least danger from the action of the waves. In the case of the Kimberley, the salvors lost no time in planting anchors, and getting out one or more hawsers, and thereby securing control of the ship, and relieving her from the more serious dangers from the waves incident to her position; but so high up upon the beach had the Kimberley been cast, so deeply imbedded had she become in the sand, clay, and roots, and so great were

her size and her weight, from cargo and water in the hold, that it proved a tedious and difficult task to slue her around with stern to sea. This operation, as it was one of the most important, was also one of the most difficult and tedious, in the salvage operations. The plan of operations usually pursued by these salvors, after thus securing control of the vessel with anchors on the hawsers, is to lighten the vessel by pumping out the water she may have shipped, and getting out her cargo as rapidly as possible, all the time heaving upon the cables, until the ship, gradually lightened of her cargo, and gaining deeper and deeper water, is finally floated and taken into harbor.

In regard to the character of the danger which besets vessels stranded upon our southern Atlantic sea-board, I repeat in substance here what I said in the case of *The Sandringham*, 10 Fed. Rep. 562, and 5 Hughes, 316, a large British steamer which was stranded in the winter of 1880-81 on the beach south of Cape Henry, a few miles distant from False cape, the site of the Kimberley's disaster: "All the Atlantic beach, from Cape Henry to the capes of Florida, is quicksand; that is, a fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom,—retreats from under it by the action of the currents of the ocean,—leaving a bed, into which a ship sinks deeper and deeper the longer it remains in position. There is no possibility of any substance which, in specific gravity, is too heavy to float upon the surface of the water, being lifted out of its bed in this sand and floated, except by outside appliances. All the vessels that are beached upon the sands of this long coast invariably continue to sink deeper and deeper, until they disappear from sight under the sea into the sand. Such quicksand, while it promotes the sinking out of sight of a vessel stranded upon it, also facilitates salvors in hauling the ship off the beach, so as to float her in deep water; which operation is most facile during heavy seas. The agitation of the sea, and of the movable sand, when gales and ocean swells are rolling upon reefs, forming breakers, and mingling the sand with the water, tends to lift the ship to some extent in her sea-dock, surrounded by sand, and lessens resistance to the operation of heaving on the cables. At the same time, such restless condition of the sand and sea greatly endangers the ship, as long as she is not afloat, by causing her to thump and pound heavily upon the hard sand bottom, and thus to leak badly, and eventually to break to pieces,—a danger from which her only escape is through the skillful exertion of expert salvors, with their wrecking apparatus and appliances." But the texture of the beach off and to southward of False cape near the shore, at the point where the Kimberley was found by the salvors on the 7th day of December, 1887, differs from that which I have described, and is peculiar. False cape was originally high land. From it the stormy seas had gradually abraded and washed away the top soil, leaving the clay bottom shoals, called "False Cape Shoals," into which stumps and roots of forest trees still penetrate. Of course, such an exceptionally stiff and tenacious bottom aggravated the difficulty of hauling the ship seaward, and it further increased the danger, since it involved heaving on the cable in rougher seas and winds; since such a bed or bottom, by reason of

its tenacity, is little agitated in weather that is generally more safely adapted to hauling a vessel off the quicksand.

The *Kimberley*, when boarded by the salvors on the 7th December, was found to have a very serious leak, which was undiscoverable. One of the greatest dangers to a stranded vessel and her cargo is water from leakage. It tends, by its weight, to break the ship in two, and thus to scatter the cargo, and fill it with sand and grit. It makes the ship heavier and harder to move. The very large water ballast tank of the *Kimberley*, located beneath the general cargo, was filled with cotton,—a fact which rendered it impracticable to lighten the ship by pumping the water out of the tank, and which put the salvors at a great and unusual disadvantage. When they first boarded the ship, the salvors were informed that the water had been 16 feet deep amidship. Further examination showed that it was as much as 14 feet deep in the engine-room after the salvors came on board. On December 8th, Capt. Baker commenced to set up his steam-pump No. 1, brought aboard on the 7th, and to clear out the engine and boiler rooms. On and after December 10th, the ship's pumps were kept running, day and night, continually, and every day. On the 9th, Capt. Baker's pump cleared the water away from the ship's donkey-pumps, which were set up in the boiler-room. On December 12th, Capt. Baker's steam-pump No. 1 reinforced the ship's donkey-pumps, and cleared the water out of engine and boiler rooms. On the 25th December, on 27th December, and on January 1, 1888, Capt. Baker's steam-pump No. 1 pumped out the ship. On January 2d, the water rose to within two inches of the grate-bars of the ship's donkey-boiler, and the first Baker pump then pumped out the ship. On January 3d, the second Baker steam-pump was set up in the No. 4 hold, and pumped the water four feet down. After that day, Baker's pump No. 2 was worked continuously in the hold; more and more discharging the water, as cargo would be removed from it. On January 16th, Baker's steam-pump No. 3 was also set up in hold No. 4, and used continuously afterwards. These two pumps discharged the water from No. 4 hold, and from No. 3 hold as well; and they thus reinforced the ship's donkey-pumps, operating in engine and boiler rooms. The pumping of water out of the ship's hold went on in this manner until near the end of the enterprise; the ship's own engines being unavailable throughout for the purpose. The ship's engines, in many cases of salvage, give very material aid to the salvors, in heaving on the cable, and thus assisting in drawing the ship out of her sand bed into deep water; but the *Kimberley's* engines were wholly ineffectual for this purpose until after she had been floated into deep water, and then only for the purpose of helping the *Peed* and *Sampson* in towing her into harbor. Nor were the *Kimberley's* pumps as effectual in rendering assistance to the salvors as is usual. The *Kimberley's* pumps were not adequate to discharging the water in her hold without being reinforced by the libellant's pumps, even after the salvors, with their pumps, had cleared the engine and boiler rooms of water which had previously submerged the ship's donkey-pumps.

On boarding the ship, the salvors, pursuing the plan of operations

which has been described, laid anchors out to sea, connected with a hawser from the port quarter of the steamer; and on the 12th December laid other anchors out, and connected with them a hawser from the steamer's starboard quarter. There were two reefs of this beach,—one of them about 50 fathoms out from the low-water line, and another a few hundred yards beyond; each of them about 500 feet in width. The rolling of the sea over these reefs in stormy weather made a rough and dangerous surf. There was not depth of water enough on either reef to float any of the schooners which were engaged in the salvage service; and the cargo had to be taken in surf-boats from the steamer to the schooners at anchor off the reefs, about 2,000 feet from the Kimberley. These surf-boats could not be navigated with oars, and were moved back and forth by their crews taking hold of lines stretched between the Kimberley and the schooners. This was a rough and dangerous procedure in all the weather and seas that occurred between the 7th December and the 26th January, the period during which this salvage work was performed. There were frequently recurring storms and gales, more or less severe, while the salving operations under consideration were going on. These would have been fatal to the Kimberley, but for the fast and firm hold upon her which Capt. Baker maintained with his hawsers, and by which the ship was held firmly to the sea. During these high winds and seas the men might have lived while working the surf-boats, but the cargoes would have been lost, and the work was for that reason periodically suspended. The surf-boats were actually at work for 18 days in December, and for 10 days in January. As many as 5 surf-boats were used, never with room for oars, always over 2 long lines of breakers, and over a continuous space of 2,000 feet, except as the distance was lessened by the gradual progress of the Kimberley seaward from the beach.

This work of discharging cargo continued from December 7th until the 15th of January, during which time 7,408 bales of cotton, and about 740 bushels of wheat, were in that way brought up to Norfolk. The cotton reached Norfolk as follows: December 10th, 250 bales; December 14th, 560 bales; December 15th, 421 bales; December 17th, 209 bales; December 19th, 50 bales; December 20th, 539 bales; December 21st, 138 bales; December 22d, 275 bales; December 23d, 618 bales; December 24th, 150 bales; December 29th, 500 bales; January 2d, 525 bales; January 5th, 833 bales; January 9th, 1,317 bales; January 10th, 374 bales; January 14th, 187 bales; January 15th, 456 bales. The cargo had been surf-boated from the Kimberley into the schooners on such days in December and January, up to January 15th, as the weather and sea would permit the work to be done with safety to the cargo. As the cargo was taken out and the vessel lightened, the libelants, by means of the steam-ship's steam-winch, hauled on the cables which had been extended from the port and starboard quarters. On the 2d of January they hauled the steamer astern about 40 feet. Prior to that date, owing to the difficulties which have been described, the location of the vessel had not been materially changed from that occupied when the libelants came aboard on December 7th, though very strenu-

ous efforts had been made at times to move her. On the 13th January she was again hauled a few feet, and on the 14th she was hauled 27 feet. On the 15th of January she was hauled 13 feet, on the 16th 40 feet, and on the 17th about 80 feet. On the 18th of January she was hauled 100 feet, and on the 19th 70 feet. On the 21st of January, and thereafter almost daily, she was hauled material distances, until on the 26th of January, during an exceptionally high tide, she was floated, and then proceeded in tow to Norfolk, assisting with her own engines, and taking with her 585 bales of cotton, about 15,000 bushels of wheat, and about 5,000 bushels of corn.

As before stated, the schooners were not able at any time to go alongside the *Kimberley* to take cargo from her, but lay at anchor about 2,000 feet from shore. The steam-tugs assisted in towing the schooners to Norfolk; one or the other of the tugs, however, remaining almost constantly at the place of anchorage for the protection of the schooners. The salvors employed such service as was necessary for discharging and surf-boating and transporting the cargo to Norfolk, and in doing such other work as their contract called upon them to perform. Including the crews of the chartered vessels, they had 132 men in service. The amount paid by the libelant for labor was \$11,394.44, and besides this they paid the wages of the crew of the steam-tug *Peed* and schooner *Annie Collins*. The libelants also expended, in addition to the charter hire above noticed, and the labor bills, \$4,658.66 for supplies, tools, and materials used in their work. Some of the tools and materials were not used up, and remain in the hands of the libelants. The total cash expenditures of the libelants for the chartered vessels, labor, and supplies was \$26,039. Add to this expense those incident to the *Peed*, the *Annie Collins*, and to other service than that performed by the chartered vessels, and the *quantum meruit* outlay of the salvors reached \$46,000, as hereafter indicated. The *Kimberley* arrived at an anchorage in Norfolk on the 26th of January, and thereafter discharged such cargo as remained in her. Later, the master of the steamer, under the rights secured to him in the contract made with the libelants, took delivery of the steamer at Norfolk, and elected to have the amount of the libelant's compensation determined by this court, and not by arbitration. The value of the *Kimberley*, her freight, and her cargo, as saved, has been fixed by consent of parties at \$490,000.

The determining and distinguishing features of this case are numerous,—the great size of the *Kimberley*; her draught of water; the weight of her cargo; her length; the remarkable depth she was imbedded in the sand and clay, exceeding that of any other ship within my knowledge or reading, similarly stranded; her proximity to the shore, and partly on dry land, while drawing 23 feet of water aft, and 20 feet forward; the great distance from deep water; the level shore; the lumpy bottom; the clay shoal, and the fact of two parallel lines of reefs or breaker lines, to obstruct and imperil the surf-boating; the unusual quantity of water in the ship, and all of it aft of the engine-room, with its exceptional depth, which rendered the ship's pumps useless by submerging her

donkey-engines; the character of the weather, which, on that coast, made often a continuous line of breakers from the steam-ship to deep water,—a space of 3,000 feet and more; her bearing to the beach, nearly broadside, and the unexampled difficulty attending the sluicing her around, on clay, roots, and sand; the unusual number of cotton bales in the ship, and the necessity for surf-boating them 2,000 feet, through continuous lines of breakers,—always over two breaker lines, each of them wide; an unusual number of “severe storms and gales,” more or less endangering life and property; the small assistance from the ship’s company; the fact that the salvors received no assistance from the ship’s engines until after she was floated off the shoals into deep water; the most tempestuous season of the year; length of the transportation line for lighters, protracted by the necessity of removing so large a cargo, while the weather did not permit a schooner ever to come along-side; the extent of the leak, involving constant pumping; the skill manifested in making a perfect success, when not even the brave master of the ship had the hope or expectation of saving her.

It is hardly necessary to speak specifically of the dangers which attended this salvage service. That the *Kimberley* and her cargo was in danger of utter and irretrievable loss is attested by the fact that all of her numerous crew, except four brave men, abandoned her to save their lives. There was danger on the *Kimberley* to numerous lives in the event of her breaking to pieces in any gale; in which case the salvors could not have reached the shore or the *Peed* in surf-boats. There were many days in which a surf-boat could not make a single trip without danger, in receiving, transporting, or delivering the cotton bales and bags of grain. There was danger on the *Peed*, which lay outside nearly two months, in all weather, to move lighters inshore and out to sea, to hoist cotton bales on the lighters, and, in case of storms, to take care of the lighters, and as a place to keep extra men and relays. There is always risk on this beach. The supreme court (8 Wall. 454, in the *Camanche Case*) declared the “risk to be great and constant” in the harbor of San Francisco, in a harbor wrecking case, because divers did the work. Much more perilous is surf-boating on the ocean in midwinter. It is useless to urge that no lives or even property were actually lost. Nobody was killed on the *Camanche*; yet the court held “the risk to be great and constant.” The fact that no one was killed on the *Kimberley* does not show, any more than in the *Camanche Case*, that the danger was not great, nor the work difficult. But it does show the skill and expertness of the salvors; their perfect success in achieving one of the most difficult salvage operations recorded in the proceedings of admiralty courts. In the *Camanche Case* the court held that the bounty allowed by the court below was not excessive, considering the skill required to perform the work, the expense incurred, and the time and labor spent; all inferior to what was done here.

In illustration of another important feature of this case, I will repeat what I said of salvage services on this coast in the case of *The Taylor Dickson*, 33 Fed. Rep. 886, which I do, not only with reference to surf-

boating for the unusual distance of 2,000 feet across two lines of breakers, under circumstances of constant hardship to men, and exposure to men, boats, and cargo, in the depth of a severe winter, but with reference to the peril to the schooners, steamers, and their crews engaged in this salving enterprise, which had to lie off that coast for the long period of 54 days, taking the risk of sudden storms, such as had surprised and seized the great ship *Kimberley*, and driven her 3,000 feet over two great sand-bars, and stranded her upon the edge of the beach; such as had, a few years ago, overtaken and surprised the scientifically navigated steamer *Huron*, of the United States navy, and destroyed her, with nearly all on board; and such as had, a year before, taken unawares the large German ship *Elizabeth*, and driven her ashore, destroying ship and cargo, and not only all her crew, but several brave men also who had gone to her assistance from a life-saving station just above that near which the *Kimberley* was stranded.

"This is not a sea-board studded with harbors and prosperous commercial cities and towns, from which salvors may run out short distances along-shore, and render successful services in a few hours. It is a long coast, dangerous and barren, constantly swept by strong winds and currents, where the ordinary tide varies only three feet, and on which wrecking enterprises are attended with constant risks and peculiar difficulties. Wrecking service here can only be successfully performed by organized capital, enterprise, and skill, so organized as to be capable of sustaining a constant provision of experienced mariners, powerful wrecking vessels, and ample wrecking implements and material, ready at all hours for immediate service. The business cannot sustain itself in the hands of reputable men and companies unless the admiralty courts shall give exceptionally liberal rewards in all cases of meritorious service on this sea-board. And surely it is in the interest of commerce to sustain the wrecking business in these waters and latitudes. I earnestly maintain that salvors on this coast should be more liberally dealt with by admiralty courts than on coasts north of us."

This was a repetition, in substance, of a declaration of which I was then ignorant, made by the late Judge MARVIN, of the Florida district, a learned author, and one of the soundest admiralty jurists which our country has produced. The passage is found in *Cohen*, Adm. 131. Judge MARVIN said:

"What would be no more than reasonable on this coast, where so many shipwrecks occur, and where the assistance of so few transient or trading vessels can be had to save the property, and where, consequently, the employment of a number of regular wrecking vessels has been found necessary for that purpose; might be unreasonably large in the neighborhood of commercial ports on the coast of England or the United States, or in any place where regular wrecking vessels were unnecessary, because wrecks were fewer, and the assistance of transient persons or vessels could be more easily obtained."

From Norfolk to the place where the *Kimberley* lay was 60 miles; from that place to within the capes of Virginia the distance was 30 miles. Schooners could not be got to go out upon that coast unless attended, going, staying, and returning, continually by steamers. It is a coast of surprises and ever-recurring dangers, and salvage service rendered upon it cannot justly be dwarfed to the grade of mere *quantum*

meruit work. It would not be in the interests of commerce to do so. Counsel for the Association of Underwriters, who conduct the defense in this case, seem to treat the saving of the Kimberley and her cargo as if it had been a work of mere labor and time, attended by no other circumstances of danger, risk, or merit than would have belonged to it if it had been performed in Hampton Roads, or in the lower harbor of New York,—performed on a theater of absolute security. I cannot look at the case in such a light. I consider such a view of it as wholly inadmissible. Not to rank the saving of the Kimberley and her cargo on that coast, in the perfectly skillful and successful manner in which it was done, as a case of extraordinary merit, deserving of the highest commendation, would be to ignore all that has been said in praise of courageous and successful salvage enterprise since the beginning of the admiralty jurisprudence.

Having stated in detail the facts which constitute the distinguishing features of this case, I come to consider it in its legal aspects, and with direct reference to the award proper to be made by the court. Salvage consists—*First*, of an adequate remuneration for the actual outlay of labor and expense made by the salvors; and, *second*, of the reward, as bounty, allowed from motives of public policy, as a means of encouraging extraordinary exertions in the saving of life and property in peril of the seas. The first of these items of award admits of computation; the second does not, and is usually determined with more or less reference to the value of the property saved. In respect to the first branch of the award, I have no difficulty, and have previously stated it to have been \$46,000.

It remains to determine what should be the amount of bounty accorded to the salvors in this case. Their service was one of extraordinary merit. There were (1) great danger, from which the property saved was rescued; (2) great value (\$490,000) in the property saved; (3) serious and continual risk incurred by the salvors and their property; (4) great value (\$164,000) in the property that was put at risk; (5) extraordinary skill and perfect success in rendering the service; and (6) much time and labor spent in the enterprise. These six ingredients, usually held to constitute a salvage service of the highest merit, all entered conspicuously into the enterprise under consideration. I have said that the bounty awarded to salvors is usually determined with more or less reference to the value of the property saved. In most cases a proportion is awarded, larger or smaller, according to the merit of the service; for it is not true, as contended by counsel for the underwriters, that the rule of percentage or proportion has been abandoned by the courts in cases of salvage service. It is true that in a certain class of cases which come into the admiralty courts—which, indeed, is a very large one—these courts refuse to estimate rewards by proportions. But this disposition is confined to cases which, while containing some ingredients of salvage service, are, in their main features, cases of mere towage. Towage is not salvage; and, when considered by itself, is never compensated except on the basis of *quantum meruit pro opere et labore*. Of course,

when this rule of compensation obtains, the value of the property towed is but slightly, if at all, considered by the courts, in determining the compensation to be awarded. A case of this sort was *The Amerique*, L. R. 6 P. C. 468, cited on the brief of counsel for the underwriters. In that case the vessel was found a few hundred miles out at sea, abandoned, with some little water in her hold, and was towed and navigated into port. It was a French steamer, that had been deserted in a panic. The fact of being abandoned, and of having a little water in her hull, were the only salvage ingredients in the case. In its prominent features it was a case of mere towage; of easy, safe, and inexpensive towage. The court below was held, by the lords of privy council on appeal, to have erred by giving too much consideration to the salvage features of the case, and by overlooking the fact that it was little else than a case of towage; and the lords reduced the award to about one-tenth of the value saved. I state the result of their decision; not its language. Neither does the case of *The Thetis*, 3 Hagg. Adm. 14, 2 Knapp, 390, cited by underwriters' counsel, teach the doctrine of a discarding of proportions in estimating awards in salvage cases. There, the property saved was specie treasure which had been sunk in an inlet of navigation in a vessel of the British navy. The salvage service was performed by officers and men of the navy, and consisted in slow and deliberate measures, protracted through more than a year, for recovering the specie; no risk attending the work, except of disease in a tropical climate, and what is incidental to diving operations. The amount recovered was the immense sum of \$750,000 of silver. An application of the rule of proportion here would seem to have been repelled by strong considerations of justice. Yet it was applied, in fact if not in form; the syllabus of the case thus describing the award: "One-fourth of the gross value awarded. * * * Gross quantity of treasure recovered, £157,000; the whole sum deducted for salvage, admiralty claim, and for expenses being £54,000." In the case of *The Arendal*, 14 Fed. Rep. 580, (the last one cited by underwriters' counsel,) the bark saved was decided by the court not to have been derelict; which eliminated from the case its principal element of salvage, and rendered it a case mainly of towing,—of towing a sail vessel found drifting in ice five miles off shore, and bringing her into port. Delay, labor, and some difficulty attended the service; and the court held that the circumstances of that case did not call for a large award, estimated by proportions of the value saved, and allowed \$2,500 to a public ice-boat for three days' towing.

On this subject of proportions, the cases show generally that the old rule of allowing to the salvors arbitrarily, in every case, half the values saved, no longer obtains. Indeed, that rule came at last to so revolt the courts of admiralty that in their repugnance to it they went far towards the other extreme, and manifested a temper to discard the idea of proportions, and to confine themselves too much in their awards to the *quantum meruit* estimate of salvage services. There has latterly, however, been a recurrence, except in cases of towage, from extreme views in that direction, to the middle ground of adapting the amount allowed

to the circumstances of each case; giving always the *quantum meruit*, and giving also, when the case calls for generous treatment, a liberal bounty, proportioned to the value recovered; taking into consideration, also, the value of property lost; giving a larger proportion where all the property is saved, and a smaller one where more or less of it is lost. In the case of the *Kimberley*, now under consideration, all the property was saved, and, on that score, would admit of a larger proportion in the award. In my decisions in the cases of *The Sandringham*, before cited, and of *The Egypt*, 17 Fed. Rep. 359, I discussed very fully the doctrine of bounties, and the rule of proportion by which they were determined. In the first case there was no appeal; in the second case, my decision was affirmed on appeal. They constitute, therefore, the law of this court on the subject of bounty and proportion, and I have only to renew now the application of the principles then proceeded upon.

The most plausible objection to bounties is that property saved is used as a fund to stimulate efforts to save life and other property in which the owners of that saved have no interest. This objection cannot be urged with any consistency by the real defendants in this case. The owner of the *Kimberley* is not here by counsel. Though here in form, he is here in a passive character only. The persons really contesting the claim of the libelants are the board of underwriters. Now, the practice of granting bounties for salvage service is really based on the principle of contribution from the fortunate for the benefit of the unfortunate, which is the principle on which all insurance rests. The dangers of the wild and stormy coast from Delaware capes to the Gulf of Mexico are so great that many vessels are lost in spite of the most arduous and expensive exertions of the wreckers, who lose their labor and property, and risk their lives, in fruitless attempts to save them. So much is this the case that the business of wrecking cannot be carried on at all on the southern Atlantic coast by individuals, and can be prosecuted only by corporations thoroughly organized and equipped with men and material; and these are more frequently engaged upon cases which bring no remuneration than upon those which bring reward. When, therefore, a valuable ship and cargo is rescued from the jaws of destruction by men who have been engaged in numerous losing salvage undertakings, it would not seem reasonable to deprive them of the benefit of an ancient principle of maritime reward, and confine their compensation to the *quantum meruit pro opere et labore* due them in that particular case. The salvors in the case under consideration were a corporation organized under the title of the Baker Salvage Company. It was argued at bar, though I do not find that the point is made in the underwriters' brief, that as salvage awards are personal, and the service personal, the libelants in this case, being a corporation, cannot be recognized as salvors by the court. This point was considered and emphatically overruled by the United States supreme court in the case of *The Camanche*, 8 Wall. 448, and by this court in the cases of *The Sandringham* and *The Egypt*, before mentioned; and it may be accepted as settled law in the United States that an incorporated company, organized for the purpose of engaging in the meritorious work of

saving ships in distress, and devoting themselves assiduously and reputably to that pursuit, may be granted salvage rewards as liberally as natural persons so engaged may be.

Underwriters' counsel make also the point that the fact that the salvage services in the case at bar were rendered under a contract precludes any claim for enhanced reward on the ground of any supposed impracticability that might have existed in December last of procuring the services of other wreckers in saving the Kimberley and her cargo. I have not allowed that consideration to enter into my view of the service rendered in this case. It has not been claimed on behalf of the salvors that they are entitled to a larger allowance on any such supposed ground; and I do not think the fact that there were no other wreckers available but themselves, if it were a fact, should enhance their compensation. I shall not allow it to influence my own award in the case.

In their fifth point, underwriters' counsel remark: "Aside from the fact that the contract under which the services were rendered contemplated that the libelants should receive compensation for their services in any event," the proofs show that they had security always in hand, etc. The same thought is suggested in other passages of the brief. The contract was, in express terms, a contract for salvage, made by the representatives of a wrecked vessel and her cargo, while in imminent peril, with a "salvage" company, to "save" the cargo, and to save the ship herself, if possible, or, failing in this, to strip the ship, and deliver the cargo, or so much as should be saved, at Norfolk, and the ship, if saved, at Norfolk or other place. It was a contract for saving. It contemplated the saving of property. It provided how the "salvage" earned should be fixed and determined. The compensation provided for was to be for saving property, and was to be a salvage compensation. If the contract, in the use of these terms and expressions, contemplated anything more distinctly than another, it was that there was to be no payment except for saving property, and that this "salvage" was to be fixed by an admiralty court, or by arbitration, as the representatives of the ship and cargo might elect. While there is no express clause declaring that nothing was to be paid unless for something saved, the terms used by the contract, in their technical purport, as well as in their ordinary meaning, exclude the idea of anything becoming due to the salvors unless something was saved. I cannot, therefore, entertain the suggestion that there was in this case anything but a salvage contract for a salvage service, upon a salvage compensation, on which nothing would be due or earned unless some of the property in peril of the sea was saved. The supreme court, in the *Camanche Case*, held, expressly and with emphasis, that "nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage." The contract under consideration was not a contract to pay a given sum. It was not a binding engagement to pay anything; that being left to arbitration. It was not a contract to pay at all events, whether successful or unsuccessful; for compensation was to

be received only for "saving" property, and was expressly described as "salvage" money. There is nothing, therefore, in this suggestion or contention of underwriters' counsel to prevent the court from decreeing a salvage reward.

In the *Sandringham Case* I awarded a fourth of the values saved. In the case of the *Egypt* I awarded a fifth, and the outlays made by the salvors. The saving of the *Kimberley* was a more difficult and far more protracted enterprise than either of those. The ship was driven higher upon the beach, and lay imbedded deeper in the sand. Her size was hugely greater, her leakage was greater, and her distance from deep water many times greater, and across two reefs instead of one. All of her cargo, except the little that did not need, at the close, to be taken off, had to be surf-boated. None of it could be discharged upon schooners brought along-side. The value of the cargo was greater, and was all of it saved, except the small quantity of grain that had been wet before the salvors got aboard. The value of the ship was greater, costing to build hardly less than a quarter of a million of dollars; insured for \$180,000; and built so strong that I doubt if it is seriously injured. While the valuation of it—\$78,000—agreed upon by the parties in interest during her disabled state is conclusive upon me in estimating the pecuniary award that is to be allowed to her salvors, I am not precluded, in the moral view of the case, from ascribing the highest merit to the men who undertook, and successfully accomplished, what was regarded the hopeless attempt to save this great and noble ship.

Estimating the *quantum meruit* allowance due the salvors to be \$46,000, and decreeing that amount, I will decree, in addition, one-fifth of the agreed value of the property saved, to-wit, one-fifth of \$490,000, equal to \$98,000; the total sum decreed being \$144,000. The \$46,000 above mentioned consists of the sum of \$26,000 expended by the salvors upon the chartered vessels and their crews, and \$20,000 which I add as proper compensation (say \$375 a day) to the salvors for the use in the enterprise of property of their own, consisting of the Peed and Collins, surf-boats, anchors, chain cables, hawsers, steam-pumps, and other material.

NOTE BY JUDGE HUGHES. An appeal was taken in this case on objection to the amount of the salvage award. The delay of the proceeding would have operated so oppressively upon the libelants that they compromised with the underwriters by a heavy discount upon the award, and the appeal was dismissed.

COLE v. TOLLISON *et al.*

(District Court, D. South Carolina. October 24, 1889.)

ADMIRALTY—ARREST—SECURITY.

On libel against the master and two mates of a vessel for an assault and battery on libellant by the two mates, who are not in the jurisdiction, where there is no evidence that the master knew of the mates' intention to assault libellant, or could have prevented it, an order of arrest will not be issued without the security usually required in such cases.

In Admiralty. Libel for damages.

C. B. Northrop, for libellant.

SIMONTON, J. The libellant, having prepared his libel, moves for leave to file it without giving the bond required under rule 12 of this court. As was intimated in *The Phoenix*, 36 Fed. Rep. 272, no general rule will be laid down permitting suit to be brought *in forma pauperis* with juratory caution. Each case will stand on its own merits, and will be examined *prima facie* before warrant is issued. Such an examination was held in this case. The libel is for damages for an assault and battery on the high seas, the respondents being the two mates and the master of the American schooner *Lewis Ehrman*. The schooner was on a voyage from Norfolk to Charleston, with a master, two mates, a steward, and four seamen, of whom libellant was one. While on the high seas libellant got into an altercation with the second mate, who thrust a hammer in his face. He went aft and complained to the master. The latter ordered him to go forward to his work, telling him not to use "so much lip," and he would not get into trouble. Returning forward, and just about amid-ships, he was struck in the head by the second mate with a marline-spike, and at the same time the first mate beat him with his fists. The marline-spike cut the skin of his scalp to the bone, and he was shamefully treated. Reaching port, he began criminal proceedings against the two mates for assault and battery. They cannot be found. He now brings a civil action for damages against the two mates and the master. The two mates are not in this jurisdiction. All the other persons on the schooner have been examined before me. The sailors describe the assault by the two mates as above set forth. One of them says that at that moment the master was near him at the wheel on the starboard side of the schooner. He does not know whether the master witnessed the occurrence or not. Another did not see the master at all. The third says that he saw the master on the port side when the blows were struck, and that the master saw them. The libel does not say whether the master witnessed it or not. Now, if we assume that these statements are all true, that the master was on deck, and that he saw the blows struck, there is no evidence that he was aware of the intention of the mates to assault the libellant, or that he could have prevented it; so he cannot be held for the assault and battery. The assault was momentary, and there was no need for further interference. The case does not come within *U. S. v. Taylor*, 2 Sum. 584; *Murray v. White*, 9 Fed. Rep. 564. The proctor for libellant insists that the master should have relieved him from duty after this assault, as it disabled him. There is no evidence that any complaint of inability to work was made to the master, nor that he really was disabled.

Under these circumstances, without discussing the question of pleading, it does not appear to be a case in which an order of arrest should issue in a civil case without the security usually required in such cases.

CONSOLIDATED ROLLER-MILL CO. v. GEORGE T. SMITH MIDDLEINGS
PURIFIER CO.

(Circuit Court, E. D. Michigan. October 7, 1889.)

1. COURTS—COMITY—FORMER ADJUDICATION.

While one court will ordinarily, as matter of comity, defer to the opinion of another court of co-ordinate jurisdiction with regard to the validity of a patent, it is too late to call upon it to do so after it has come to a different conclusion, and entered a decree in ignorance of the prior adjudication.

2. PATENTS FOR INVENTION—RES ADJUDICATA.

A decree declaring the invalidity of a patent is not a proceeding *in rem*, and does not prevent the same or a different plaintiff from prosecuting a suit against another defendant, and establishing its validity upon the same or different evidence.

3. SAME—INFRINGEMENT.

Patent No. 222,895, to William D. Gray, for an improvement in roller grinding mills, does not cover a machine having no lever or swinging arm which may be raised or lowered for a vertical adjustment, and no rod corresponding to the rod, G, of the Gray patent, and fitted at either end with devices for horizontal adjustments.

(Syllabus by the Court.)

On Motion for Preliminary Injunction.

This was a bill in equity to recover damages for the infringement of letters patent No. 222,895, issued to William D. Gray, December 23, 1879, for an improvement in roller grinding mills. The invention covered by the patent was stated in the preamble to consist "in a peculiar construction and arrangement of devices for adjusting the rolls vertically, as well as horizontally, whereby any unevenness in the wear of the rolls, or in their journals or bearings, may be compensated for, and the grinding or crushing surfaces kept exactly in line;" "and also in the special devices for separating the rolls when not in action, and in other details." The defense raised upon this motion is fully stated in the opinion of the court.

George H. Lothrop, for plaintiff.

Parker & Burton, for defendant.

BROWN, J. A preliminary objection in the nature of a plea of *res adjudicata* is taken by the defendant against the issue of this injunction. Prior to the opinion of this court in the case of *Roller-Mill Co. v. Coombs*, 39 Fed. Rep. 25, sustaining the validity of the plaintiff's patent, a bill had been filed in the western district of Wisconsin by one Allis against Freeman to compel the defendant to desist from using a machine which was claimed to infringe several patents, among which was the Gray patent, upon which this suit is based. A decree was made dismissing the bill;¹ and it would appear from a letter of the learned judge to the solicitors, put in evidence in this case, that the court was of the opinion that the Gray patent had been anticipated by an English patent to one Lake, and hence was invalid for want of novelty. It appeared that plaintiff in that case claimed and perfected an appeal to the supreme court from

¹No opinion filed.

this decree, and the cause was docketed in that court in October, 1887. Subsequently, this appeal was dismissed upon the motion or by the consent of the appellant.

Had the decision of the court in that case been called to our attention at the time the *Coombs Case* was argued, it is quite probable that, out of the usual comity obtaining among courts of co-ordinate jurisdiction in this class of cases, we should have waived our own views, and deferred to it; so far, at least, as it covered the issues involved in that case. It seems, however, that the reason for dismissing the bill in the Wisconsin case was not then known, and no stress was laid upon it in the argument of the *Coombs Case*. Having expressed our own opinion of the patent in that case, it is now too late to claim that, as matter of comity, we ought to follow the Wisconsin case. It is equally clear that it does not create a case of estoppel. Not only is no record produced showing upon what ground the bill was dismissed, but neither the plaintiff nor defendant in this suit were parties to that. A decree declaring the invalidity of the patent is in no sense a proceeding *in rem*, and does not prevent the same or a different plaintiff from prosecuting a suit against another defendant, and establishing its validity upon different, or even upon the same, evidence. This precise thing was done in *Ingersoll v. Jewett*, 16 Blatchf. 378, which was also a bill in equity for the infringement of a patent. In defense, it was argued that the plaintiff had previously filed a bill against different parties for an infringement of the same patent, the defense of which had been assumed by one Topham, under whom the defendants in that suit, as well as the defendants in the suit under consideration, were licensees. It was held by Judge WALLACE that, assuming that Topham was a party to the former suit, the defendants could not avail themselves of the decree in his favor upon the ground that there was a want of mutuality in the estoppel. The same ruling was made by Mr. Justice BLATCHFORD in respect to the same decree in *Stamping Co. v. Jewett*, 18 Blatchf. 469, 7 Fed. Rep. 869. The facts of the present case are much more conclusive against the estoppel, as neither of the parties to this suit were parties or privies to the case of *Allis v. Freeman*.

2. In the case of *Roller-Mill Co. v. Coombs*, 39 Fed. Rep. 25, we had occasion to consider the Gray patent in issue in this case, and came to the following conclusions:

(1) That it had not been anticipated by the Lake Nemelka patent, or by any other of the devices offered in evidence, and that the second, third, fourth, and fifth claims were valid.

(2) That the patentee was not debarred from the benefit of the doctrine of mechanical equivalents by the fact that his original claims for a combination of a vertical and horizontal adjustment by any method had been rejected by the patent-office, and he had accepted restricted claims in their place.

(3) That the Mawhood machine, containing, as it did, all the elements of the patentee's combination, though differently arranged and located, and with a lever of a different order, was an infringement of the Gray patent.

It was not, however, intended to decide that the Gray patent covered all methods of horizontal and vertical adjustments, or methods of making such adjustments by means essentially different from those employed by the patentee. Indeed, this could not have been done without disregarding the limitations put by the patent-office upon the original claims, as well as the state of the art as it existed at the time the patent was issued. Other methods of adjusting rolls, both vertically and horizontally, existed before Gray filed his application, and in at least one there was a combination of both adjustments as applied to the same roll. That the defendant has produced a machine which accomplishes the same results as the plaintiff's will not be seriously disputed, and the only question is whether it has accomplished them by the same, or by an essentially different, device. These results are four in number: (1) A vertical adjustment at each end of the movable roll; (2) the horizontal grinding adjustment, by which the distance between the two rolls is kept precisely the same while the rolls are in operation; (3) a spring device, by which the rolls are made to yield to a breaking strain whenever a nail or other hard substance enters between them; (4) a stop and holding device, by which the rolls are spread apart when not in operation, and are thrown together again without a new adjustment.

To accomplish these results, the patentee makes use of—*First*. Two rolls, one of which is fixed, and the other adjustable. His specification also seems to contemplate that both rolls may be made adjustable, but in what manner is not stated. Indeed, it is difficult to see how this could be done without taking away from the combined devices applied to the other roll some one of the elements, which would destroy the integrity of the combination. *Second*. An upright, swinging arm at each end of the adjustable roll, upon the pivot of which the roll is moved in a vertical direction. *Third*. A rod, G, at one end of which are devices for the grinding adjustment, and a spring urging the upper end of the arm inward, but yielding to a breaking strain, and at the other end the stop and holding devices for the spreading adjustment. In defendant's machine both rolls are adjustable. To one is attached the spring and a nut and eccentric for vertical adjustment, and to the other the grinding adjustment and the stop and holding device. There is no lever or swinging arm, but the journals of both rolls rest upon horizontal shafts, one of which may be raised and lowered for the vertical adjustment, and the other of which slides forward and back, carrying the second roll to and from its fellow. There is no rod, G, fitted at either end with the several devices for horizontal adjustment, and nothing properly corresponding to it, since the shaft attached to one of defendant's rolls corresponds about as nearly with it as the one attached to the other. If we were to attempt to locate it, we should have to say that it was divided into two separate parts, by one of which the vertical adjustment is accomplished; while in plaintiff's patent this adjustment is made by means of a swinging arm, and not by means of the rod. This rod, and the upright swinging arm, we regard as of the essence of the plaintiff's patent. Should defendant's device be adjudged an infringement, we

should not know where to draw the line, providing the defendant's device accomplished the four results. This, evidently, was not the scope of the Gray patent, since the original claims for the combination of those adjustments had been rejected by the commissioner. While the sliding support might be, under certain circumstances, a mechanical equivalent for the swinging support, in view of the state of the art, and the limitations upon plaintiff's claims, we cannot consider it so in this case. Under the view we have taken, we find it unnecessary to consider the claims separately. The departure of the defendant's machine from the underlying theory of the plaintiff's is too radical to require us to descend to details. We are clear in our opinion that the injunction should be denied.

HARLAND v. UNITED LINES TEL. CO.

(Circuit Court, D. Connecticut. November 14, 1889.)

FEDERAL COURTS—JURISDICTION—PROCEEDINGS IN REM.

Although Act Cong. March 3, 1887, authorizes an original suit brought in the circuit court, where jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and the statutes of Connecticut permit the attachment of the property, located in the state, of a non-resident defendant, without personal service on him, and in the absence of voluntary appearance, the subjection of such property to a judgment *in rem*, Rev. St. U. S. §§ 914, 915, authorizing the practice and modes of procedure in federal courts to be conformed to those of the respective states wherein such courts are held, and authorizing the same remedies by attachment as are provided by the laws of those states, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings *in rem* against the property of a non-resident defendant, who has not been personally served or appeared.

At Law. On demurrer to plea.

Morris W. Seymour and Wm. G. Wilson, for plaintiff.

W. W. Hyde and Robt. G. Ingersoll, for defendant.

SHIPMAN, J. The question at issue in this action at law arises upon the plaintiff's demurrer to the defendant's plea to the jurisdiction of the court. The complaint alleges that the plaintiff is a citizen of the state of Connecticut, and that the defendant is a corporation existing under the laws of the state of New York, and a citizen of said state, and carrying on business in the state of Connecticut, and having an office in Hartford, in said state. Section 910 of the General Statutes of Connecticut provides as follows:

"When the defendant is not a resident or inhabitant of this state, and has estate within the same which is attached, a copy of the process and declaration or complaint, with a return describing the estate attached, shall be left by the officer with the agent or attorney of the defendant in this state; and when land is attached a like copy shall be left in the office of the town-clerk of the town where the land lies, as in cases where the defendant belongs to this state; and, if the defendant has no agent or attorney within this state, a like copy shall be left with him who has charge or possession of the estate attached."

Section 908 of the same statutes provides that—

"In actions against towns, societies, communities, or corporations, the service of the process by the officer by leaving a true and attested copy of it, and of the accompanying declaration or complaint, with or at the usual place of abode of their clerk, or either of the selectmen or committee, or the secretary or cashier, or, in case of a private corporation having no secretary or cashier, at the principal place in this state where such corporation transacts its business, or exercises its corporate powers, shall be sufficient. When a corporation doing business in this state has no secretary or cashier resident in this state, service of process upon a resident director shall be good and effectual service."

The return of the marshal declares that he attached, as the property of the defendant, divers articles of personal property situated in the offices of the defendant in five towns of the state, viz., New Haven, Hartford, Meriden, Bridgeport, and the borough of Willimantic, in the town of Windham, and left true and attested copies of the writ, and of his indorsement thereon, with five named persons, who have "the charge and possession of said estate of the defendant so attached" at the several places before named; "the defendant not being a resident or inhabitant of this state, and not having any known agents or attorney in the same, and being absent therefrom." By chapter 9 of the Public Acts of Connecticut, which were passed in 1889, the fixtures of a telegraph company in this state can be attached in the same manner as real estate is attached in civil actions, by the officer's lodging in the office of the secretary of state a certificate that he has made such attachment. Under an order which was made after the foregoing service, and which permitted an additional attachment, the marshal attached the wires, posts, etc., of the defendants in this state, in the manner provided in said statute, and also left a copy of the writ, application, and order, and of his indorsement, "at the principal office of the defendant in this state, and also with its attorneys," who had entered a limited appearance in the case. The defendant pleaded to the jurisdiction, because, after alleging that it was and is a foreign corporation, "said writ was not otherwise served upon the defendant than by the officer's making a pretended attachment of certain personal property which the plaintiff claimed to be the property of the defendant, and leaving a copy of said writ and complaint with the agents in charge of certain offices of the Postal Telegraph Cable Company in the state of Connecticut, and with the secretary of the state of Connecticut, as will appear from the officer's return on said writ indorsed. No service of said writ and complaint was made, or attempted to be made, on any officer of said defendant company." The plaintiff demurred to the plea.

Under the admissions of the able counsel for the respective parties, but a single question arises upon the demurrer. The defendant admits that by the proper construction of the act of March 3, 1887, a foreign corporation defendant may be found within the district which is the residence of the plaintiff; and if so found, and duly served with process, it can, when the jurisdiction is based upon the fact of diverse citizenship, properly be sued in the district of the residence of the plaintiff. As-

suming that this construction, which has been sanctioned by a number of decisions of the circuit courts, is correct, the next question which would naturally be considered is whether any personal service was made upon the defendant. The plaintiff, in the last brief of his counsel, properly admits that up to the present time no such service has been made, and no such appearance has been entered by it, as would entitle the plaintiff to a judgment *in personam*, but contends that under the act of March 3, 1887, a judgment can properly be rendered against the defendant's property which is situated in this state, and was attached in this suit. His argument, briefly stated, is that whereas, the statute of Connecticut permits the attachment of the property, located in this state, of a non-resident defendant, without personal service upon him, and, in the absence of his voluntary appearance, the subjection of such property to a judgment *in rem*; and whereas, sections 914 and 915 of the Revised Statutes authorize the practice and modes of proceeding in the United States courts to be conformed to the modes of procedure in the respective states wherein such courts are held, and authorize the same remedies by attachment as are permitted by the statutes of said respective states; and whereas, by the act of March 3, 1887, when an original suit is brought in the circuit court, and jurisdiction is founded only on the fact of diverse citizenship, such suit can be brought either in the district of the residence of the plaintiff or the defendant,—the circuit court can obtain jurisdiction *in rem* by attachment of the property of a non-resident defendant, which is situated within the district of the plaintiff, without personal service. It will be readily admitted that the United States courts, which are created by statute, "can have no jurisdiction but such as the statute confers," (*Sheldon v. Sill*, 8 How. 441,) and that this doctrine has been asserted with great earnestness by the supreme court. It is furthermore evident that a state may subject property situated within its limits, which is owned by non-residents, to the payment of the demands of its own citizens, and that, when the non-resident cannot be personally served with process, the statutes of the state may authorize a constructive service, which shall be sufficient to subject the property to a proceeding *in rem*; but such proceedings must be authorized and derive their validity from the local statutes. *Pennoyer v. Neff*, 95 U. S. 714. Neither can it be denied that prior to the enactment of sections 914 and 915 there was no statute of the United States which gave authority to a circuit court, by original process, in an action at law, to seize the property of a non-resident defendant, and subject it to the demands of a resident plaintiff, without personal service upon the defendant, and, in the case of a corporation, upon such agents as may properly be deemed its representatives, or the voluntary appearance of the defendant in the suit. In the well-known case of *Toland v. Sprague*, 12 Pet. 300, the following proposition was announced, which has ever since been adhered to, (Curt. Jur. of U. S. Courts, 105,) and in *Ex parte Railway Co.*, 103 U. S. 794, was evidently regarded as axiomatic:

"(4) That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amena-

ble to the process of the court *in personam*; that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add that, even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as part of, or together with, process to be served upon his person."

In *Ex parte Railway Co.*, decided in 1880, Chief Justice WAITE said:

"It is conceded that the person against whom this suit was brought in the circuit court was an inhabitant of the state of Massachusetts, and was not found in, or served with process in, Iowa. Clearly, then, he was not suable in the circuit court of the district of Iowa, and, unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and, unless the suit can be maintained, the attachment must fall."

The attachment in that case was made in accordance with the statute of the state of Iowa in regard to attachments of the property of non-residents. But it is said, notwithstanding this decision was made after sections 914 and 915 were passed, that those sections confer upon the circuit courts jurisdiction *in rem* over attached property of non-residents which is situated within the limits of the state wherein the suit is brought, if the attachment is made in conformity with state laws. Section 914 assimilates the practice, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the courts of the United States, to the practice, forms, and proceedings in the courts of record of the state within which such circuit or district courts are held. The statute is an act in regard to practice and procedure, and not in regard to jurisdiction. The question at issue in this case relates to the power of the court. Section 914 confers no new power or authority upon the circuit court. In *Butler v. Young*, 1 Flip. 276, the distinction which is to be observed, in the construction of this section, between power which is conferred and practice which is to be observed, is clearly pointed out. The court says:

"Care and caution will be used that substantive rights given by the state laws shall not be confounded with what is mere practice in the state courts. In this connection, I may mention, among other matters, the right to bring an absent or non-resident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the state, and, in my opinion, were not contemplated by congress, by the law in question, to be given to parties in this court." *Wear v. Mayer*, 6 Fed. Rep. 660; *Lyons v. Bank*, 19 Blatchf. 279, 8 Fed. Rep. 369; *Insurance Co. v. Bangs*, 103 U. S. 435.

Section 915 entitles plaintiff, in common-law causes in the courts of the United States, to similar remedies by attachment against the property of the defendant which are provided by the law of the state in which such court is held for its courts. It empowers the United States court to adopt the remedies by attachment or other process, and relates to methods and forms. It does not create jurisdiction over property without personal service upon the defendant. As succinctly stated by Mr. Justice MILLER in *Nazro v. Cragin*, 3 Dill. 474:

"The effect of this section in the act of 1872 is simply this: If the court has or can acquire jurisdiction over the defendant personally, this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction." *Chittenden v. Darden*, 2 Woods, 437.

Stress is laid by the plaintiff upon the general doctrines which are announced in *Cooper v. Reynolds*, 10 Wall. 308, *Pennoyer v. Neff*, 95 U. S. 714, and in *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165, in regard to the power of the state over the property of non-residents within its limits, and the jurisdiction which a court acquires over such property by seizure. In these cases, the supreme court was considering the power which the state has over the property, within its limits, of non-residents, and which state courts obtained by state statutes over attached property; and the opinions are very far from intimating either that the courts of the United States, in common-law causes, have an authority over the property of a defendant which is not conferred by statute, or that the existing statutes confer a right to seize property, in an action at common law, and subject it to execution, unless in a suit where personal service has been made upon the defendant. The statute of March 3, 1887, introduced no new principle which obviated the necessity of personal service. It provided that suit, when jurisdiction is founded upon diverse citizenship, must be brought in the district either of the residence of the plaintiff or of the defendant; and it omitted the provision that the defendant could be sued in any district in which he should be found at the time of serving the writ; but it by no means intended to discard the long-established doctrine that the defendant must be legally found and served in the district in which he is sued. The conclusions in *Toland v. Sprague*, *supra*, in regard to the scope of the federal statutes which existed at the time of that decision, are still applicable.

It is not necessary, at the present time, to discuss whether there was service upon agents who properly represent the defendant. The demurrer admits, for the purposes of pleading, how the writ was served, and the plaintiff does not now ask that it may be considered as anything else than a service by attachment. The demurrer is overruled.

PICKETT v. FILER & STOWELL Co.¹

(Circuit Court, N. D. Florida, March 12, 1889.)

1. FEDERAL COURTS—REPLEVIN OF PROPERTY HELD BY SHERIFF.

Property in the hands of the sheriff under execution from a state court is in the custody of the law, and cannot be taken by the marshal on process in a replevin suit in the United States court.

2. SAME—INTERPLEADER.

In such case the proper remedy is for the sheriff to set up these facts by petition in the nature of interpleader in the replevin suit, and not by bill in equity for injunction.

In Equity. Bill for injunction.

The Filer & Stowell Company brought an action of replevin on the common-law side of this court against Morgan *et al.*, to recover certain mill machinery claimed by them to be their property, and under the process in the case the marshal seized and took possession of the property. The bill alleges that, at the time of the seizure by the marshal, the complainant, as sheriff of the county, had the property in his custody under and by virtue of a writ of execution against said Morgan *et al.* issued from the state court. It claims that the seizure by the marshal was wrongful; that complainant has no adequate remedy at law; and prays that the replevin suit be enjoined, and the property seized be restored to complainant's custody.

Mallory & Maxwell, for complainant.

Blount & Blount, for defendant.

TOULMIN, J., (*orally*.) I think it would be error and improper for this court to permit a recovery of the property sued for in the replevin suit by the plaintiffs, (even if the rightful owners,) if the property was thereby taken from the possession of the sheriff, who held it by virtue of an execution issued upon a judgment of the state court. The possession of the property by the sheriff by virtue of a levy under an execution issued by the state court is in itself a complete defense to the action of replevin, without regard to the rightful ownership. *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355. According to the allegations of the bill, the property was in the custody of the law, and within the exclusive jurisdiction of the state court from which the process issued, for the purposes of the writ, and the possession of the sheriff should not be disturbed by process from this court. But how does this court take cognizance of these facts, and administer the appropriate remedy in the premises? Not by an original bill filed by the sheriff on the equity side of the court to restrain the suit in replevin of the Filer & Stowell Company against Morgan *et al.*, but by a petition, or summary motion, or, as I think more appropriately, by a proceeding in the nature of an interpleader. I cannot consider this bill (filed on the equity side of the court by the sheriff against the Filer & Stowell Company) as an original bill in equity, and

¹ Reported by Peter J. Hamilton, Esq., of the Mobile bar.

grant an injunction on it as is prayed for, for as such it could not, in my opinion, be maintained. The bill alleges that the complainant is wholly without remedy save in a court of equity, and it is on this ground that the injunction is asked for. He has other and adequate remedies, as I have suggested. The injunction prayed for must therefore be denied. But if the bill is presented to the court and asked to be made ancillary to the action of replevin, to be regarded as merely a petition or in the nature of an interpleader in that cause, it will be so ordered in accordance with the principles laid down in the case of *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27.

JONES v. SMITH *et al.*

(Circuit Court, E. D. New York. October 29, 1889.)

RECEIVERS—APPOINTMENT AND DISCHARGE.

Pending the final determination of a suit concerning real property, a receiver will not be continued in possession of the property, where the filing of a notice of *lis pendens* and continuance of an existing injunction will effectually secure complainant's rights as to the *corpus*. As to the rents, those already collected should remain in the hands of the receiver until the final determination of the action, and future rents be secured by a bond.

On Reargument. Motion to suspend receivership.

Benjamin G. Hitchings, for complainant.

Edward K. Jones, for defendants.

LACOMBE, J. Upon the former argument, (38 Fed. Rep. 380,) as to the doctrine of *lis pendens*, the brief of defendants' counsel contained a separate point, in which it was contended that if the state statute applied the complainant should file his notice under it. This point was overlooked by the court, and a reargument upon defendants' application is therefore proper. Upon the entry of the decree the receiver was continued as to the leasehold property because it was assumed that in no other way could the *status quo* of the property, the conveyance of which to the defendants was attacked by the complainant, be successfully maintained. The point for consideration now is whether the rights of complainant can be secured by some other measure, less harsh than the continuance of the receivership. He has a right to insist that the *corpus* of the property shall not be transferred until the final termination of the suit, and that the accumulated rents and profits, and those yet to be earned by it, shall not be dissipated. He has no right, however, to insist on the continuance of the receivership as a means of coercing the defendants into a consent to waive oral argument in the supreme court, especially where, on an important branch of the case, they are appellants. In the memorandum filed on the former motion it was substantially held that the

state statute applied as a rule of property, and that *lis pendens* in a federal court was not available as notice to innocent purchasers, unless notice thereof is filed, as the statute requires. By filing such notice, therefore, the complainant can effectually prevent the transfer of the property. Should it turn out, however, that the state statute does not apply, then, under the decisions of the supreme court which were considered on the prior motion, the old harsh doctrine of *lis pendens* will operate to effect the same result. The continuance of the injunction on the defendants, and the filing of a notice of *lis pendens*, will therefore secure complainant's rights as to the *corpus*. The rents, and so forth, already accumulated, may be secured by their remaining in the hands of the receiver, who should not be required to account till the final determination of the action. Future rents may undoubtedly be secured fully by a bond with sureties other than the defendants, and with liberty to move to substitute new sureties in case of future insolvency. This is all the complainant is entitled to demand. Defendants may proffer an order carrying out these views, and serve it on the other side, with notice of settlement as to form and as to amount of bond for future rents, etc., with an order to show cause why, upon filing such bond, the receivership should not be suspended.

BEADLE v. BEADLE.

(Circuit Court, D. Nebraska. May, 1881.)¹

1. WILLS—CONSTRUCTION.

A will provided that the executors should sell testator's real estate and pay certain legacies, and devised the rest of his estate, real and personal, to his brothers. *Held* that, the legacies being paid in full, the title to the remaining real estate was vested in the devisees, and not in the executors.

2. FRAUDULENT CONVEYANCES—RELIEF.

Where an assignment of an interest in an estate is made by one devisee to another for the purpose of defrauding creditors, it is void, and neither party to it can obtain any advantage therefrom.

3. TRUSTS—ACCOUNTING.

Where one of two brothers owning an interest in land conveys the same to the other by quitclaim deed, for the purpose of convenience in making title, etc., it creates a trust in the grantee in favor of the grantor, and entitles the latter to an accounting.

In Equity.

Bill by David Beadle against Mishael Beadle to set aside a quitclaim deed given by complainant to defendant, and to establish a half interest in the land conveyed by it, and for an accounting.

Webster & Gaylord, for complainant.

Esterbrook & Hall, for respondent.

McCARY, J. 1. We are to consider in the first place the question whether the complainant, David E. Beadle, derived title to the undi-

¹ Publication delayed by failure to receive copy.

vided half of the real estate in question under the will of John L. Beadle. The particular provisions of that instrument to be construed are the third and fourth clauses. The third clause provides "that after the payment of all debts, as above provided for, all the rest and residue of my property resting in real estate, [describing it,] together with all other, the land and real estate or interest therein, that I may have or hold in said county of Sarpy, in the territory of Nebraska, or elsewhere in that or any other territory, state, or county on the face of the earth; that my said real estate and chattels real be sold by my said executors for the best prices that can be procured therefor, either at public or private sale, (or by the survivor of my executors,) in their discretion, at any time within the space of ten (10) years after my decease, at such times as they shall deem best, and out of the avails of such sales, and the proceeds thereof, or any part thereof, I give, devise, and bequeath," etc., (naming various bequests to relatives, amounting in the aggregate to \$950.) And the fourth clause is as follows:

"And the rest and residue of my property and estate, real and personal, of whatsoever nature or kind, not hereinbefore disposed of and already devised and bequeathed, (except the right and interest in a certain patent and invention hereinafter named,) I give, devise, and bequeath to my brothers, Mishael Beadle and David E. Beadle, to be divided equally between them, share and share alike; to have and to hold unto them, the said Mishael Beadle and David E. Beadle, and to their heirs and assigns, forever."

Respondent insists that this will vested the title in the executors, and made it their duty to sell the land and convert the proceeds into personalty, and that therefore the will itself was a conversion, so that the land must be treated as personalty. This upon the ground that, where a testator distinctly directs in his will that land shall be sold and converted into money, equity considers it as done. 2 Story, Eq. Jur. §§ 791, 793, 1212, 1214; *Craig v. Leslie*, 3 Wheat. 563. On the other hand, it is insisted by the complainant that these clauses of the will did not vest title in the executors; that they only authorized them to sell for the purpose of paying the several legacies named; and that by the terms of the will no equitable conversion was provided for or intended.

We must, if possible, construe the two provisions of the will above quoted so that both may stand; and there is therefore much force in the suggestion that it could not have been the intention of the testator by the third clause to require the sale by his executors of all his real estate, since by the fourth he bequeaths "the rest and residue" of his property and estate, both real and personal, to his brothers, Mishael Beadle and David E. Beadle, the complainant and respondent herein. The fourth clause bears upon its face strong proof that the testator did not anticipate that all his realty would necessarily be sold by the executors under the previous clause. The fourth clause not only expressly devises the residue of the realty,—thus assuming that there might be a residue of realty,—but it bequeaths the same, "to have and to hold, unto them, the said Mishael Beadle and David E. Beadle, and to their heirs and assigns, forever," which is the phraseology usually employed in convey-

ances of real estate. In the light of these considerations, let us look at the language of the third clause in the will. Does it convey the title to the executors, or simply vest in them a naked power of sale? If the latter, then the title, which could not rest in abeyance, must have passed to the devisees subject to the right of the executors to sell. Upon this subject Judge Redfield, in his work on Wills, (volume 3, p. 136,) says:

"It is often made a question whether the executor takes a fee-simple under the will, upon which his power to dispose of the same is ingrafted, or a mere naked power to dispose of the title to the estate in a particular mode, in order to effect the purposes of the will."

And in a note, on page 137, the same author lays down the rule for determining the question in these words:

"It is said the devise of the land to the executors to sell passes the title; but a devise that executors may sell, or shall sell, lands, or that they may or shall be sold by the executor, gives them only a naked power of sale." Citing Sugd. Powers, (8th Ed.) 112; *Doe v. Shotter*, 8 Adol. & E. 905.

Judged by this rule, it is clear that the will now under consideration did not vest the title in the executors. There are no words of conveyance or devise to them. The language is "that my said real estate and chattels real be sold by my executors," etc. He does not say: "I give and bequeath to my executors," etc.; nor does he use any equivalent language. There are certainly no words expressly passing the title to executors, and since the purpose of the testator is secured as well by treating the instrument as conferring only a power of sale, and since by this construction all the provisions of the will may be harmonized, I adopt it.

Another consideration has great weight with me in determining the true construction of this will. It is conceded that all the legacies provided for in the will, to be paid out of the proceeds of the sale of the land, have been paid in full. The legatees are therefore satisfied, and there is no one to claim the property as personalty. The complainant and respondent both claim realty under the will. They have both elected to claim the realty, as their pleadings in this case abundantly show. The complainant sues as devisee, and claims title under the will. The respondent claims title in himself by virtue of the will and a conveyance from complainant. He sets out the will as a part of his answer, and as the source of his title, and prays that his title may be quieted. The legacies having been paid, it is clear that the whole beneficial interest under the will, whether that interest be in the land or in the proceeds of a sale thereof, is in the same parties; that is to say, in complainant and respondent jointly, or respondent solely,—in both, if complainant succeeds in this controversy; in the respondent, if he is successful. Now, the law is well settled that where the same person is to receive the bequest, whether it remain in the form of realty or be sold and converted into money, that person may elect to take either. This for the reason that no other person can by possibility have any interest in the question. It is only in cases where if the property be treated as realty it will go to one party, and if regarded as personalty to another, the questions arise

requiring the intervention of courts, and the application of the principles contended for by the respondent. Courts of equity cannot be called upon to hear and determine controversies concerning purely abstract questions, and which do not involve substantial rights. If the same result follows a decision either way, there is nothing with which a court ought to be troubled. A court of equity will not compel a trustee to execute a trust against the wishes of the *cestui que trust*. If the latter is entitled to the land, or its proceeds if it be sold, the court will allow him to take his choice. This rule is settled by the case of *Craig v. Leslie*, *supra*, and by a uniform current of authority in this country and in England. My conclusion upon this branch of the case is that by the will the title was vested in the devisees, and not in the executors; and I proceed to consider the other questions presented in the case.

2. We are next to consider the force and effect of the following instrument executed by complainant to respondent:

"To all whom it may concern: Know that I, D. E. Beadle, of the town of Galen, Wayne county, New York state, for and in consideration of certain notes signed by Mishaël Beadle as security for me, do hereby, and by these presents, assign and convey to the said Mishaël Beadle all my right, title, and interest in and to certain lands in the territory of Nebraska, acquired by me through the will of John L. Beadle, deceased. Dated this first day of April, 1865. [Signed] DAVID E. BEADLE."

The bill in this case is not filed for the purpose of setting aside the assignment; it is aimed at the quitclaim deed subsequently executed. It is, however, insisted on behalf of respondent that this assignment and the said quitclaim deed are parts of the same transaction; that both were executed for the same consideration, and for the same purpose, viz., to vest in respondent the title to the land absolutely and unconditionally. It is further insisted that if it be found that the purpose of this assignment was to defraud the creditors of complainant, then he cannot be heard to attack it, and that the same must be held with respect to the quitclaim deed afterwards made in consummation of said assignment. Whatever may have been the purpose of this instrument, it is very clear that it was not intended by the parties as a conveyance of all the interest of complainant in the real estate, and that it was not, after its execution, treated by them as having any such purpose or effect. After its execution the respondent continued in various ways to recognize the interest of complainant in the land, and to consult him from time to time with respect to sales thereof, and its management generally. In numerous letters addressed to complainant he speaks of the land as "ours," as "our property," and "our land," etc.; and in several written long after the assignment he speaks of the respondent's "interest" in the land, and of his "part" thereof, and in one he speaks of an expected settlement and division between them. Without quoting in this connection from these letters, it is sufficient to say that they cannot be harmonized with the theory that the assignment was intended or understood as divesting complainant of all interest in the land. To construe that instrument as having been given as a security in the nature of a mortgage, to indemnify

respondent against loss on account of his indorsement of the notes of complainant, would do no great violence to its terms; but the master has found, and I think correctly, under the evidence, that the assignment was executed by complainant for the purpose of covering up his Nebraska interests as against the claims of his creditors. This makes it necessary for us to consider the question whether complainant is estopped to recover in this case upon the ground that he is asking relief as against his own fraudulent act. The well-settled rule is that no affirmative relief will ever be granted upon a fraudulent contract to either of the parties thereto. If it be true that complainant is asking this court to set aside this assignment, or that the assignment is so clearly identified with the quitclaim deed that they must be regarded as parts of the same transaction, then, in either case, I would have no hesitation in saying that he is not entitled to relief. The same result, however, would follow as to respondent. He was a party to both instruments, and was *in pari delicto*. If they were fraudulent, he, too, was a party to the fraud, and can claim nothing under either of them. The court would in that case refuse relief to either party, and leave them in precisely the position in which they have placed themselves. *Telegraph Co. v. Railway Co.*, 1 McCrary, 418, 3 Fed. Rep. 1, and cases cited.

If, therefore, the assignment and the deed are to be regarded as parts of the same fraudulent scheme to defraud the creditors of complainant, it would inevitably follow that both would be treated as absolutely null and void, and the parties would be left, as between themselves, without any right to a decree to enforce or set aside either the one or the other. This result would be much more injurious to the interests of respondent than to those of the complainant, since the latter is in possession; and, if the two instruments are ignored, he can, as against respondent, hold the undivided half of the land—all that he claims—under the provision of the will of John L. Beadle. But I am of the opinion that the evidence does not sustain the position of respondent, that the assignment and the quitclaim deed are parts of one and the same transaction, both executed for the same consideration and for the same purpose. Upon this question, as upon nearly all the disputed questions of fact in this case, the testimony of the complainant and respondent is in direct conflict. They are equally interested, and, so far as appears, equally intelligent and credible. I conclude, therefore, that the matters of fact in controversy between them, and concerning which their testimony is in conflict, must be determined by a consideration of the corroborating testimony, and particularly by the acts, declarations, and writings of the parties contemporaneous with the transactions in question. What was said and done by the parties in connection with these transactions at the time they were transpiring, and before any ill will had arisen, may be relied upon as exhibiting a reliable indication as to their aims and purposes.

For what purpose was the quitclaim deed executed? Complainant swears that it was for the purpose of simplifying the title, and making it more satisfactory to purchasers of lots, who objected to the title made

by the executors without an order of court. Respondent swears that there was no such purpose, but that, on the contrary, the object was to invest him with the fee-simple title, absolutely and unconditionally. This dispute can best be settled by reference to the correspondence between the parties which preceded and led to the execution of the deed, and this settles it very satisfactorily in favor of complainant. I do not find in this correspondence a single allusion to the assignment which has been executed four or five years before, and apparently ever since entirely ignored. I do find, however, the reason for the execution of the quitclaim deed clearly and repeatedly stated in this correspondence by the respondent himself. In a letter dated December 12, 1869, respondent expresses his surprise that the title was questioned, or that there was anything more to be done, and goes on to propose a plan for arranging the matter and satisfying purchasers. He proposes to pay the legatees, get their receipts in full, and then adds:

"I see no other way, but you must quitclaim to me your interest in the will. I have already assumed all the debts, and that settles up the estate, and leaves the title in me individually. Then, as soon as we can sell enough to pay these debts, we can settle, and I will deed you your part. All the trouble there is, is in your trusting me until we can do so. We can then do without the other executor."

It is impossible to believe that the respondent would have used this language if the parties had understood that complainant was to execute the deed in consummation of the assignment, and to have no interest thereafter. This letter demonstrates that the quitclaim was asked for upon quite another ground, to-wit, that the estate should be closed, the legacies and debts paid, the title vested in one person, who could make deeds, and afterwards a settlement and division could be made as between the two brothers to whom the land has been devised. In a later letter on the same subject respondent writes to complainant: "You can quitclaim your interest in the will. Trust me, it shall be all right." In still another letter (not dated) respondent writes to complainant: "I will pay the expense, if you quitclaim your interest in the will. It will be easier for me to settle with the surrogate, for then he will not have to look after your interest. That will be between you and me to do." Other letters contain similar language. In no one of them is it intimated that respondent is entitled to the quitclaim as a matter of right, or as the real owner of the property, or because of the assignment of 1865. If the negotiations had been conducted upon the basis of his entire and unconditional ownership, as now claimed by respondent, the correspondence would have given some expression or suggestion of such an understanding or of such a claim. We find nothing of the kind; but, on the contrary, repeated and explicit declarations showing that such was not the intention of the parties. I conclude, therefore, that the quitclaim deed was not executed for the purpose of making effective the previous assignment; that it was the result entirely of negotiations arising subsequently to the assignment, and having no connection therewith; and that, therefore, the parties are not estopped by the fraudulent character of the as-

signment to contest in this case the validity or the force and effect of the quitclaim.

This brings us to the question whether the said quitclaim deed was in equity an absolute and unconditional conveyance of all the interest of complainant in the land, or a conveyance, as between the parties in trust, made for convenience, and leaving the respondent bound to account for proceeds of sales, and to reconvey upon final settlement any interest of complainant's remaining in the land. This question has been to some extent anticipated in what has been said. We have seen that the deed was executed for the purpose of facilitating the conveyance of portions of the property to purchasers by vesting the legal title fully in respondent. The quotations already made from the contemporaneous correspondence between the parties show this. This conclusion is confirmed by the acts and declarations of respondent subsequently to the execution of the quitclaim deed. He did not assume to be the owner of the property. He did not claim possession, nor deny the right of the complainant. On the contrary, he went on assuming that the two were still jointly interested. Perhaps the most conclusive proof upon this point will be found in the letter of the respondent which is in evidence, marked "Exhibit R," in which he says:

"This satisfaction piece and your quitclaim being recorded, there will be no question in my giving a warranty deed; and, just as soon as we can sell and pay some of the debts resting on me, we can settle and divide, or hold it together, just as we are a mind to. I see nothing to hinder, if you are satisfied to do so."

It is clear that the execution of the quitclaim deed, under the circumstances developed in the proof, did not divest complainant of his interest in the lands devised under the will, but said interest was vested in respondent only in trust, and he was bound in equity to account to complainant therefor.

3. It remains only to consider the effect of the contract, a copy of which is attached to the answer, dated June 20, 1877. By this instrument the respondent agreed to furnish "good and sufficient warranty deeds" for the land in question, when called upon by complainant to do so, as he should sell or dispose of lands. Complainant was to pay respondent \$11,000 for his interest, the whole amount to be paid within five years; and to pay at least \$600 per annum, together with all money or securities received for the sale of said real estate. Whenever \$2,000 was paid, the complainant was to have a deed for the house and block upon which he resided. By reference to the pleadings, it will be seen that neither party is seeking in this suit to enforce this contract. It seems to be assumed that it has been abandoned and rescinded by the parties to it. It seems pretty clear that it was repudiated by the respondent as early as the 15th of March, 1878; for on that day he wrote to complainant that he was resolved to sell the land and the buildings, and would want possession when he made a deed. The time for carrying out the contract had not expired, and this notice could have been given only upon the theory of an abandonment of the contract. It is, however,

enough for the present to say that the court is not asked to specifically enforce it. It is offered in evidence only as tending to establish the claim of the respondent to the entire ownership of the real estate. It contains a reference to the land as "now owned by" Mishael Beadle; but this recital is not, in my judgment, sufficient to overcome the proof already referred to, establishing the fact that he did not, in fact, own the whole of said land.

Upon the whole case, my conclusion is that all the exceptions to the master's report, by both parties, should be overruled, and that the said report should be confirmed and decree rendered as recommended. It is accordingly so ordered. The case will be recommitted to the master to state an account in accordance with his findings, and with power to take further testimony touching the matter of the account between the parties.

ROBERTSON *v.* HEDDEN, Collector.

(Circuit Court, S. D. New York. October 24, 1889.)

1. CUSTOMS DUTIES—COTTON CLOTH.

The term "cotton cloth," as used in Schedule I of the tariff act of March 3, 1883, means any woven fabric of cotton used for garments or other purposes. Following *Ulmann v. Hedden*, 38 Fed. Rep. 95.

2. SAME.

The provisions of Schedule I of the tariff act of March 3, 1883, for countable cottons, necessarily import that the cloth shall be homogeneous, so that the number of threads per square inch will not differ in different parts of the fabric.

3. SAME.

Where a cotton cloth has figures woven in it upon the loom at the same time with the fabric itself, the count must include the threads of the figure, as well as the threads of the ground-work.

4. SAME.

Madras curtain goods, made of cotton, with figures woven in them in the loom, are dutiable, not under the countable clauses of Schedule I of the tariff act of March 3, 1883, but under the general provision of that act and schedule for "manufactures of cotton not specially enumerated or provided for."

At Law. Action to recover duties.

Plaintiff imported from Scotland a class of fabrics generally known as "Madras Curtain Goods." They were composed of cotton, woven in looms, and were figured, the figures being woven in the same loom and at the same time as the cloth, and covering portions of the fabric. The collector had classified the goods as cotton cloth, and had assessed duties under the countable clauses of Schedule I of the tariff act of March 3, 1883, according to the number of threads to the square inch in the ground-work of the fabric, and the value per square yard. Against this assessment plaintiff protested, claiming the goods were manufactures of cotton not specially enumerated or provided for, and dutiable at 35 per cent. *ad valorem*. Upon the trial it was shown that the figures were woven in the cloth in the process of manufacture by means of the Jacquard machine, and that, if the threads of the figure were counted

with those of the ground-work, the number of threads per square inch would differ in different portions of the fabric; while, if the latter only were counted, the number of threads to the square inch would be uniform. It was further shown that the practice of the appraisers was to count the threads of the ground-work only.

Charles Curie, (*Stephen G. Clarke*, of counsel,) for plaintiff.

Edward Mitchell, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J. These samples are cotton cloth, within the dictionary definition, and within the common, every-day meaning of the word "cloth," just the same as was the "penelope canvas," which was before us in *Ullmann v. Hedden*, 38 Fed. Rep. 95. They are within the definition which was used as the test in that case, viz.: "Cloth: A woven fabric, of fibrous material, used for garments or other purposes." Congress has, however, in the paragraph on which the defendant relies, prescribed rates of duty only for those kinds of cotton cloth which may be discriminated from each other by a count of the threads of which they are composed; such count being stated per square inch. That necessarily imports that the cloth shall be homogeneous, so that the number of threads per square inch will not differ in different parts of the fabric. The contention of the defendant that the threads in the so-called ground-work only are to be included in the count, the figures being regarded as a merely incidental ornament,—as something added to the cloth,—seems unsound, in view of the testimony, which shows, without contradiction, that the figures (which in some of these samples cover fully more than half the surface of the goods) are woven upon the loom at the same time with the fabric itself. They are therefore just as much cotton cloth as the ground-work is, and the threads composing them as much entitled to a count. We then have a fabric which is, indeed, a cotton cloth, but which cannot, as a whole, be fairly classified by the use of the test which congress has provided as the sole one for classifying such cloth; and as it cannot, therefore, be put in any one of the classes of cotton cloth on which duty is laid as such, it must fall under the general clause. For these reasons I direct a verdict for the plaintiff for the full amount claimed, \$983.93.

In re DIETZE.

(District Court, S. D. New York. October 25, 1889.)

IMMIGRATION—CONTRACT LABOR—HABEAS CORPUS—RE-EXAMINATION.

The petitioner, an immigrant from Switzerland, arrived at Castle Garden, October 18, 1889. On examination by the proper officers, he stated, and signed an affidavit, in substance, that he was engaged by contract to work for a silk manufacturer at Paterson, N. J., which being reported to the collector, he was directed to be sent back in accordance with the provisions of the act of February 23, 1887, (24 St. at Large, p. 414, c. 220.) *Held* that, the proceedings being regular in every respect, the petitioner could not be released on *habeas corpus*, on the mere ground that his statements in regard to the contract were untrue. Re-examination of facts recommended.

Habeas Corpus.

Robert N. Waite, for petitioner.

Edw. Mitchell, U. S. Atty., and Abram J. Rose, Asst. U. S. Atty., for respondent.

BROWN, J., (*orally*.) This case is a very plain one, so far as the duty of the court is concerned, which is not to determine the fact whether the act of 1887 has been violated by the immigrant, but to see whether the proceedings on the part of the collector or other officers in ascertaining and reporting the facts have been regular or irregular. There is no suspicion that the officers who were charged with the examination of Mr. Dietze were actuated by any malicious or unkind motives. The examination was in the ordinary course of business, and in the performance of their duty. Probably, upon the testimony, as it now appears, there was not any such contract as the acts of 1885 and 1887 prohibit. But, however that may have been, Mr. Dietze, in consequence of his own suspicions, was led to make to the examining officers exaggerated statements, or, rather, false statements, if there was not any such contract as they have reported. Upon the testimony before me there is no doubt that he did state to the officers at Castle Garden that he was under contract to work for Mr. Staub, in Paterson, at \$25 a week. Mr. Dietze says he was excited, and he cannot remember just what he did say. His answers go far to confirm everything that the officers say, except that the latter are more specific. It is incredible that, without any sort of motive, they should have written down statements which were in no way authorized by Mr. Dietze, in answer to their questions. Very likely Mr. Dietze, finding himself in an inclosure with other persons who were charged with being paupers, was tempted to make these statements from fear of being sent back on the ground that he had no means of sustaining himself here. While he was intent upon avoiding that supposed difficulty, instead of relying upon what now appears to have been the simple fact, viz., that he was merely recommended to Mr. Staub, he untruly stated that he had a contract for employment from him. But his answers to the officers, which I have no doubt were made as they have testified to, fully justified them in reporting him to be re-

turned. They could have done nothing different. Their report was regularly made to the collector, with the affidavit, signed by Mr. Dietze, stating the above contract. Whether it was sworn to or not is immaterial. The report was one which they were required to make in the ordinary course of business. It thus appeared to the collector that Dietze came here under a contract to work for \$25 a week, and upon this report the prisoner was liable to be sent back to the place whence he came. All that the court has to do with the matter is to see that the proceedings in ascertaining the facts are regular and fair; and it is plain, upon this testimony, that they were without a shadow of irregularity.

If the prisoner made false statements to the examining officers, he alone is to blame for the condition in which he finds himself now. It is not possible for me to release him upon *habeas corpus*. It may be a suitable case for an application for a further hearing before the collector. I think it is so. But it will be for the collector to hear any such application in the first instance, and to determine it, not for this court; because this court is not the tribunal to make an original examination into the facts, but merely to see that the proceedings by the collector or other officers were fairly conducted, and legally sufficient. I cannot say that they have been in any respect irregular or unfair; and they were based upon evidence that was the best that could be obtained, and apparently conclusive.

It is impossible for the court to interfere with the custody of the prisoner. He must therefore be remanded; but with a recommendation to the collector that he authorize a re-examination of the facts.

UNITED STATES v. CLARKE.

(District Court, E. D. Missouri, E. D. November 7, 1889.)

1. CRIMINAL LAW—VERDICT—ARREST OF JUDGMENT.

Where a verdict finds defendant "guilty on all the counts contained in the indictment," the fact that some of the counts are bad does not warrant an order arresting judgment, where some are good.

2. OFFENSES AGAINST POSTAL LAWS—DEPOSITING OBSCENE MATTER IN MAIL—INDICTMENT.

A count in an indictment, under Rev. St. U. S. § 3892, for depositing obscene matter in the mail, described the paper deposited as "a certain obscene * * * paper, print, and publication, of an indecent character, beginning with the words following, to wit: 'As long as there is life there is hope,' and then and there contained in a paper wrapper having thereon the address * * * following: 'W. E. Deer, Bluff Mills, Indiana, via Waveland;'" but which paper is so obscene as to be offensive," etc. The paper, when produced, proved to be a form of circular prepared by the defendant for circulation through the mails. Several days before the trial the defendant craved and obtainedoyer of the indecent paper in question. Held that, under the circumstances, the description of the paper was sufficient.

At Law. On motion in arrest of judgment, and for new trial.

Indictment of Frank D. Clarke for depositing obscene matter in the mails. For report on demurrer to indictment, see 38 Fed. Rep. 500. For report of charge to jury, see Id. 732.

George D. Reynolds, Dist. Atty.
C. H. Krum, for defendant.

THAYER, J. If it should be conceded that counts Nos. 2, 3, 5, 6, 8, and 9 are defective because the description of the alleged obscene publications referred to therein is too indefinite, yet that would not warrant an order arresting judgment on counts Nos. 1, 4, 7, in which the indecent pamphlet complained of is described with sufficient certainty. It must be borne in mind that the verdict in this case is not a general verdict of "guilty." It is a verdict that specifically finds the defendant "guilty on all the counts contained in the indictment." The jury expressly declare that the charge laid in each count is proven. In such cases the rule is that, if any of the counts are good, judgment upon the verdict as to such counts cannot be arrested. If some counts of an indictment are good, and others bad, and the verdict is merely a general verdict of guilty, so that it is impossible to say whether the jury intended the finding to apply to one count, or to all, it might be the duty of the court, (according to the authorities cited by defendant's counsel) to arrest the judgment on all the counts, if, during the trial, the court's attention was called to the defective counts, and it was asked to withdraw the same from the consideration of the jury, and it refused to do so. This disposes of the motion in arrest, so far as it relates to counts Nos. 1, 4, and 7, which are admitted to contain a sufficient description of the obscene pamphlet in those counts mentioned.

I am aware, however, that, if counts Nos. 2, 3, 5, 6, 8, and 9 are bad because they do not contain an adequate description of the two obscene papers or circulars in those counts referred to, then, inasmuch as the court permitted such papers to be read to the jury, and inasmuch as they were only admissible under the defective counts, such evidence may have prejudiced the finding on counts 1, 4, and 7, and in that event the motion for a new trial as to the latter counts may be tenable. It seems necessary, therefore, to determine whether any of the counts are defective by reason of an insufficient description of the indecent papers or circulars on which the counts are founded. It is manifest that an indictment under section 3892 for depositing an obscene publication or print in the mail ought to describe the publication or print so deposited, in such manner, at least, that the accused may be able to prepare his defense, and that the judgment may be pleaded in bar of another prosecution for the same offense. An allegation that a publication complained of is too indecent to be spread on the record, merely obviates the necessity of setting out the contents of the publication in full, as would otherwise be required. It does not excuse the pleader for wholly omitting to describe it, or for describing it in language too general to advise the accused what particular publication or paper is intended. *U. S. v. Harmon*, 34 Fed. Rep. 872. The second count of the present indictment, which may be taken as a sample of all the counts supposed to be defective, avers that on November 22, 1888, the defendant deposited in the post-office at the city of St. Louis "a certain obscene * * * paper,

print, and publication, of an indecent character, then and there beginning with the words following, to-wit: 'As long as there is life there is hope,' and then and there contained in a paper wrapper having thereon, then and there, the address * * * following: 'Mr. W. E. Deer, Bluff Mills, Ind., via Waveland;' but which paper is so obscene and indecent as to be offensive," etc. As the papers, when produced at the trial, proved to be circulars that had evidently been prepared by the defendant with a view of obtaining patients, by circulating them through the mails, there can be no doubt that the description of them contained in the indictment sufficiently advised the defendant of the character and contents of the document that would be produced by the prosecution; and in view of the fact that the caption of the papers was properly described, and that the name and address of the person to whom they had been respectively mailed, and the date of mailing, was also stated, it does not appear to the court that the defendant will have any difficulty in future in showing for what particular offense he has been tried under the present indictment. It is no doubt true that the pleader might have given a further description of the two circulars complained of in the alleged defective counts. He might have stated the general tenor of the same, as that they contained a list of questions to be answered by the parties to whom they were mailed, etc.; but, even if he had done so, it is questionable whether the identification of the papers would have been any more certain. It would still be open to the defendant to say, as he says now, that the general description given might apply as well to other circulars or papers as to those produced at the trial, and hence that the indictment did not advise him how to prepare his defense. In the nature of things, there could be no complete identification of documents such as are involved in this case, unless they had been copied in full into the indictment; but the rule of pleading in this class of cases did not require that to be done. In point of fact, the defendant craved oyer of papers before the trial, and the court compelled the district attorney to produce and file the same for the defendant's inspection. It is obvious, therefore, that the defendant was not put to any actual disadvantage in making his defense, as he was permitted to inspect the alleged obscene papers some days prior to the trial. Although the court expressed some doubt as to the sufficiency of the description of these circulars, when the point was first raised, yet, on further consideration of the question, I think the description was adequate, and that the motion in arrest and for a new trial should be overruled as to all the counts.

It is so ordered.

ELECTRICAL ACCUMULATOR CO. v. NEW YORK & H. R. CO. *et al.*

(Circuit Court, S. D. New York. October 25, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ELECTRICAL ACCUMULATOR.

On motion for a preliminary injunction against the infringement of letters patent No. 252,002, issued January 3, 1882, to C. A. Faure, it appeared that defendant's electrodes were made by mixing the dry powder of the active material with $2\frac{1}{2}$ per cent. of fluid, and applying the mixture to the plates under hydraulic pressure, by which pressure the particles of the powder and of the fluid are brought into closer contact, producing cohesion of the particles of the mixture, and adhesion to the plate; the fluid being an indispensable agent. *Held*, that the mixture, at the moment of application, is a true paste, and, as such, an infringement of claim 1 of such patent, which is for the application of the active layer "to the supports, [electrodes, plates, or grids,] in the form of a paste, paint, or cement, prior to their immersion in the battery fluid."

2. SAME.

It appeared that defendants also made electrodes by forcing the dry powder into the interstices of the grid by hydraulic pressure, and then moistening the grid with fluid, by which the powder is saturated with the fluid; the mixture hardening by the same process as when mixed by the other method. *Held*, that this process was likewise an infringement of claim 1 of such patent, which covers any case where the application of the active material to the plate, in the form of a paste, paint, or cement, is completed, so as to leave the plates ready for use "prior to their immersion in the battery fluid."

In Equity. Bill for infringement of letters patent No. 252,002, issued January 3, 1882, to C. A. Faure. On motion for preliminary injunction.

Betts, Atterbury, Hyde & Betts, (Fredk. H. Betts, of counsel,) for complainant.

Starr & Ruggles, (Thos. W. Osborn, of counsel,) for defendants.

LACOMBE, J. The question whether or not the battery plates used by the defendants are infringements of the first claim of complainant's (Faure) patent, as it stands after filing of the disclaimer, is to be determined in view of the construction given to that patent by Judge COXE in the action brought by the complainant against the Julien Electric Company. 38 Fed. Rep. 117. Under that construction, what Faure discovered was the application of the active layer "to the supports, [electrodes, plates, or grids,] in the form of a paste, paint, or cement, prior to their immersion in the battery fluid." After hearing the testimony as to the experiments of Brush, and the other proofs as to the prior state of the art, which are again presented on the present motion, Judge COXE found that the invention was one of more than usual merit, and allowed plaintiff to file a disclaimer, which should save him what he discovered. Defendants' plates have been made in either of three ways: *First*. By the use of an active material containing over 10 per cent. of fluid. This they concede to be a paste, and assert that they no longer use it. *Second*. By mixing the dry powder with about $2\frac{1}{2}$ per cent. of the fluid, and then applying the mixture to the plates or grids under hydraulic pressure. The mixture, before application, does not present the appearance of an ordinary paste; but when it is subjected to high pressure, and when

the particles of the powder and of the fluid are thus extended, or brought into closer contact, there ensues either molecular or chemical action which produces what is known as "setting," the particles of the mixture adhering to each other, and cohering to the grid. To the production of this action the fluid is apparently an indispensable agent. No other satisfactory reason for its use is shown. Whether or not, therefore, a mixture of dry powder with $2\frac{1}{2}$ per cent. of fluid is a paste while in the mixing tub, it seems to be a true paste at the moment of application. Its components are substances by whose combination a paste may be formed, and such mixture acts as a paste does. *Third.* Defendants also force an absolutely dry powder into the interstices of the grid by hydraulic pressure. While the particles of the powder, thus compacted together, are still in place, the grid is moistened with the fluid, either by brushing it over, or by applying it to a carpet saturated with the fluid; being laid for a moment first on one side and then on the other upon the carpet. Sometimes it is also dipped momentarily in a bath of the fluid. The result of these processes (or either of them) is a saturation of the powder. The percentage of fluid in the mixture thus formed is not stated, but it is probably considerably higher than the $2\frac{1}{2}$ per cent. of the second mixture. The mixture thus formed on the grid hardens in a few seconds, apparently going through the same process of setting as when mixed in the other methods.

The defendants claim that this last process is the same as that used by Brush in the experiments proved in the former case, and that therefore it is still open to them, despite the affirmance of the first claim of Faure, as modified by the disclaimer. They contend that all Faure did which Brush did not was to mix his paste before he applied it to the plate at all. This, however, seems too narrow a construction of Judge COXE's opinion. If that is all that Faure invented, it is difficult to see in what respect his discovery merited the encomiums passed upon it in the opinion. What Brush did was to immerse a plate coated with dry material, not only into fluid, but into the very fluid in which it was forthwith, and without removal therefrom, put to use as a battery plate. If such immersion of Brush's dry material in the battery fluid did not form a paste because the electrical action to which it was subjected prevented its setting (which is what complainant claims,) Brush's experiments did not anticipate Faure, who did discover the use of paste. If such immersion of Brush's dry material did form a paste, it was formed after, and not before, the immersion of the plate in the battery fluid. Complainant's patent, however, covers any case where the form in which the layer of active material is applied is that of a paint, paste, or cement; the application of such paste, paint, or cement being completed, so as to leave the plates ready for use, "prior to their immersion in the battery fluid." Whether the paste is compounded in the mixing tub, or on the surface of the grid, seems immaterial, if the paste, etc., is in fact formed, and that process completed, before immersion for battery purposes. The Brush experiments, however, would no doubt cover the defendants' fourth method, as described by their witnesses, viz., where a perfectly

dry powder is compacted upon the grid by hydraulic pressure, and no fluid is added until the plate goes into use in the battery. Order accordingly.

HERON v. THE MARCHIONESS.¹

(District Court, N. D. Florida. March 14, 1889.)

1. WHARVES—LIABILITY FOR WHARFAGE—MOORING FOR SAFETY.

When a ship is compelled by stress of weather to moor to a wharf for safety of itself and timber raft, it thereby subjects itself to a charge for wharfage.

2. SAME—COMPENSATION.

In such case, if the wharf-owner libels to recover wharfage, the amount allowed will be the customary charge for wharfage, and will not be predicated on the danger to the wharf or salvage benefit to the ship or timber.

In Admiralty. Libel for wharfage.

John C. Avery, for libelant.

Blount & Blount, for claimants.

TOULMIN, J. It appears that the libelant was the owner and operator of a wharf used as a mooring place for vessels and timber at Pensacola, and that the ship *Marchioness* was driven by severe wind or came near and was moored to said wharf, with several hundred pieces of timber which the vessel had in charge, and which were secured by the vessel being made fast to the wharf. While the position in which the ship found herself at the time she made fast to the wharf might not have been voluntary, her making fast to it was a voluntary act, and, the wharf being there for that purpose, the law implied a contract to pay a reasonable compensation for the use of the wharf for mooring purposes. *The Dora Mathews*, 31 Fed. Rep. 619; *The Whitburn*, 7 Fed. Rep. 925; *Packet Co. v. Aiken*, 16 Fed. Rep. 895.

In allowing wharfage in this case I do not think I should consider the danger to the wharf, under the circumstances of the particular case, but should award a reasonable wharfage charge, according to the usages and customs of this port as shown by the evidence in the case. I do not think I should be influenced by the consideration that the wharf might have been greatly damaged, or because there was a storm prevailing at the time. The libelant does not, indeed, could not, claim in this proceeding, or one of like character, compensation for the service rendered in saving the vessel and timber from loss or damage, or for damage to his wharf, if there was any, but claims, what in my judgment he has a right to claim, reasonable compensation in the nature of wharfage. To determine what is reasonable wharfage in this case, I must ascertain what it is usual to charge for furnishing a mooring place for ships and timber like that in question. It seems from the proof that the charge as to

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

the ship is regulated by the tonnage of the vessel, and the charge for timber is so much per stick; and it seems that this charge is made whether the vessel is at the wharf one hour, one day, one week, or more. In this instance the vessel was moored to the wharf less than one day. My opinion is that, under the allegations of the libel and on the proof, the libelant is entitled to a decree. The exceptions to the libel are overruled, and a decree will be entered for \$60.41, and costs.

THE JOHN G. STEVENS.¹ THE R. S. CARTER. LOUD *et al.* v. THE JOHN G. STEVENS and THE R. S. CARTER.

(Circuit Court, E. D. New York. October 31, 1889.)

MARITIME LIENS—PRIORITY—REPAIRS—SUBSEQUENT TORT.

The maritime lien created by collision takes precedence of liens for repairs and supplies, although the latter liens arose prior to the collision.

In Admiralty. Appeal from district court. See 38 Fed. Rep. 515. *George A. Black*, for libelants.
Alexander & Ash and Robert D. Benedict, for intervenors.

BLATCHFORD, Justice. This is an appeal by certain intervenors in this suit from a decree made by the district court on the 26th of April, 1889. The libel was filed by Loud and others, as owners of the schooner C. R. Flint, and carriers of her cargo, and the master of that schooner, against the two tug-boats, to recover for damages caused to the schooner and her cargo, and those suffered by her master, on the 8th of March, 1886, by a collision between the bark Doris Eckhoff, which was at the time in tow of the Carter, and the schooner Flint, which was at the time in tow of the Stevens.

The Carter was seized under process, and a decree was obtained against her by default, for \$15,155.15, as damages sustained by the Flint and her cargo, and by her master, for the loss of personal effects, that amount including interest to December 26, 1888. The Carter was sold under process issued in another suit against her, and the proceeds of the sale were brought into the registry of the district court. The firms of Jones & Whitwill, Gladwish, Moquin & Co., and Theodore Smith & Bro. filed libels in the district court against the Carter to recover, two of them for repairs made upon her, and the other one for coal furnished to her. The claim of Jones & Whitwill was established at the sum of \$962.70, on the 16th of January, 1889, for repairs done to the Carter at Jersey City, between August 1, 1885, and January 17, 1886, she being then owned in the state of New York. The claim of Gladwish, Moquin & Co. was established at the sum of \$249.40, on the 16th of January, 1889, for coal furnished to the Carter at Brooklyn, between November 1, 1885,

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

and March 7, 1886, under such circumstances as to give a lien upon her, under the laws of the state of New York. The claim of Theodore Smith & Bro. was established at the sum of \$187.72, on the 16th of January, 1889, for repairs made to the Carter in New Jersey, between August 1, 1885, and August 22, 1885, while she was owned in the state of New York. The proceeds of sale being insufficient to pay the claims for damages growing out of the collision, and the claims for the repairs and the coal, the district court was called upon to determine the priorities between the respective parties. It held that the lien of the libelants in this suit for the damages sustained by the collision was entitled to priority over the claims of the three intervening parties for repairs and coal, although the latter liens arose prior to the collision; and it decreed that the whole of the proceeds of sale in the registry be paid to the libelants on account of their damages by the collision, such damages exceeding the amount in the registry. That amount is also less than the amount of the claims for repairs and coal.

The opinion of Judge BENEDICT in this case, in the district court, was delivered in April, 1889, and is reported as *The R. S. Carter*, 38 Fed. Rep. 515. Judge BENEDICT says:

"The question is not between a wages claim and a collision claim, nor between material-men and a claim arising out of a *quasi* tort, where the cause of action is a neglect of some duty assumed in pursuance of a voluntary agreement between the parties. The claim of Loud is for damages caused by collision,—a tort, pure and simple, committed by the R. S. Carter. The claims of the material-men are for repairs done to the R. S. Carter prior to the collision, which liens have not been lost or impaired by laches. The question is analogous to the question decided by this court in the case of *The Pride of the Ocean*, 3 Fed. Rep. 162."

In that case, decided in June, 1880, Judge BENEDICT held that a claim for damages caused by a collision was entitled to preference over a bottomry loan made upon the vessel for the same voyage, prior to the happening of such collision.

Judge BENEDICT, in *The Pride of the Ocean*, cited in support of his decision the case of *The Aline*, 1 W. Rob. 111, decided by Dr. LUSHINGTON in December, 1839, where it was held that, in a case of damage by collision, the lien for the damage was, in the event of a deficiency of proceeds, paramount to the claim of a mortgagee or bondholder accruing prior to the collision. Dr. LUSHINGTON was of opinion that the mortgagee and the bottomry bondholder could not take any right greater than the owner of the vessel could confer, namely, a lien on her as security against the owner and all who claimed under him. He said that, if the vessel was not first liable for the damage by the collision, the person injured might be wholly without a remedy, and added:

"Another reason that would incline the preponderance in favor of the person suffering the damage arises from the consideration that he has no option, no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks, and advance his money or not, as he may think most advisable for his own interest. He has an alternative; the suitor in a cause of damage has none."

In *The Pride of the Ocean*, Judge BENEDICT remarked that it was not possible to say that the prior lender on bottomry had derived any benefit from a subsequent collision, and that "the value of the lender's security cannot be enhanced by a subsequent collision, nor could such a collision in any way tend to preserve the lender's security for him, but the contrary;" and he stated that he rested his decision on the ground "that a lender of money upon bottomry is a voluntary creditor, who, for the advantage to be derived therefrom, and with knowledge of the risks attending the voyage, deliberately enters into a contract with the ship, and, moreover, is permitted to obtain compensation for the risk assumed by exacting a maritime premium, while the relation to the ship of him whose demand arises out of a collision is involuntary. It is created by circumstances over which the creditor in damage has no control, and he can receive no compensation for the risk."

In his opinion in the case at bar Judge BENEDICT says that the question involved is not the same as that decided by him in the case of *The Samuel J. Christian*, 16 Fed. Rep. 796, in April, 1883; that in that case the controversy was between two claims arising *ex contractu*, (a breach of a contract to tow being the sole foundation of the libel,) on the view that the libellant waived any tort, and relied upon a breach of the contract, the damage being claimed for the act of the tug in dragging the tow against a pier; and he states that the decision was, not only that wages, but the claim of a material-man for prior necessary repairs to the vessel, were entitled to priority in payment over a demand based upon a subsequent contract which had no relation to any necessity of the ship, and in no way tended to increase her value, and which had been voluntarily entered into by the creditor.

In his opinion in the case at bar Judge BENEDICT also refers to the fact that the precise question involved had been decided in one way by Judge NIXON, in the district court for the district of New Jersey, in the case of *The M. Vandercook*, 24 Fed. Rep. 472; and in the opposite way by Judge BROWN, in the district court for the southern district of New York, in the case of *The Amos D. Carver*, 35 Fed. Rep. 665. This difference of opinion between the judges of two of the district courts in this circuit, on the same question, makes it important for this court to establish a rule which shall be one of uniformity in the district courts in this circuit upon that question.

In the case of *The M. Vandercook*, in June, 1885, a libel against a tug which was towing the libellant's boat under a contract of towage alleged negligence in the tug which caused damage to the tow by her striking a pier. Judge NIXON held that the damages arose *ex delicto*; that the libel was not for damages sustained by reason of a breach of the towage contract; and that it was the settled doctrine of the American, as well as of the English, admiralty, that the claim *ex delicto* should be paid in preference to a claim for prior repairs and supplies.

In the case of *The Amos D. Carver*, in June, 1888, Judge BROWN held that a lien on a vessel for seamen's wages, and a lien for necessary repairs and supplies, outranked a subsequent lien arising from a negligent col-

lision. Judge BROWN was of opinion that a prior contract lien could not be superseded through a subsequent tort of the vessel, to which the prior lienor was in no way privy, and which afforded him no benefit; and that, the prior lienor not being a party to the navigation of the vessel, and in no way responsible for the tort, his priority of right should be upheld. Judge BROWN states his views as follows:

"The liens created or recognized by the law upon the contracts of the ship with seamen, freighters, supply-men, or lenders on bottomry, are designed for the security of the parties concerned, and are deemed necessary for the conveniences of commerce, and in the exigencies of navigation. Such claims, moreover, are mostly incapable of being conveniently secured in any other way than by a lien on the ship, and are therefore, as a rule, equitably entitled to a superior privilege. Damage liens, on the other hand, whether for injuries to cargo or to vessels, by collision, by stranding, or by other negligent navigation, belong to the perils of the seas, and are, for the most part, otherwise secured by the universal practice of marine insurance. If this security is neglected, it is by the choice or fault of the owner. The same need of security upon the ship, as respects such perils, does not exist; and hence they have everywhere been ranked by the maritime law below contract liens for wages, bottomry, and supplies. The controversy in the great majority of cases is practically with the insurer, (as it is mainly in this case,) who, having in the first instance paid the loss, in effect, out of the fund created by the premiums advanced by all ships insured, seeks to recover indemnity from the offending ship. The insurer does, indeed, have the benefit of the injured party's lien. But to subordinate prior lienors for wages, bottomry, and supplies to the collision lien, would be practically, and in effect, to treat those lienors as co-proprietors *pro tanto* in the offending ship, and responsible for its navigation; or as reinsurers *pro tanto* of the underwriters upon the vessel and cargo injured,—a relation as far as possible removed from the equitable relation of the parties. If the lienors may insure, so may the owners of the injured ship and cargo, as they usually do. They stand equal in this respect, and the superior equitable right of the prior contract lienors stands unaffected."

Referring to the cases thus decided by Judge NIXON and Judge BROWN, Judge BENEDICT, in his opinion in the case at bar, says:

"In this conflict of opinion, I incline to follow the analogy of the case of *The Pride of the Ocean*, above alluded to, and give the subsequent collision claim priority over the prior claims of the material-men. As between such creditors, when one or the other must lose his debt, it seems to me more equitable that the loss should fall upon the material-man, who voluntarily, and for a consideration, agreed with the ship-owner to give delay in payment, in order that the ship-owner, by the use of his vessel, might earn profits wherewith to pay the material-man. The material-man, for a consideration in the price he charged, voluntarily assumed the risk of a total loss of his security by the sinking of the ship he repaired in a collision. Why, in fairness, should not the creation of a lien upon the ship he repaired, arising from a collision, be held to be included in his risk? Why may not a material-man, who gives time, be fairly held to become a party to the employment of the vessel in the course of which the accident occurred, since he has a beneficial interest in that employment? I find nothing inconsistent with such a view in the case of *The Frank G. Fowler*, 17 Fed. Rep. 653. No doubt the maritime law gives a lien in order that the ship may gain time, but the policy of the law is to make the time of credit as short as possible; and it seems to me that a rule which, in effect, tends to extend the duration of liens of material-men, and

to increase the amount of liens upon the ship, because, under the rule, they serve to lighten, and sometimes, as in the present case, destroy, all liability for collision, is a rule of doubtful expediency, and may be rejected as contrary to public policy. Upon these grounds, following the analogy of my decision in the case of *The Pride of the Ocean*, I have determined to direct that the claim of Loud be paid out of the proceeds in court, prior to the demands of the material-men."

The case of *The Frank G. Fowler*, 21 Blatchf. 410, 17 Fed. Rep. 653, decided by me in July, 1883, in the circuit court for the southern district of New York, does not cover the question here involved. In that case there were two collisions, at intervals of time, caused by the negligence of the same tug in the course of the execution of contracts of towage. Each claimant for damages arrested the tug at the same time, and, there being no laches, or waiver or abandonment, the court held that the elder lienor was entitled to priority in payment over the younger lienor. The view of the court was that each claim was to be considered as one sounding in damages for a tort; that the second tort or collision could have no effect in reference to a party injured by the prior tort or collision, to benefit the vessel or add to her value or preserve her; that there was nothing in the mere fact of the second tort to extinguish the lien arising out of the first tort; and that, when both torts were of the same character, each arising out of negligence on the part of the tug in fulfilling a contract of towage, and each claimant arrested the vessel at the same time to respond, there was no principle of the maritime law, and no interest of commerce or navigation, which required that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor.

The rule in England is thus laid down in Abb. Shipp. (11th Ed.) 621:

"The maritime lien of damage, originating in the wrong of the master and crew of the vessel in fault, and founded on considerations of public policy for the prevention of careless navigation, takes precedence, within the limits which the law assigns to the indemnification of the injured party, even though anterior in date, of liens *ex contractu*. It absorbs, in the event of the *res* proving insufficient to meet all demands, the liens of wages, towage, pilotage, and bottomry, leaving them to be enforced by proceedings against the persons of the owners. Were it otherwise, the owners to whom the damage is imputed would be indemnified at the expense of the injured party; the wrong-doer at the cost of him to whom the wrong has been done."

As authority, the author cites *The Benares*, 7 Supp. Notes Cas. Adm. & Ecc. 50, 54, decided by Dr. LUSHINGTON in May, 1850, and *The Linda Flor*, Swab. 309, decided by the same judge in December, 1857, and reported also in 6 Wkly. Rep. 197. In *The Elin*, L. R. 8 Prob. Div. 39, decided by Sir ROBERT PHILLIMORE, in August, 1882, he held that the maritime lien arising out of damage done by a foreign vessel, in a collision for which she is to blame, takes precedence of the maritime lien of the seamen on board such vessel at the time of collision for wages earned by them subsequently to the collision; and stated that it was admitted that the claim for damage took precedence over the claim of the

crew as regarded wages earned before the collision. He cited with approval the case of *The Chimera*, decided by himself in November, 1852, (Shipping and Mercantile Gazette of November 27, 1852;) *The Linda Flor*; and the case of *The Duna*, decided in the Irish Admiralty Court, in October, 1861, (1 Mar. Law Cas. 159, and 5 Law T. N. S. 217.) In the court of appeal, in May, 1883, in *The Elin*, L. R. 8 Prob. Div. 129, before BRETT, Master of the Rolls, and Lords Justices COTTON and BOWEN, the decision of Sir ROBERT PHILLIMORE in the same case was affirmed. That court approved the decisions in *The Benares*, *The Chimera*, *The Linda Flor*, and *The Duna*. BRETT, M. R., stated that it would be unjust to the owner of the injured ship to allow the fund against which the lien for damage had priority to be diminished by a payment of wages. COTTON, L. J., said that it was a just principle that the owner who had caused the damage should not be at liberty to withdraw any part of the fund arising from the value of his ship and freight out of the reach of the claimant for damages.

In *Macl. Shipp.* (2d Ed.) 653, it is said that liens in damage causes "rank against ship and freight, in derogation of any rights of ownership or rights by mortgage or beneficial lien existing at the time of the collision;" and that "they acquire thereby priority over mortgages, prior bottomry, wages, pilotage, towage, and salvage;" referring to *The Benares*, (above cited.)

In *Norwich Co. v. Wright*, 13 Wall. 104, 122, the supreme court, speaking by Mr. Justice BRADLEY, said: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc."

The reasons assigned by Judge BENEDICT in the present case, for coming to the conclusion at which he arrived, seem to me to be more sound than the opposite views, and a decree must be entered to the same effect as that made by the district court, awarding priority to the libelants in respect of their claim for damages.

NUSSBAUM *et al.* v. NORTHERN INS. CO. *et al.*

(Circuit Court, S. D. Georgia, W. D. November 5, 1889.)

FEDERAL COURTS—FOLLOWING STATE PRACTICE.

The federal court will allow plaintiff, before verdict, in an action removed from a state court in Georgia, to discontinue his suit as to part of the amount sued on, which he could do before removal under Code Ga. § 8479, authorizing amendments at any stage of the cause as matter of right.

At Law. Suit on insurance policies, and motion to discontinue as to part of the sum sued for.

Hill & Harris and *Bacon & Rutherford*, for plaintiffs.

R. F. Lyon and *D. P. Guerry*, for defendants.

SPEER, J. In this cause several cases have been tried under a consent order directing that they be tried together, but that each case shall preserve its integrity as such, and that the parties shall have the privilege of insisting upon any and all legal rights which might have obtained had the cases been tried separately. Before verdicts were taken on each declaration, also provided for by the order, the plaintiff offered in open court formally to discontinue his suit upon one of the policies to the amount of some \$700. This motion was resisted upon the ground that it would deprive the defendants of their right to have the case reviewed by the supreme court of the United States. These causes were all removed from the state court; and it would seem clear that under the practice act the rule in the state courts must control the decision of the question. The Code of Georgia (section 3479) provides:

"All parties, whether plaintiffs or defendants, in the superior or other courts, (except the supreme court,) whether at law or in equity, may at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by."

It appears, therefore, that the court has no discretion in the premises. The plaintiff may, at any time before verdict is taken, dismiss or discontinue his case, in whole or in part, and the court has no control of the matter. After verdict it is otherwise. It is then a matter in the legal discretion of the court. *Opelika City v. Daniel*, 109 U. S. 108, 3 Sup. Ct. Rep. 70; *Thompson v. Butler*, 95 U. S. 694. In the case of *Insurance Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. Rep. 120, this question depended on a statute of the state of Texas which authorized the plaintiff to remit a part of the verdict or judgment. The supreme court sustained the exercise of discretion of the circuit court, whereby the plaintiff was permitted, on motion in open court, to remit a part of the verdict and judgment rendered in his favor. In the *Telegraph Cable Case*, 128 U. S. 394, 9 Sup. Ct. Rep. 112, the same question was involved, and was decided the same way. In the case of *Bank v. Redick*, 110 U. S. 224, 3 Sup. Ct. Rep. 640, the circuit court, after verdict, permitted the plaintiff to remit all of the verdict in excess of \$5,000;

and the supreme court, Chief Justice WAITE delivering the opinion, affirmed the judgment of the circuit court, and dismissed the writ of error. In all these cases there could have been no other motive save that of avoiding the writ of error, and the delay and expense of the years of pendency of the litigation upon the overcrowded dockets of the supreme court of the United States, which has thus sanctioned the practice. Of course, the presumption is that these cases of the several plaintiffs were meritorious, and that the discretion of the court was not abused. In this state, however, before the verdict, where there is no set-off or cross-claim it is a matter entirely in the control of the plaintiff. If he chooses to surrender a portion of his demand, by a formal amendment, to obtain a legal advantage, it is competent for him to do so. It would seem, therefore, that the plaintiff is under no legal or moral obligation to further the efforts of his adversary, which might result in the hindrance and delay of payment, and of the settlement of the litigation. If, however, it were a matter simply for the discretion of the court, under all the circumstances which have surrounded the motion, which need not be further adverted to at this time, the discretion would be exercised in behalf of the motion. But the leave to make the amendment is granted, upon the application of the plaintiff, as a matter of right under the Georgia statutes.

MCCABE v. MATHEWS.¹

(Circuit Court, N. D. Florida. April 15, 1889.)

1. SPECIFIC PERFORMANCE—LACHES.

The unexplained delay, for eight years, in enforcing an agreement for a deed, which by its terms was to be performed within three months, constitutes such laches as will prevent a decree for specific performance.

2. SAME—PLEADING—DEMURRER.

The delay appearing on the face of the bill, advantage may be taken by demurrer.

In Equity. Bill for specific performance of contract for sale of land. On demurrers to bill.

H. Bisbee & Son, for defendant.

TOULMIN, J., (orally.) It is well settled that, where there is great unexplained delay on the part of any of the parties to an agreement, it will constitute an abandonment of the same, and will amount to such laches as will bar a court of equity from decreeing specific performance. In other words, courts of equity will not aid in enforcing stale demands where the party has been guilty of negligence, and has slept upon his rights. The contract, the specific performance of which is here sought, was made on the 10th of February, 1880, and the contract, by its terms,

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

was to be performed within three months from its date. Yet the complainant slept upon his rights until in February, 1888, when, as the bill alleges, he came to Florida to assert and maintain them. Eight years elapsed from the making of the contract before he asserted and endeavored to maintain his rights under it; and nine years elapsed before his bill for specific performance was filed. His unexplained delay amounts to laches. *Pratt v. Carroll*, 8 Cranch, 471; *Fry*, Spec. Perf. § 715; *Holt v. Rogers*, 8 Pet. 420. The unreasonable delay appearing from the allegations of the bill, and no valid legal excuse or sufficient explanation being shown, my opinion is that there is no equity in the bill, and that the demurrer to it should be sustained; and it is so ordered.

CASE MANUF'G CO. v. SMITH *et al.*

(Circuit Court, M. D. Tennessee. April, 1889.)

1. MECHANICS' LIENS—ENFORCEMENT—PARTIES.

Holders of a vendor's lien and a mortgage on certain premises are not necessary or indispensable parties to a suit to enforce a mechanic's lien against property on the premises, where complainant does not seek priority over such liens, as they cannot be prejudiced by the suit.

2. SAME—WAIVER.

Retention by a seller of title to machinery placed on land until the price is paid, with a reservation of the right, in case of default in payment, to take possession of and remove such machinery without process, is not a waiver of the lien given by Code Tenn. § 2739, on any lot of ground for the price of machinery furnished or erected thereon.

In Equity. On demurrer to bill.

C. R. Head and Morris & Anderson, for complainant.

Vertrees & Vertrees, for defendants.

JACKSON, J. The bill in this case seeks to have declared and enforced a mechanic's lien on and against certain mill property in Gallatin, Tenn., for the purpose of compelling payment for certain mill machinery and improvements made and placed upon said property by complainant under special contract with the defendants, or the owners thereof. After setting out the contract under which the machinery was furnished and the improvements made, the bill states that complainant retained the title to the machinery until the same was fully paid for, and reserved the right, in the event defendants made default in payment, to take possession of and remove the same without legal process. It was further stated that certain parties had a vendor's lien on the property or mill lot to secure the balance of purchase money due thereon, and that another party held a mortgage upon the premises. The persons holding said vendor's lien and mortgage are not made parties to the suit. The defendants demur to the bill, alleging, as grounds of demurrer, that complainant has a plain, adequate, and complete remedy at law; that any mechanic's lien

which it might have had upon the described premises was waived by retaining the title to the machinery furnished; and that the persons having and holding the express vendor's lien upon the property, together with the holder of the mortgage thereon, were necessary parties to the suit.

It is not alleged in the bill that complainant gave any notice to the holders of the vendor's lien and mortgage, as provided by law, (sections 2742, 2743, Mill. & V. Code,) so as to assert any priority of right over said liens, nor does the bill claim any lien or right prior to said vendor's and mortgagee's liens. The holders of these liens might have been made parties to the suit. They would not have been improper parties, but they are not necessary or indispensable parties. Whatever rights complainant may be able to assert and enforce against the particular premises will be in subordination to their liens. Complainant, under the present form and scope of its bill, can only subject the interests which defendants have in and to the property, without prejudice to the rights of those holding the vendor's and mortgagee's liens.

The last ground of demurrer cannot, therefore, be sustained. The relief sought by complainant does not involve the rights of the absent lien claimants.

The material question raised by the first and second grounds of the demurrer is this: Did the retention of title to the machinery until the same was fully paid for, with the right reserved, in case of default in making payment on the part of defendants, to take possession and remove said machinery without legal process, operate as a waiver of the statutory lien given in such cases? The statutory lien is given upon any lot of ground or tract of land upon which a house has been constructed, or fixtures or machinery have been furnished or erected, or improvements made by special contract with the owners of the premises, in favor of the mechanic, undertaker, founder, or machinist who does the work or furnishes the material, or puts thereon fixtures, machinery, or material of either wood or metal. Code Tenn. § 2739. The case made by the bill comes within the letter of the statute, and clearly confers upon complainant a lien upon the premises, so far as defendants' right, title, and interest therein is concerned, which may be enforced in a court of equity, if the retention of title to the machinery until paid for does not have the effect and operation of waiving such statutory lien. The retention of title till payment was made for the machinery was in no way inconsistent with the statutory lien given upon the lot of ground or tract of land. The purpose of the stipulation was to secure the payment of the purchase money to be paid for the machinery. The retention of title was in the nature of a specific lien upon the identical machinery furnished. It was not inconsistent with the lien given by the statute upon the premises on which the machinery was placed or erected. Nor does it, as a matter of law, show any intention of waiving the latter lien. Retaining title as a means of securing payment on the part of defendants did not impose upon complainant any duty or obligation to assert such title by resuming possession of the machinery. Complainant could still look to de-

defendants personally for the payment of the purchase price of the machinery, and to any and all other remedies conferred by law to enforce its payment. Instead of being inconsistent, it was merely additional security to that provided by the statute. It certainly does not establish, as matter of law, that in thus retaining title to the machinery complainant has waived its statutory lien upon the lot of ground or premises on which the machinery was placed. In *Railroad Co. v. Rolling-Mill Co.*, 109 U. S. 719, 720, 3 Sup. Ct. Rep. 594, it was held, where the contract of sale stipulated and provided for an express lien upon the rails furnished, that there was no waiver of the statutory lien given under and by the laws of Illinois, which contain substantially the same provisions upon the subject of mechanics' liens as the Tennessee statute. But, without looking to outside authorities, the Tennessee decisions do not, as we think, support the proposition contended for by the demurrants. It is clearly intimated, if not settled, by the cases of *Anthony v. Smith*, 9 Humph. 508, and *Fogg v. Rogers*, 2 Cold. 290, that this doctrine of waiver by taking security does not apply where the vendor retains the legal title, or, what is the same thing in effect, expressly reserves or creates an express lien on the property sold. The bill in the present case having been filed within the time prescribed by the statute, and the averments thereof not disclosing any waiver, as matter of law, of the statutory lien given complainant, we think the first and second grounds of demurrer are not well taken, and should be disallowed.

It is accordingly ordered and adjudged that defendants' said demurrer to the same is hereby overruled and disallowed, at defendants' costs, and defendants are allowed 30 days within which to answer the bill.

SHEPARD *et al.* v. NORTHWESTERN LIFE INS. CO. *et al.*

(Circuit Court, E. D. Michigan. September 2, 1889.)

1. INDIAN TREATIES—TIME OF TAKING EFFECT.

Where an Indian treaty provided that it should be obligatory as soon as the same should be ratified by the president and senate, *held*, that it did not take effect until signed by the president, although it had been previously ratified by the senate, and accepted by the Indians.

2. PUBLIC LANDS—RAILROAD GRANTS—WHEN OPERATIVE.

While the act of June 3, 1856, granting certain public lands to the state of Michigan for railroad purposes, was intended as a present grant of the lands included in its terms, no further conveyance by the government being contemplated, yet the grant did not become operative or divest the title of the United States to any particular lands until they had been earned by the building of a certain number of miles of road, and selected by the railroad company. Such act, however, did not attach to lands which, at the date of the act, had been reserved to the United States.

3. SAME—TITLE OF INDIANS.

Where the title of the Indians and their right of occupation of certain lands had been fully extinguished, it was *held* that they passed under this act, notwithstanding that they were held by the United States in trust to sell them for the benefit of the Indians.

4. SAME.

But, even if these lands did not pass under the act, it was held that the defendant, who had taken possession and claimed title under the same act, was estopped to set up this fact. The doctrine of common source is applicable.

5. SAME—RAILROAD GRANTS—FORFEITURE.

Defendants in this case claimed title under a deed from the Amboy, Lansing & Traverse Bay Railroad Company, the original grantee of the land under the act of congress. Plaintiff claimed under a deed from the Jackson, Lansing & Saginaw, which had succeeded to the rights of the Amboy Company upon its failure to perform the conditions of the grant. *Held*, (1) that the Amboy Company had never earned the lands in question, and that its deed to defendants was inoperative to pass the title; (2) that congress, by an act of July 3, 1866, had elected to forfeit the right of the Amboy Company to the lands then unearned, upon its failure to perform certain conditions, and, upon such failure, had authorized the state legislature to confer the grant upon some other corporation; (3) that the Amboy Company failed to perform such conditions, and the legislature thereupon conferred its grant upon the Jackson Company, under an arrangement to that effect between the two companies; (4) that, even if no forfeiture was intended, the acts of the legislature and of the two companies operated as a surrender by the Amboy Company of its rights, and the investiture of such rights in the Jackson Company; (5) that the Jackson Company was not the mere assignee of the Amboy Company, and did not take the unearned lands subject to its conveyances; and hence that patents of these lands, subsequently issued to such company, did not inure to the benefit of the grantees of the Amboy Company.

(Syllabus by the Court.)

At Law.

This was an action of ejectment to recover the S. W. $\frac{1}{4}$ of section 9, township 14 N., range 5 E. At the time the suit was begun, the land was in the possession of the defendant Clark, under a lease from his co-defendant, the Northwestern Life Insurance Company.

Plaintiffs claimed title under an act of congress approved June 3, 1856, granting certain public lands to the state of Michigan to aid in the construction of certain railroads. 11 St. at Large, 21. These lands were subsequently patented to the Jackson, Lansing & Saginaw Railroad Company, (which, for convenience, will be called the "Jackson Company,") as successors of the Amboy, Lansing & Traverse Bay Railroad Company, (which will be called the "Amboy Company,") and passed by deed of the prior company to plaintiffs, May 5, 1869.

Defendant claimed under the same act, and under a deed from the Amboy Company to Maxwell, Campbell, and Van Etten, dated November 28, 1855; a deed from Campbell and Van Etten to Maxwell, dated August 5, 1868; and subsequent conveyances to the Northwestern Life Insurance Company, the main defendant in this case.

Upon the trial of this case at the October term, at Bay City, a jury was impaneled to try the only question of fact involved, viz., whether defendants had been in the undisputed possession of the property for 15 years prior to the commencement of the suit. To this question the jury responded in the negative. The case was thereupon, by consent of counsel, taken from the jury, and submitted to the court, to be tried as a question of law upon the undisputed testimony.

The facts of the case are substantially as follows: By a treaty with the Chippewa Indians, signed September 24, 1819; (7 St. at Large, 203,) there were "reserved for the use of" these Indians 40,000 acres of land out of a large quantity ceded to the United States, and it was admitted that the land in question lay within this reservation. This tract, which by the treaty was "to be hereafter located" on the west side of the Saginaw river, was actually located and surveyed in the following year. By

a subsequent treaty, made in 1837, (7 St. at Large, 528,) this tract was ceded to the United States; the latter agreeing to pay the Indians, in consideration of such cession, "the net proceeds of the sales thereof, after deducting the expense of survey and sale, together with the incidental expenses of this treaty." By a subsequent treaty, negotiated August 2, 1855, but not signed by the president until June 21, 1856, (11 St. at Large, 631,) the Chippewas ceded to the United States absolutely "all the lands within the state of Michigan heretofore owned by them as reservations, and whether held for them in trust by the United States or otherwise;" releasing and discharging the United States "from all liability to them" "for the price and value of all such lands heretofore sold, and the proceeds of which remain unpaid."

By an act of congress approved June 3, 1856, (11 St. at Large, 21,) after the treaty and its amendments had been accepted by the Indians, but before it had been signed by the president, certain lands were granted to the state of Michigan to aid in the construction of certain railroads from and to certain points therein specified, and, among others, from Amboy, by Hillsdale and Lansing, to some point on or near Traverse bay. The grant covered "every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption has attached to the same," it was provided other lands should be selected nearest to the tiers of sections above specified as should be equal to such as had been sold or appropriated: provided, "that the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; and provided, further, that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operations of this act," etc. The third section declared that "the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other;" and the fourth, that "the lands hereby granted to said state shall be disposed of by said state only in the manner following, i. e., that a quantity of land, not exceeding 120 sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said state shall certify to the secretary of the interior that any 20 continuous miles of any said road is completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads having 20 continuous miles completed, as aforesaid, and included within a continuous length of 20 miles of each of said roads, may be sold; and so, from time to time, until said roads are completed; and, if any of said roads are not completed within ten years, no further

sales shall be made, and the lands unsold shall revert to the United States."

On the 14th of February, 1857, the legislature passed an act which, referring to the grant by congress, declared that so much of the lands, franchises, rights, powers, and privileges as were, or may be, granted and conferred in pursuance thereof, to aid in the construction of a railroad from Amboy, by way of Lansing, to some point on or near Traverse bay, "are hereby disposed of, granted to, conferred upon, and vested in the Amboy, Lansing & Traverse Bay Company." The act provided for the formal acceptance of the grant by the company, and that it should be the duty of the company, on or before the 1st day of December then next, to locate the line of its railroad, and make complete maps of the line, and to file copies in the office of the governor and secretary of state, and the governor was required to transmit a duplicate to the land-office at Washington.

The seventh section of the act provided that the company, after the completion of 20 continuous miles of its road, and after the governor should have certified to the secretary of the interior that such 20 continuous miles of its road were completed, then, and not before, might sell 60 sections of land included within any continuous 20 miles of the line of its road; and in like manner, upon the completion of each other 20 continuous miles, it might sell other 60 sections; and so on, from time to time, until the whole of its road was completed. The company was required to complete the road between Hillsdale and the point of intersection with the Detroit & Milwaukee Railroad on or before the 1st of November, 1859, and at least 20 continuous miles of the road every year thereafter, until the entire road was completed; the whole to be finished by the 1st day of November, 1865. The company made acceptance in writing, November 3, 1857. It also prepared maps, located its road, and proceeded to construct a portion thereof. By the maps and location of the road, a large quantity of lands was brought within the provisions of the grant. The lands in question are located less than six miles from the line of road. The commissioner of the general land-office, at Washington, withdrew from sale large tracts of land in Michigan, covering the lands in question, by an order dated June 13, 1856; and afterwards, from time to time, made lists of the lands which were conceived to be subject to the grant, and which were approved by the secretary of the interior. These lists were filed in the land-office at Lansing. The Amboy Company commenced the construction of its road from Owosso in the direction of Lansing, and constructed in all, from first to last, some 27 miles of road, extending from Owosso to Michigan avenue, in the city of Lansing, but never constructed any part of its road north of Owosso. By an act of the legislature of February 14, 1859, the quantity of land that might be sold on the completion of 20 continuous miles of road was increased to 120 sections. On December 20, 1860, the governor certified to the completion of 20 miles of road. By an act of 1861 (Sess. Laws, p. 150) it was provided that the company should not be entitled to the second 120 sections until it should

have constructed the road, and opened it for use, from Owosso to Michigan avenue, in Lansing. On the 19th day of March, 1863, another act was passed, waiving all forfeitures, but requiring the company, within six months from the passage thereof, to finish and open their road for use to Michigan avenue, in the city of Lansing, and also, by the 1st day of June then next, to commence work in good faith on the road from Owosso to Saginaw city, and by the 1st day of January, 1865, to complete that portion thereof. There was a further proviso that the company should not "be entitled to that portion of the second 120 sections of land, not already conveyed by them," until the road should be completed and opened for use to Michigan avenue, in the city of Lansing. On the 17th of September, 1863, the governor certified to the secretary of the interior that the road was constructed and opened for use to Michigan avenue, in the city of Lansing, stating therein that he did so "in order that it may appear that the said railway company now has title to the second 120 sections of lands so granted by said act of congress and referred to in said act of the legislature of the state of Michigan, approved March 19, 1863."

Under the operation of these two certificates, the Amboy Company became entitled to 240 sections. The company prepared lists of the land to which it was thus entitled, and submitted them to the board of control of railroads, and they were approved by that board, and filed in the land-office at Lansing. These lists bear date September 3 and 4, 1861, and were executed by the officers of the railroad company, declaring the purpose and intention of the company to take these descriptions of land for and on account of the lands to which they were entitled. The Amboy Company also proceeded to sell the lands described in the lists by three deeds:

(1) A deed from the Amboy Company to Henry Day, dated November 9, 1861, covering 87,693.13 acres.

(2) A trust-deed or mortgage to Chapman and Williams, dated November 9, 1861, covering 65,275.74 acres, to secure a large amount of bonds.

(3) A deed to Halmer H. Emmons of about 80 acres, dated November 12, 1861.

Neither of the lists or deeds above mentioned embraced the lands in question in this suit, but they more than exhausted the total number of acres contained in the 240 sections to which the road was entitled.

By an act of the legislature of March 18, 1865, it was provided that it should be lawful for the Jackson Company, or any other company, to enter into an arrangement with the Amboy Company, for the location of its line of road from Lansing, by way of Owosso, to Saginaw, upon the line of the said Amboy road, and for the construction of the same on such line; and, in case of such agreement and location, then, upon the filing in the office of the secretary of state of a copy of the agreement between the companies, duly certified, said Jackson or other company should become entitled to receive, take, hold, sell, and dispose of the lands granted by congress to aid in the construction of said line of road,

as the said Amboy Company might have done under existing laws if such road from Owosso to Saginaw had been constructed by it; and the right of said Amboy road to such lands, so far as the portion of its road from Owosso to Saginaw is concerned, should cease upon the filing of said copy of agreement in the office of the secretary of state. Under the second section, full authority was conferred upon the Jackson Company to purchase, at private, public, or judicial sale, the railroad and property of the Amboy Company. On the 28th November, 1865, the Amboy Company executed a deed to Maxwell, Campbell, and Van Etten purporting to convey a considerable quantity of lands, embracing the description in question in this suit. The deed recited the legislation already referred to, including that of 1863; the construction of the road from Owosso to Lansing; the giving of the two certificates by the governor; the fact that the lands therein described were a portion of those included in the grant aforesaid, and selected between said township 6 N. and said township 18 N. The quantity covered by this conveyance was about 7,000 acres, equivalent to about 11 sections.

The next item of interest is an act of congress of July 3, 1866, (14 St. at Large, 78,) which extended the time seven years for the Amboy Company to complete its road, and again authorized the legislature to confer the grant on some other than the Amboy Company, unless—

(1) It clear, grub, and grade 20 miles of road-bed between Owosso and Saginaw by the 1st day of February, 1867; and

(2) Fully complete said 20 miles by the 1st day of November, 1867; and

(3) Fully completes 20 miles a year thereafter, and fully completes the entire road by the time limited in the act. In October, 1866, an agreement was entered into between the Amboy Company and the Jackson Company by which it was agreed on both sides that the beneficial interest in the land grant was transferred to the Jackson Company. By this agreement the Jackson road was to locate its line from Lansing, by the way of Owosso, to Bangor, upon the line of the Amboy road, and was to construct its road thereon, and to complete it, in the time and manner prescribed by the act of 1866; in consideration of which, the Amboy road bargained and sold to the Jackson road all its right, title, and interest to its line north of Owosso, together with all its interest in and to so much of the land grant as pertained to that part of the Amboy road lying north of Owosso, and in and to all lands which were applicable to aid in the construction of such line north of Owosso, "or which may be in any way acquired, taken, or sold on the completion of said road; it being understood and agreed that the Jackson Company shall take possession of the line, and construct its road thereon, and take and hold and dispose of the land grant in the same manner, in like quantity, and on the same terms and conditions as if the grant had been expressly conferred on it by said acts." On January 4, 1866, the Jackson Company had acquired the road of the Amboy Company from Lansing to Owosso by a deed executed upon foreclosure of the mortgage to Chapman and Williams. In 1867 the legislature passed an act confirm-

ing the right of the Jackson Company, and vesting it with the land grant. The Jackson Company proceeded with the construction of the railroad from Owosso north, obtained the governor's certificates of completion, and afterwards selected the lands to which it became entitled, amongst others the lands in question, and received a patent therefor from the United States, dated May 4, 1869, and afterwards conveyed the lands in question to the plaintiff in consideration of the sum of \$1,600.

H. H. Hatch and Theodore F. Shepard, for plaintiffs.

John D. Conely and A. C. Maxwell, for defendants.

BROWN, J. This is one of many cases which have arisen out of the loose methods adopted by congress and the state legislatures in identifying and dealing with lands granted in aid of construction of railways. The cumbersomeness of executing patents for the large tracts of land involved in these grants has led to the practice of patenting by legislative act, leaving the lands to be selected and identified in each case by the patentee.

THE INDIAN TITLE.

The first question in order of time, in this case, relates to the supposed want of power in the United States to make the grant of these lands under the act of June 3, 1856. It is claimed by the defendant, in this connection, that these lands, having been reserved to the Indians by treaty, were not in a condition to be granted by the United States at the time the act was passed, inasmuch as the treaty of August 2, 1855, ceding them unconditionally to the United States, was not signed until June 21, 1856, 18 days after the act was passed. It seems that on April 15, 1856, the senate ratified this treaty, with certain amendments, which were accepted by the Indians May 14, 1856, but the treaty was not finally ratified and signed by the president until June 21, 1856. Plaintiffs' theory is that the treaty took effect from the time the amendments thereto were accepted by the Indians, May 14, 1856, and that the president's act in ratifying and signing it related back to that time. But by article 4 of the treaty it was absolutely provided that "it should be obligatory and binding upon the contracting parties as soon as the same shall be ratified by the president and senate of the United States." As it was never ratified by the president until June 21, 1856, it is clear that it did not take effect until that day. Indeed, the constitution itself vests in the president the power to make treaties, by and with the advice and concurrence of the senate. As he is the treaty-making power, it is as clear that the treaty does not take effect until he signs it as that his appointees to office cannot enter upon the discharge of their duties until he has signed their commissions. His act in sending the treaty to the senate may have shown that it met his approval, but it evidently did not meet the approval of the senate, as it was returned by that body for amendment. The doctrine of relation has no application to a case of this kind, where a statute prescribes the time when the bargain shall take effect.

But we think the exact time when the treaty became operative is of no importance in this case, for the following reasons:

1. Conceding, what appears to be entirely settled, that the act of June 3, 1856, was a present grant of the lands included in its terms, devoted to a particular purpose, and that no further conveyance by the government was contemplated, (*Schulenberg v. Harriman*, 21 Wall. 44; *Wright v. Roseberry*, 121 U. S. 519, 7 Sup. Ct. Rep. 985; *Johnson v. Ballou*, 28 Mich. 378; *Railroad Co. v. Davison*, 32 N. W. Rep. 726,) it is held by the same authorities that the grant did not become operative, or divest the title of the United States to any particular lands, until they had been earned by the building of a certain number of miles of road, and selected by the railroad company. Indeed, the express language of the statute is that "in case it shall appear that the United States have, when the lines or routes of said road are definitely fixed, sold any section, or any part thereof, as aforesaid," other lands shall be selected in lieu thereof. It follows from this that if, after the passage of the act, and before the lines had been definitely fixed, the United States had sold any of the lands within the specified section, the road would be entitled to select other lands in their place. Upon the other hand, were it not for the clause to which attention is hereafter called, it would be equally true that if, within the same time, the title of the government to such lands had become perfected, the right of the road would attach to them as if the government had always held the title; in other words, that we should look solely at the state of the title when the right of selection attached, and not when the act was passed. This seems to have been the opinion of the supreme court in *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *Taborock v. Railroad Co.*, 13 Fed. Rep. 103.

But counsel for defendants claims, in this connection, that these lands did not pass by the act of 1856 by reason of the last proviso of the first section, that "any and all lands heretofore reserved to the United States by any act of congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act." If the lands in question had been reserved to the United States, within the meaning of this proviso, it would seem to follow that they were not the subject of location under this act.

This consideration renders it necessary to examine the prior treaties concerning the same land. By the treaty of January 14, 1837, (7 St. at Large, 528,) the Indians ceded to the United States certain lands, including this tract, in trust "to pay to the said Indians, in consideration of the lands above ceded, the net proceeds of the sale thereof, after deducting the expense of the survey and sale, together with the incidental expenses of this treaty. The lands shall be surveyed in the usual manner and offered for sale as other public lands, at the land-offices of the proper districts, as soon as practicable after the ratification of this treaty." The treaty further provided that a special account of the sales should be kept, and the balance invested, under the direction of the president,

"in some public stock," and the interest thereof should be annually paid to said tribe. By the second article there was reserved to the Indians "the right of living" upon certain tracts of these lands, but not including the tract in question, for a term of five years, "during which time no white man shall be allowed to settle on said tracts." By a second treaty, the same year, December 20, 1837, (7 St. at Large 547,) the United States were to reserve 50 cents per acre as an indemnification for the location to be furnished for the future permanent residence of the Indians, and to constitute a fund for emigrating thereto. This treaty was still further modified by the treaty of January 23, 1838, (7 St. at Large, 565,) by which a minimum price of \$5 per acre was put upon these lands for and during the term of two years from the commencement of the sale. "Should any portion of said lands remain unsold at the expiration of this time, the minimum price shall be diminished to two dollars and a half per acre, at which price they shall be subject to entry until the whole quantity is sold: provided that, if any part of said lands remain unsold at the expiration of five years from the date of the ratification of this treaty, such lands shall fall under the provisions of the third article of this treaty." Article 3: "To provide against a contingency of any of said lands remaining unsold, and to remove any objections to emigrating on the part of the Indians, based on such remainder, it is hereby agreed that every such section, fractional section, or other unsold remainder shall, at the expiration of five years from the ratification of this treaty, be sold for such sum as it will command: provided, that no such sale shall be made for less than 75 cents per acre." Part of the lands were sold under this treaty; but the lands in question, and a large quantity of other lands formerly within the reserve, were not sold within the period of five years, or at any other time, by the government. What, then, were the rights of these Indians when the act of 1856 was passed? They certainly did not possess the fee of these lands. That had long before passed under the treaty of 1819, which had merely reserved to the Chippewas the use of these lands. But if there be any doubt as to the proper construction of the treaty upon that point, it was removed by the treaty of 1837, which again ceded to the United States the tract in question. Nor did the Indians still possess the right to occupy them. Under the same treaty of 1837, this right was given to certain tracts, not including the one in question, and was limited to five years from the execution of the treaty. This right of occupation never extended to the land in question, and, as to those to which it did extend, it expired in 1842, fourteen years before the act of 1856 was passed. The only possible right which remained to the Indians then, was the right to call upon the United States for the net proceeds of these lands, at the minimum price stated in the treaties. It is true that a sale, and not a gift, was contemplated; but all the Indians could receive in any event was the net proceeds of such sale. This, however, was no restriction upon the right of the government to dispose of them in any other way, though it would be equitably bound to account for them as if they had been sold at the minimum price fixed by the treaties.

In short, the title of the Indians to these lands had been fully extinguished. We are not, then, embarrassed by the considerations which influenced the court in the case of *Railroad Co. v. U. S.*, 92 U. S. 733, in which it was held that a general grant of lands to a railroad would not be construed to embrace lands of which an Indian tribe had been granted by treaty the use and possession for an indefinite length of time. In this case, by a treaty negotiated in 1825, there was reserved to certain tribes a tract of land "so long as they may choose to occupy the same." In 1863, and while this treaty was still in force, congress granted certain lands to the state of Kansas to aid in the construction of certain railroads. The act contained a reservation similar in language to that contained in the act of 1856, and it was held that it did not apply to lands secured to the Indians under the treaty of 1825, notwithstanding that in 1865, two years after the grant had been made to the state, another treaty was negotiated, by which the lands were ceded absolutely to the United States, in trust to sell, and place the proceeds of sale to the credit of the Indians. The court took the ground that the perpetual right of occupancy negated the idea that congress intended to grant the Indian lands, either absolutely or *cum onere*. "For all practical purposes, they [the Indians] owned it; as the actual right of possession—the only thing they deemed of value—was secured to them by treaty until they should elect to surrender it to the United States." Three of the judges dissented. The case, however, is distinguishable from this in the important fact that the Indians retained the right of occupancy at the time the grant was made to the state,—a right which had been declared to be as sacred as the right of the United States to the fee. *Cherokee Nation v. Georgia*, 5 Pet. 48; *U. S. v. Cook*, 19 Wall. 591. It is unnecessary to decide whether, if the land had been held by a private person in trust for the Indians, to sell and invest the proceeds, a donation of the same lands to a railroad company would be valid; because, as it seems to us, a rule of this kind ought not to be applied to the government in dealing with the public lands. It was the policy of the government at that time to make grants of alternate sections of public lands to states for the construction of railways, doubling the price of the other sections, so that the government might, by thus opening the country traversed by these railways, realize as much from the sale of one-half the lands as it would have realized from the whole of them had no such grant been made. It seems to us that the right to dispose of these lands in this way ought not to be embarrassed by the fact that they were held under a trust to account to the Indians for their value, when no doubt existed as to the ability and willingness of the government to make such accounting, or to settle with the Indians in some manner satisfactory to them. That, in fact, had already been done in this case before the act had been passed, although the bargain was not fully consummated until a few days thereafter.

2. But, even if we concede that the United States had no right to donate such lands as it held in trust to sell for the benefit of the Indians, the fact remains that the road did locate these lands under the act of

1856; that such location has for over 30 years been acquiesced in, both by the Indians and the government; and that both parties to this suit claim title under this act. Under such circumstances, we do not think that the right of the Indians is, in the language of the supreme court in *Beecher v. Wetherby*, 95 U. S. 517, 525, "a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians." In this case, the government had granted one section in every township to the state of Wisconsin, upon her admission to the Union, for the use of schools, but subject to the right of occupancy of certain Indians. Plaintiff contended there had been a prior reservation of the land to the use of the Menominee tribe; but it was held that "the fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would only take the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States." It was held that the propriety or justice of their action towards the Indians, with respect to their lands, was a question of governmental policy only, and not one which could be put in issue between third parties, neither of whom derived title from the Indians. The real question in the case under consideration is whether a private person who makes no claim under this Indian title, but holds the land in pursuance of the same act under which the plaintiff also claims, may set up a right which has lain dormant for 30 years, and which no one having an interest therein has ever seen fit to assert. We are clear in our opinion that he cannot.

If the reservation in this case did not pass under the act of 1856, it remained the property of the United States, and the government was at liberty to treat it as its own, and to patent it to whomsoever it pleased. After the execution of that treaty of 1856, and after the last vestige of the rights of the Indians to these lands had become vested in the United States, it exercised this right by issuing the patent of May 4, 1869, to the Jackson Company. The defendant, by taking possession under the act of 1856, under which the plaintiff also claims, is estopped to show that the act did not apply to these lands. We regard the doctrine of common source of title as applicable to this case. Both parties to this suit claim title to these lands under the act of 1856, and neither is at liberty to deny that the act applied to the land in question. *Gaines v. New Orleans*, 6 Wall. 642, 715. As was said by the supreme court of Alabama in *Garrett v. Lyle*, 27 Ala. 590: "We do not deny that in equity, as well as at law, the plaintiff must recover on the strength of his own title; but, because this is the rule, it does not follow that he must show a good title against all the world. It is enough that he shows a right to recover against the defendants; and there are many cases in which he has this right, although another person must recover it from him."

THE TITLE OF THE AMBOY COMPANY.

Assuming the act of 1856 to have operated upon the lands in question, we will now proceed to examine the respective titles of the plain-

tiffs under their deed of 1869 from the Jackson Company, and that of the defendants under their deed from the Amboy Company to Maxwell, Campbell and Van Etten of November 26, 1865. Plaintiffs' position, in this connection, is that the Amboy Company never earned but 240 sections of these lands; that all which had been earned were in November, 1861, either deeded to Henry Day, of New York, or Halmer H. Emmons, of Detroit, or were mortgaged to Chapman and Williams, trustees; that four years after that, and after it had conveyed all the lands which it had earned, or had any right or power to convey, it made a deed of the lands in question to Maxwell, Campbell and Van Etten; and that no title passed to them thereby.

Defendants' position is that the Jackson Company was the mere assignee of the Amboy Company, and took the lands subject to any conveyance it may have made; and when the patent subsequently issued to the Jackson Company it inured to the benefit of Maxwell, Campbell, and Van Etten, and their grantees. This argument is more fully stated and answered in the opinion of the supreme court of this state in the case of *Railroad Co. v. Davison*, 32 N. W. Rep. 732, arising out of the same state of facts, in which it was held, in substance, that neither the state nor the railroad had any right to dispose of or incur any of the unearned lands, and no right, legal or equitable, could arise out of such disposition in violation of law. We should have accepted this decision as settling the law of this case, without misgivings as to its soundness, had our attention not been called to the opinion of the supreme court in *Railroad Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. Rep. 123, in which, upon a somewhat similar state of facts, it was held that there had never been any forfeiture of the grant, so far as the lands in dispute were concerned, and that the title of the purchaser stood precisely as it would if the original company had completed its road within the time fixed by the act.

There can be no doubt that, so far as the decision of the state supreme court covers the construction of the state statute, it is binding upon this court, though the supreme court of the United States might have given a different construction to a similar statute. To determine this, and also to determine how far, if at all, it conflicts with the *McGee Case*, it will be necessary to analyze it with some care, in order to learn the exact points decided. The case arose upon a bill filed by the Jackson Company to remove a mortgage given by Maxwell, the grantee of himself and his two associates, to one Davison, as a cloud upon the title of the road. The case was first reported in 32 N. W. Rep. 736. In delivering the opinion of the court, Mr. Justice CHAMPLIN held:

(1) That the language of the act of June, 1856, referring to the quantity of land which might be sold, was manifestly a limitation of the power of the state to convey.

(2) If the conveyances to Day, Chapman, and Williams and Emmons carried all the lands actually earned, and no other, no title passed to Maxwell, Campbell, and Van Etten of the lands described in the bill, and included in the deed of November 28, 1865.

(3) That the deed of the state to Maxwell of May 26, 1867, (not in

evidence in this case,) conveyed no estate, either legal or equitable, because the state could not convey lands in advance of their being earned; that the Amboy Company had no right to sell any of the land not earned, on the line of its road, included in the grant, subject to the right of forfeiture. It did not possess any such right, for the reason that no such right is conferred by the act of congress, nor is it within the spirit and intent of such act.

(4) That Maxwell and his associates had no rights, as against the Jackson Company, based upon its having completed the road, and earned the lands.

(5) That it was not necessary to decide whether there was a forfeiture of the grant declared or acted upon by the legislature or not, though he inclined to think there was not.

(6) That the right of the Amboy Company to earn the land was not transferable, but might be voluntarily surrendered, and that the effect of the assignment, by the permission of the legislature, was a surrender of its right to the state, and the legislature vested this right in the complainant.

(7) That the title of the complainant to the lands as earned, was not derived from the assignment, but from the act of the legislature conferring upon the Jackson Company the land grant, subject to the prior conditions of the grant.

Another question was decided, not necessary to be noticed here. The opinion upon the rehearing also deals with this latter question, and is also immaterial.

The court evidently placed much reliance upon the frequent declarations of the supreme court of the United States in *Schulenberg v. Harriman*, 21 Wall. 44; and *Farnsworth v. Railroad Co.*, 92 U. S. 49; and *Railroad Co. v. Railroad Co.*, 97 U. S. 491. The case of *Railroad Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. Rep. 123, is not noticed in the opinion, and does not seem to have been called to the attention of the court. In this case, congress, in 1853, passed a similar act, granting certain lands to the states of Arkansas and Missouri to aid in the building of a railroad from the Mississippi, by way of Little Rock, to the Texas boundary line. The Cairo & Fulton Railroad, of Missouri, was incorporated under the laws of the state, and in 1855 the legislature passed an act vesting in that company full and complete title to the lands granted to the state by the act of 1853, and provided that the company might sell the land in the manner provided for in the act of congress, and issue bonds. On January 3, 1859, the company sold and conveyed the lands sued for to McGee, who immediately went into possession, and continued to occupy and improve them, paying taxes and assessments thereon. The deed was duly recorded, but the land was more than 40 miles from the starting point of the road on the Mississippi, and it did not appear that when it was sold a sufficient number of miles of road had been built to authorize its sale. In February, 1866, the legislature directed the governor of the state to sell the road at auction, so far as the same was constructed or projected, with all its property, and all rights and franchises belong-

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ing to it, to satisfy a lien in favor of the state. In July, 1866, congress revived and extended the grant for the term of 10 years from the passage of the act, with a provision that all the lands should be patented to the state whenever the road should be completed. After the passage of this act, the railroad property was sold and conveyed by the state to certain persons, under whom the St. Louis Railway Company, complainant, claimed title. The road was completed by the purchasers, and the lands in dispute were patented to the complainant. The court decided—

(1) That the lands granted to aid in the construction of railroads do not revert, after condition broken, until a forfeiture has been asserted by the United States, either by judicial proceedings or legislative action.

(2) That no such intention appeared in this case, but, upon the contrary, the evident purpose of congress was to waive the forfeiture, and extend the time for earning the lands under the original act.

(3) That there was no forfeiture, and that the title of the defendants stood precisely as it would if the original company had completed its road within the time fixed by the act of 1853. The purchasers at the sale made by the state in 1866 took subject to the rights of the St. Louis Company, and got no better title than they had themselves.

But the act of July 3, 1866, contained provisions for forfeiture which did not appear in the act considered by the court in the *McGee Case*. After extending the time for the completion of the road for seven years, it provided that the Amboy Company should forfeit all right to said grant, or any part thereof, if it should fail to perform any of the following conditions:

(1) To clear, grub, and grade 20 miles between Owosso and Saginaw city, so that the same should be in readiness for the ties and iron by February 1, 1867.

(2) To complete said road from Owosso to Saginaw city, so that the same should be in readiness for the running of trains by November 1, 1867.

(3) To fully complete, in like manner, 20 miles of road in each and every year after said November 1, 1867, and to fully complete the entire road by the time limited by the act.

There was a further proviso that, in case of the failure of the Amboy Company to perform any of these conditions, the legislature of the state might, at its first session after such failure, confer the grant upon some other corporation, upon such terms and conditions as it should see fit, to carry out the purposes of the act of June, 1856, and, when so conferred, such corporation should be entitled to enjoy all of the grant not then lawfully disposed of, as if the same had been originally conferred upon such corporation. "But in case the said legislature shall, in such case, fail to confer said grant, then the said lands shall revert to the United States."

The purpose of the second proviso seems to have been to authorize the legislature to declare the forfeiture imposed by the first proviso, by conferring the grant upon some other road, with the right to enjoy all that had not been lawfully disposed of. The Amboy Company did make default. It did not grade 20 miles of road between Owosso and Saginaw, or any

part of it, by February 1, 1867. Thereupon the legislature passed the act of February 7, 1867, conferring upon the Jackson Company all the rights and franchises granted by the act of 1856, and theretofore belonging to the Amboy Company. It is true that the title indicates that the object of the act was to confirm the title of the Jackson Company to the property and franchises acquired by it of the Amboy Company under the act of 1865, authorizing the Jackson Company to enter into an arrangement with the Amboy Company. This act authorized the two companies to enter into an arrangement for the location of the Jackson road upon the line of the Amboy road, from Lansing, by Owosso, to Saginaw, and provided that the Jackson Company should be entitled to the land grant, and that the right of the Amboy Company to such land, so far as the portion of its road from Owosso to Saginaw is concerned, should cease upon the filing of a copy of said agreement in the office of secretary of state. This act was in force when congress passed the act of 1866, authorizing a forfeiture of the rights of the Amboy Company upon a failure to do certain specified work; in other words, it was passed in view of what had been done by the legislature the previous year. It seems to us to follow from this legislation that congress intended to forfeit the rights of the Amboy Company by empowering the legislature to confer them upon the Jackson Company. The fact that this was an amicable proceeding, as between the two companies, as appears from their agreement of October 26, 1866, does not affect the construction to be given to the act of 1866, which seems to us to contemplate a forfeiture, to be carried into effect by the legislature.

But, even if a forfeiture were not contemplated, the supreme court of the state, in the case of *Railroad Co. v. Davison*, 32 N. W. Rep. 726, construed the legislation of 1865 and 1867, and the agreement of October 26, 1866, as a surrender by the Amboy Company to the state of all its rights, and the vesting or conferring of such rights upon the Jackson Company, subject to the performance of the conditions of the grant; and in this opinion, even if it be not absolutely binding upon us as a question of statutory construction, we are disposed to concur.

A different conclusion might work great hardship to the Jackson Company. Maxwell, Campbell, and Van Etten did not take possession of the land under their deed, and it remained unoccupied up to the time the Jackson Company received its conveyance from the Amboy Company. The testimony shows that it had no actual notice of the deed to Maxwell, either at the time it entered into the contract, or when the grant was conferred upon it, or at the time it received its deed; and the recording of that deed was not constructive notice, since the Amboy Company had then no legal title to convey. In its search for incumbrances upon the land, the Jackson Company was under no obligation to look for conveyances by persons who did not hold the legal title. *Trust Co. v. Malby*, 8 Paige, 361; *Hefron v. Flanigan*, 37 Mich. 274. In this particular the case differs materially from that of McGee, who, as it appears by the report, immediately went into possession, and had ever since occupied and improved it as his own, and paid the taxes and assessments thereon.

The opinion, both of the supreme court of Missouri and that of the United States, seems to have rested largely upon this ground. If, under these circumstances, the Jackson Company is to lose the benefit of these lands, then it would follow that the Amboy Company might, with equal propriety and legality, have conveyed the whole quantity of land granted, and left none, in case of failure to construct more, to be conferred upon another company.

Upon the whole, while the facts of this case are very complicated, and the questions arising upon them are by no means free from difficulty, our opinion is that plaintiffs are entitled to judgment.

LERMA v. STEVENSON.

(Circuit Court, W. D. Texas, El Paso Division. October 7, 1889.)

1. EVIDENCE—CONSTITUTIONAL LAW—TREATIES.

Though Const. Tex. 1876, art. 13, § 4, forbids that any claim of title to land which issued prior to November, 1835, be deposited in the general land-office, or recorded or used as evidence, a Mexican grant deposited in the land-office subsequent to 1876, is admissible in evidence, if conceded to be valid, as to nullify it would be to impair the obligation of a contract, and also to infringe the treaty of Guadalupe Hidalgo.

2. NOTICE OF OCCUPANCY.

The fact that a person or his ancestor had cattle wandering over a grant of land 50 leagues in extent affords no presumption that he owned or claimed the land.

3. EJECTMENT—LEGAL AND EQUITABLE TITLES.

Under Rev. St. Tex. art. 3930, providing that when the terms and conditions of pre-emption shall have been complied with, and the pre-emptor shall have paid the price of the land, etc., the commissioner shall issue a patent to the pre-emptor, one who has filed his location for pre-emption, but has not received a patent, has only an equitable claim to the land, which cannot prevail in an action at law in the federal court against a legal title asserted by another.

At Law.

Merchant, Teel & Wilcox, for plaintiff.

Thompson & Davis, for defendant.

MAXEY, J. This cause having been submitted to the court without the intervention of a jury, in accordance with the written stipulation of counsel, and the parties, by their counsel, having filed an agreed statement of facts, which briefly and tersely sets forth the facts of the case, such agreement will be considered as the findings of fact by the court, and is here inserted:

FINDINGS OF FACT.¹

"(1) That the *testimonio* of the grant to Jose Lerma, and the confirmation by the second constitutional congress of the state of Chihuahua, in the republic of Mexico, as shown by the certified copies of the general land-office of the state of Texas, were executed as set out, and constitute plaintiff's paper title. (2) That the *testimonio* has been in the pos-

¹ Constituents of plaintiff's title omitted.

session of Jose Lerma during his life, and since his death in the possession of the said plaintiff, Felix Lerma; and that the confirmation of the grant to Jose Lerma and the protocol are among the archives of Paso del Norte, Mexico, and have been since the year 1828, as well as the protocol since 1823, or evidence of said grant, as provided under the Spanish and Mexican law. (3) That the land contained in the grant to said Jose Lerma was within the jurisdiction of Paso del Norte, and in the territory ceded by Mexico to the United States in the year 1848 by the treaty of Guadalupe Hidalgo. (4) That the plaintiff's title was proven up and filed for record in the clerk's office of El Paso county, Tex., in which the grant of land lies, October 4, 1887, and recorded on October 9, 1887. (5) That the survey of the lines of the grant, as per survey on file, is correct. That the "Sierra Blanca," "Eagle Peak," and "Hot Springs" are natural calls, also stone monuments; these three natural calls being corners, and known notoriously as such corners. That the beginning corner on the Rio Grande (formerly Rio Bravo del Norte) is opposite to Ojo del Toros (Bull Springs) and Sierra de los Todos Santos, natural points and places well known, the beginning corner being opposite thereto. (6) That Jose Lerma cultivated a part of the grant anterior to the execution thereof, and used the land for his cattle, horses, sheep, and goats, and that his possession was continuous until 1847, at the time General Donophan's command from Missouri passed into Mexico at Paso del Norte, when Jose Lerma moved into the now state of Chihuahua, and remained, the land being vacant until 1849 or 1850. That in one of these years the plaintiff put tenants on the same, and used the land for pasturage for his stock. That when the United States troops abandoned Ft. Quitman, in 1861, he again left the land, but left stock on it. That since the abandonment of the United States troops, in 1861, the Indians were hostile, and constantly at war with the settlers, and until within the last four or five years. (7) That Jose Lerma died in 1852, and that Felix Lerma is his sole heir at law, and the plaintiff herein, and that he resides in and is a citizen of Mexico. That the defendant filed his location for pre-emption on the 15th day of December, A. D. 1887, and has possession of the same. That he has complied with the laws regulating pre-emptions in this state to perfect title thereto, and that his claim is embraced within the boundaries of the grant to Jose Lerma." It is proper here also to state that the original grant to plaintiff's ancestor, Jose Lerma, said to contain 50 leagues of land, was conceded by counsel for defendant, on the argument, to be a valid grant as originally extended by the Mexican authorities.

CONCLUSIONS OF LAW.

1. It is a well-recognized principle that in actions of trespass to try title the plaintiff must recover upon the strength of his own title.

2. It is questionable whether the copies of the title styled by the parties "*Testimonio* of the grant to Jose Lerma" (in the first finding of fact) are, in strictness, *testimonios*, which are usually, if not always, issued contemporaneously with the execution of the protocol or *matrix*, and deliv-

ered to the interested party as his evidence of title. The Lerma grant was issued in 1823, and certified copy made by Pilar del Laso, second alcalde of Paso del Norte, in 1852, and delivered to the plaintiff, who is the sole heir at law of the original grantee Jose Lerma. The title exhibited would seem to be rather a second or subsequent copy of the original, but a determination of this question, and the effect to be given a second copy, becomes unimportant in view of the agreed statement of facts. See *Escribie*, Title Verbo-Instrumento, 891, III.; *Houston v. Blythe*, 60 Tex. 513, 514; *Pasture Co. v. Preston*, 65 Tex. 457-459; *State v. Cardinas*, 47 Tex. 290, 291; *Paschal v. Perez*, 7 Tex. 360-363; *Herndon v. Casiano*, Id. 332, 333; *Word v. McKinney*, 25 Tex. 268, 270.

3. In view of the concession made by defendant's counsel and the admissions of defendant, as embodied in the first, second, third, and fifth findings of fact, the grant to Jose Lerma, for the purpose of this suit, and as between the parties thereto, will be assumed to be a valid grant, as originally extended and confirmed by the Mexican authorities. As to presumptions which may be indulged touching the regularity and validity of the acts of officials under a former government, reference is made to the following authorities: *Gonzales v. Ross*, 120 U. S. 619, 622, 7 Sup. Ct. Rep. 705; *Johns v. Schutz*, 47 Tex. 582; *Clark v. Hills*, 67 Tex. 144, 145, 2 S. W. Rep. 356; *Jones v. Muisbach*, 26 Tex. 237; *Jones v. Garza*, 11 Tex. 206-209; *Jenkins v. Chambers*, 9 Tex. 235; *Hancock v. McKinney*, 7 Tex. 442, 443; *Holliman v. Peebles*, 1 Tex. 698-702; *Uhl v. Musquez*, Tex. Unrep. Cas. 655, 656.

4. The registration in the land-office of the Spanish document styled "testimonio" did not constitute the paper an archive of said office. *Paschal v. Perez*, 7 Tex. 355-360; *Herndon v. Casiano*, Id. 333, 334; Rev. St. Tex. arts. 57-59; *Hatchett v. Conner*, 30 Tex. 110; *Dikes v. Miller*, 11 Tex. 101, 102. The constitution of 1876 (article 13, § 4) prohibits the deposit of plaintiff's claim of title in the land-office, and it further provides that claims of that class shall not be "recorded in this state, or delineated on the maps, or used as evidence in any of the courts of this state, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession." Under this provision of the constitution the deposit of the paper in the land-office conferred no additional rights upon the plaintiff. It neither enhanced nor diminished the value of his title. The act of depositing it there was simply a nullity, as well as its registration in the records of El Paso county; and a certified copy of such title so deposited in the land-office, or registered in the records of El Paso county, is not admissible in evidence. See foregoing authorities.

5. Plaintiff is not in actual possession of the land embraced in the grant, and has not been, certainly, since 1861; and it is a matter of serious doubt whether his actual possession, such as the law contemplates, did not terminate in 1849 or 1850. The fact that plaintiff or his ancestor may have had cattle wandering over the grant, 50 leagues in extent, would afford no presumption that he owned or claimed it. *Arguello v. U. S.*, 18 How. 545; *Satterwhite v. Rosser*, 61 Tex. 171.

6. Although the registration of plaintiff's title in the land-office is a nullity, and notwithstanding his want of actual possession of the land, the execution of the title-papers is admitted by the defendant, and they are therefore admissible in evidence without further proof, unless their exclusion should be demanded by article 13, § 4, of the constitution. The grant, being admitted to be a valid grant, is within the protection of the treaty of Guadalupe Hidalgo and the constitution of the United States; and it is not competent for the state to nullify it, as a stale claim, without judicial inquiry, or to prohibit its use as evidence. Treaty of Guadalupe Hidalgo, art. 8, and second clause of the protocol. See Rev. St. D. C. "Relating to Public Treaties," 496, 502; Const. U. S. art. 1, § 10; Const. 14th amend. § 1; *Railway Co. v. Locke*, 12 S. W. Rep. 80, Sup. Ct. Tex., Austin Term, 1889. See, also, *Brownsville v. Cavazos*, 100 U. S. 142, 145; *Davis v. Gray*, 16 Wall. 232; *Osborn v. Nicholson*, 13 Wall. 656, 662; *Gonzales v. Ross*, 120 U. S. 629, 7 Sup. Ct. Rep. 705; *Walker v. Whitehead*, 16 Wall. 317, 318; *Vance v. Vance*, 108 U. S. 514 *et seq.*, 2 Sup. Ct. Rep. 854; *Edwards v. Kearzey*, 96 U. S. 595 *et seq.*; *Wolff v. New Orleans*, 103 U. S. 367, 368; *Grigsby v. Peak*, 57 Tex. 147; Cooley, Const. Lim. (5th Ed.) top p. 446, and pp. 453, 454. The title-papers are therefore admissible in evidence.

7. The defendant has not obtained a patent from the state to the land which he seeks to appropriate under the pre-emption laws. The law contemplates the issuance of a patent as the final step towards obtaining the state's title. Rev. St. Tex. art. 3930. The defendant has, therefore, a mere equitable title, originating in 1887, which cannot avail him in a suit at law as against the legal title asserted by the plaintiff. In the language of the supreme court: "In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts." *Foster v. Mora*, 98 U. S. 428; *Singleton v. Touchard*, 1 Black, 344, 345; *Hickey's Lessee v. Stewart*, 3 How. 759, 760; *Greer v. Mezes*, 24 How. 274 *et seq.*; *Steel v. Smelting Co.*, 106 U. S. 452, 1 Sup. Ct. Rep. 389.

8. Judgment will be rendered in favor of the plaintiff for the recovery of the 160 acres of land sued for and described in his petition, and all costs of suit. The conclusions here announced are expressly limited to the facts of this case as agreed upon by the parties.

In re HERDIC.

(District Court, W. D. Pennsylvania. October 26, 1889.)

BANKRUPTCY—SALE—RESCISSION OF ORDER OF CONFIRMATION—PRACTICE.

After a bankrupt had obtained his discharge, under an order of court made upon the petition of his assignees, a claim of the bankrupt's estate against one R. was sold at public auction, which sale was confirmed by the court, and the proceeds distributed among the creditors. More than four years thereafter, the bankrupt having in the mean time died, a creditor who had participated in the distribution presented a petition setting forth that the purchaser of said claim bought the same in trust for the bankrupt, and that the transaction was a concealed fraud upon the creditors, and praying that the administrator of the bankrupt be required to show cause why said purchase should not be declared fraudulent, and the sale set aside. *Held*, that the bankrupt court, after the lapse of time, upon a mere rule upon the administrator to show cause, could not proceed in a summary way to rescind the order of confirmation and set aside the sale, but the petitioner's remedy was by a plenary suit.

In Bankruptcy.

Sur petition of the Metropolitan National Bank, and rule on James P. Herdic, administrator of Peter Herdic, deceased, to show cause why the purchase by Frank L. Herdic of a claim against John G. Reading should not be set aside.

Wm. Macrum, for rule.

Wm. S. Stenger, *contra*.

ACHESON, J. The answer of James P. Herdic, administrator of the estate of Peter Herdic, deceased, to the rule to show cause, etc., raises a question of jurisdiction which was not discussed much, if at all, at the hearing, the arguments of counsel being directed to other questions of law, and to the merits of the controversy, but in the course of my investigation the question of jurisdiction has assumed a controlling importance. The facts upon which it arises are these: Peter Herdic, the bankrupt, was granted a discharge on February 18, 1880. On July 28, 1883, upon the petition of his assignees in bankruptcy, an order was made for the sale at public auction of the claim of the bankrupt's estate against John G. Reading. After due public notice such sale took place, and Frank L. Herdic became the purchaser, for the price of \$3,000. By an order of court made September 12, 1883, the sale was confirmed; and soon thereafter the purchase money was distributed among the creditors of the bankrupt, the Metropolitan National Bank, the present petitioner, receiving its *pro rata* share. Thus the matter rested until May 1, 1888, Peter Herdic having died in the mean time. On the date last mentioned said bank presented its petition, setting forth that the said purchase by Frank L. Herdic was made in trust for Peter Herdic, and that, for reasons set out, it was a concealed fraud upon the bankrupt's creditors, and praying that James P. Herdic, administrator of Peter Herdic, deceased, be required to show cause why the said purchase should not be declared fraudulent, and the sale set aside; and, accordingly, on July 20, 1888, a rule to show cause was granted upon the administrator.

Can the court, sitting in bankruptcy, at this late day, upon a mere

rule on the administrator, proceed in a summary way to rescind its order of confirmation of September 12, 1883, and set aside said sale? This question I am constrained to answer in the negative. According to the general rule, the lapse of time here, of itself, would debar summary relief, and require a resort to a plenary suit. *Bronson v. Schulten*, 104 U. S. 410; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901. Even where a decree in equity is obtained by fraud, the appropriate remedy, after the expiration of the term, is by a bill of review. *Terry v. Bank*, 92 U. S. 454. If it be conceded that a bankrupt court has power to alter or amend its records until the proceeding is formally ended, still, it by no means follows that, for matters *dehors* the record, the court may summarily vacate a sale regular on its face, years after final confirmation and the distribution of the proceeds. Again, Peter Herdic was free to purchase at the assignee's sale, (*Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. Rep. 155;) and he took the same title that an entire stranger purchasing would have taken. That title has become vested in James P. Herdic, the administrator of the estate of Peter Herdic. The administrator is not a party to the proceedings in bankruptcy, and, therefore, his title cannot be adjudicated by the bankrupt court upon a rule to show cause. *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551. If his title is impeachable for the cause alleged, the remedy is by a plenary suit. *Id.* This is not a question of convenient practice. The interests here involved are very large,—of such value as to bring the controversy within the appellate jurisdiction of the supreme court. But, under this proceeding, the administrator, in the event of a result adverse to him, would be deprived of his right of appeal to that tribunal. *Stickney v. Wilt*, 23 Wall. 150; *Nimick v. Coleman*, 95 U. S. 266. It is worthy of remark that in each of the two cases (*Clark v. Clark*, 17 How. 315, and *Phelps v. McDonald*, 99 U. S. 298) here cited to sustain the impeachment of the sale to Frank L. Herdic the complainant proceeded by an original bill in equity; and this, in my judgment, is the proper mode of procedure in the present case. Rule to show cause discharged, without prejudice to the petitioner's right to proceed by a plenary suit.

THE NICANOR.

BRITISH & FOREIGN MARINE INS. Co., Limited, *v.* THE NICANOR. NEW YORK MUT. INS. Co. *v.* SAME. PHIPPS *et al.* *v.* SAME. UNIVERSAL MARINE INS. Co. *v.* SAME.

(District Court, S. D. New York. October 24, 1889.)

1. PAYMENTS—VOLUNTARY PAYMENTS.

Payments voluntarily made cannot be recovered back upon grounds which would have constituted a defense, and were known to the plaintiff at the time of payment.

2. SHIPPING—AVERAGE BOND—VOLUNTARY PAYMENTS.

The bark N., having stranded on the Jersey coast, was got off by a wrecking company, whose salvage was fixed by a board of underwriters at \$15,000. The

the same as on the present trial; and no additional evidence of negligence now appears. It was from two to four weeks after the award that the libelants' payments were made. During this interval there was ample opportunity for them to determine whether to seek to hold the ship liable for negligence or not. After this opportunity, they voluntarily transmitted their checks to the ship's agents in payment and settlement, *pro tanto*, of the claim for salvage contribution, even without any formal demand.

The rule cited has, of course, no application to independent demands that may be counter-claimed or offset or recouped against each other; such as a claim for freight by the ship, on the one side, and a counter-claim for damage to the cargo by the ship's negligence, on the other. In such cases, each party has his option as to the time and mode of litigating his demand. Here there were no such independent demands or causes of action at the time the payments were made.

The libelants urge that their causes of action are essentially for damages on account of the negligence of the ship in stranding, which imposed upon the cargo owners an obligation to pay their contributory shares of the salvage. But there was no physical damage to the cargo. The only damage to the cargo owners was a possible liability to pay a salvage contribution. As respects the right to recover in this action, that liability is to be judged, not according to what might have happened as a consequence of the stranding, but according to the circumstances as they actually existed at the time when the payments were made, viz., from September 25th to October 5th. If, at that time, the cargo owners were under no legal liability to pay any salvage contribution, as I find the fact to be if the stranding arose through negligence, then there was no legal damage, and the payments would be voluntary, in the legal sense, and cannot be recovered back.

There is no question that the wrecking company, in the absence of any other agreement, might have held the vessel and cargo, either in their own possession, or under arrest by suit *in rem*, until the ship and cargo owners had either paid or secured their respective shares; and on such payments the amounts paid could doubtless have been recovered back from the ship, if the stranding was caused by her negligence. But the circumstances here are quite different. Before the salvage service was begun, the master, on September 2d, agreed with the wrecking company that the latter should "assist the vessel now in distress, and leave the amount of compensation to the New York Board of Underwriters, binding himself and owners to abide by said award." The wrecking company relied upon this agreement. No person in its behalf accompanied the vessel beyond quarantine; no possession of vessel or cargo was maintained; no salvage suit was instituted; and, two days after arrival, the master performed his agreement by paying the salvors in full, through the ship's agents, who, upon his order and request, advanced the money therefor. Thereupon the ship had a lien upon the cargo for such contributory shares as, under the facts of the case, the cargo owners might be bound to pay, if anything; and, if the ship had required payment of

such shares before delivery of the cargo, the owners could have recovered back the sums paid in order to obtain their goods, upon proof that the stranding was by negligence. But there was no such detention of the cargo. It was delivered upon the execution of the usual average bond. Any possible lien upon the goods was thereby discharged; and thereafter the only existing claim against the cargo owners was a money demand; according to the terms of the bond, for such sums, when adjusted by Currie and Whitney, as "might be shown to be a charge upon the cargo." If, as the libelants allege, the stranding was caused by negligence, then no "charge upon the cargo" existed in favor of the ship, or of her owners, representatives, or agents, for any contribution towards the salvage award that she or they had paid. Such negligence would have been a perfect defense to any action which the master, owners, or ship's agents might have brought, either against the goods *in rem*, before delivery, or against the owners *in personam* upon the average bond. *Gourl. Gen. Av. 15; Snow v. Perkins*, 39 Fed. Rep. 334; *The Ontario*, 37 Fed. Rep. 222, *et infra*. The general intent of the bond is to stand as a substitute for the goods; not to commit the cargo owners to the payment of the sum adjusted, whether justly owing or not. The bond is not to be construed as a submission to arbitration before the adjusters; much less to preclude the cargo owners from any legal defenses against the payment of the salvage apportionment, wholly or in part. It was perfectly competent for them to show that, by reason of the ship's negligence, neither the ship owners nor her agents could recover anything on the bond. *The Niagara*, 21 How. 9; *The Alpin*, 23 Fed. Rep. 815, 819; *L'Amerique*, 35 Fed. Rep. 835, 837. As the facts constituting the alleged defense were known before the payment, the libelants were bound to avail themselves of this defense at the time; and, having paid without any duress or constraint, are barred from a subsequent recovery back.

I cannot sustain the contention that J. F. Whitney & Co. stand as independent assignees of the salvors' lien. There was no such assignment. Their payment was made to discharge the salvors' lien, not to preserve it. They did, indeed, act in the general interest, and for the benefit of all parties, but only in the same sense as the master acted in the general interest. It was for the interest of vessel and cargo alike that the claim of salvage should be settled without litigation, and without the detention and delays incident to the arrest of the ship and cargo. The vessel was a foreign one, belonging in Nova Scotia. J. F. Whitney & Co. were her consignees and agents. All the papers in the case, the receipt taken on paying the wrecking company, and the bond taken from the cargo owners, as well as the testimony, show that they acted expressly as "agents of the ship and owners," and on the master's direction. Their acts were legally the acts of their principals, the owners of the vessel. The insurers also specially insisted that Whitney & Co. had no authority to pay in their behalf. For their advances upon the master's order to pay the whole salvage, they had a claim and right of action against the owners, whether the cargo paid its share or not; but they had no lien on the ship, as against their principals. *The Esteban*, 31 Fed. Rep. 920; *White*

v. *Americus*, 19 Fed. Rep. 848; *The Raleigh*, 32 Fed. Rep. 633. The bond taken was properly enough taken in their own names, as agents of the owners, because they had advanced the money as such agents. Their taking such a bond from the cargo owners is wholly inconsistent with the theory that in advancing the money they acted at all as the agents of the latter. They plainly acted as agents of the ship and owners only. The latter were the principals. They, and not Whitney & Co., held a lien on the cargo until its delivery. Had Whitney & Co. paid as agents of the cargo owners, neither the ship nor her owners could have held any lien thereafter on the cargo, nor have refused immediate delivery, even without any bond; and any bond given must have been given to Whitney & Co. individually, and simply for their personal reimbursement. But the bond, on the contrary, is given to them as "owners or agents of the vessel." In any suit therefor, brought upon the bond, whether in the names of the agents or of the principals, precisely the same defenses, such as negligence of the ship, could be interposed.

No reasons are suggested why the rule as to voluntary payments should not be applied to maritime transactions as much as in other cases. The reasons in favor of this rule as respects actions *in rem* are even stronger than in ordinary cases; for implied liens are not favored, except in so far as they stand upon the grounds of commercial convenience or necessity, which cannot be pleaded in favor of actions like these. To recognize an implied lien for the repayment of moneys voluntarily paid would tend to the prejudice and insecurity of subsequent *bona fide* purchasers and incumbrancers; since such a lien, if sustained at all, would exist for a reasonable time to enforce it. These risks ought not to be increased or multiplied except upon strict necessity. In this very case, the charterer, after these payments, took the ship into possession, put her up as a general ship, and received a large amount of cargo, before notice of these demands. Were the vessel to be held, and her owners prove irresponsible, the result would be a heavy loss inflicted on the charterer for the benefit of those who had voluntarily paid a demand without raising objections, which, upon their present contention, constituted a known defense. The claims now made come too late. The libels must be dismissed, with costs.

CROSBY v. THE LILLIE.¹

(District Court, S. D. Alabama. May 2, 1889.)

1. MARITIME LIENS—WAGES—DISCHARGE BY SALE OF VESSEL UNDER EXECUTION.

A sale by the sheriff of a vessel under execution for debt against the owners does not divest paramount liens, such as the claim for wages of a seaman not guilty of laches.

2. SAME—ESTOPPEL.

His standing by at a sheriff's sale of the vessel without giving notice of his claim does not prevent a sailor from afterwards enforcing his lien in admiralty against the vessel.

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

In Admiralty. On exceptions to answer.

W. D. McKinstry, for libellant.

W. E. Richardson, for claimant.

TOULMIN, J. The sale by the sheriff on execution for debt against the owners did not divest paramount liens, one of which was the libellant's claim for wages. *The Gazelle*, 1 Sprague, 378; *The Powell*, 1 Woods, 99. And my opinion is that there has been no laches on the part of libellant in the delay in filing the libel, and I am inclined to the opinion that the facts alleged in the answer do not show that claimants were *bona fide* purchasers without notice. It appears that they had constructive, if not actual, notice of the libellant's claim. He had brought a suit, and obtained judgment on it, and had execution issued and placed in the sheriff's hands before the sale. And the very circumstances of the derivation of their title from the owners were sufficient to put them upon inquiry. 1 Brown, Adm. But, even if they were *bona fide* purchasers without notice, there is no rule of law which requires a seaman to assert his lien in any given time. Yet such lien will become extinct or barred by unreasonable delay if the vessel passes into the hands of a *bona fide* purchaser without notice. There was no unreasonable delay in asserting the claim in question. I was at first somewhat impressed by the proposition urged by the proctor for claimants, and sustained by some citations of authority,—that the libellant stood by and saw the sale made to claimants, and did not inform them of his claim for wages. On looking at the authorities, I find that some hold that, where the libellant is present at the negotiation of a sale, and knew it was being made, yet permitted the purchaser to buy without giving him notice there were wages due him, it would be inequitable to permit the libellant to recover. These were private sales, and the courts, influenced by equitable considerations, say that seamen as well as others, in order to uphold a tacit lien, should not intentionally conceal it, to the prejudice of purchasers acquiring the property *bona fide*, and in ignorance of the incumbrance. I do not consider this case, under the allegations of the answer, as like those referred to. This vessel was sold at public sale by the sheriff under executions against the owners thereof. The claimants took the title to the vessel *cum onere*, (*Maxwell v. The Powell*, 1 Woods, 102;) and if there is anything due by her to libellant he is entitled to recover it in this proceeding, so far as the answer filed by the claimants shows to the contrary. The exceptions to the answer are sustained. See *The St. Lawrence*, 1 Black, 522; *Sheppard v. Taylor*, 5 Pet. 675, 676; *The Mary*, 1 Paine, 180; *The Bolivar*, Olcott, 474; 2 Pars. Mar. Law, 579.

MINNICK v. UNION INS. CO.

(Circuit Court, W. D. Michigan, S. D. November 26, 1889.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—REPEAL OF STATUTE.

Rev. St. U. S. § 639, subd. 3, providing for the removal of suits between citizens of different states from state to federal courts, on the filing of an affidavit in the state court stating that affiant "has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court," is repealed by the removal act of March 3, 1887, which repeals all conflicting laws, and section 2 of which provides for a removal of such causes into the federal circuit court by defendant, "when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court," etc.

2. SAME.

An affidavit, filed in the federal circuit court, stating that affiant "has reason to believe, and does believe," that defendant will not be able to obtain justice in the state court, is not sufficient evidence of that fact to warrant a removal under the later statute.¹

At Law. On motion to remand to state court.

Rev. St. U. S. § 639, subd. 3, provides for the removal of suits between citizens of different states from state to federal courts, on the filing of an affidavit in the state court stating that affiant "has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court." Act March 3, 1887, § 2, cl. 4, provides for a removal of such causes into the federal circuit court, by defendant, "when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court," etc.

Chaddock & Sullivan, for plaintiff.

Norris & Norris, for defendant.

SEVERENS, J. This is an action at law, heretofore pending in the circuit court of the state for the county of Muskegon; being a consolidation of two causes in that court, in which suits were brought upon two policies of insurance. An application was made to this court by the defendant, after issue joined, but before trial, for an order of removal from the state court into this court, upon the ground of prejudice and local influence. The petition of the defendant and supporting affidavit set forth the pendency of the suit, and the affidavit, which was made by a special agent of the company, alleged that the affiant had good reason to believe, and did believe, that, from prejudice and local influence, the defendant would not be able to obtain justice in the state courts. It was not shown by the petition or affidavit what sum was in controversy, but it appears from the transcript filed in this court that it was about \$500. The order for removal was made by me,² upon the supposed authority of *Whelan v. Railroad Co.*, 35 Fed. Rep. 849. A motion to remand to

¹ For a discussion of how prejudice or local influence may be "made to appear" under the removal act of 1887, see *Malone v. Railroad Co.*, 35 Fed. Rep. 625, and note; *Southworth v. Reid*, 86 Fed. Rep. 451; *Huskins v. Railway Co.*, 87 Fed. Rep. 504; *Dennison v. Brown*, 38 Fed. Rep. 535; *Amy v. Manning*, *Id.* 536, 538; *Goldworthy v. Railway Co.*, *Id.* 739; *Hakes v. Burns*, 40 Fed. Rep. 33.

² Not reported.

the state court is now made by the attorneys for the plaintiff, upon several grounds,—the most important of which are—*First*, that there was no sufficient evidence exhibited to the court to make it appear that from prejudice and local influence the defendant could not obtain justice in the state court; and, *second*, that it was not shown that a sufficient amount was involved to entitle the defendant to a removal. It is also further urged that a removal is not authorized to be made upon an *ex parte* application, heard without notice, nor upon the bare general allegation of the party, or his agent, that such prejudice or local influence exists as to prevent the obtaining of justice. But I am concluded, in respect to these last grounds, by the express decision of the circuit judge of this circuit, and the district judge, who concurred with him, in the case of *Whelan v. Railroad Co.*, above referred to.

Upon the occasion of the making of the order for removal, a somewhat cursory reference was made by me to the opinion of Judge JACKSON in the *Whelan Case*, and I observed that he expressed his concurrence in the opinion of Judge DEADY, in *Fisk v. Henarie*, 32 Fed. Rep. 417-421, that the clause following subdivision 3, § 639, Rev. St., providing for the method of removal of causes on account of prejudice, etc., was not repealed by the provisions of section 2 of the Act of March 3, 1887, which relates to removals for that cause; and I also observed that in his analysis of the differing particulars in the old and the new law Judge JACKSON noted, at page 854, 35 Fed. Rep., that in the new law no jurisdictional amount was specified as a condition of removal. Judge DEADY held, in substance, in *Fisk v. Henarie*, that the clause of the old law providing the method of removal was not repealed, and, being left operative by the new law, supplied the mode of removing cases when the right of removal was given by the clause of section 2 in the later act, relating to this class of cases; and the circuit judge, in the *Whelan Case*, referring to that decision, expresses his concurrence. If I felt sure that Judge JACKSON founded his decision in that case upon that ground, it would be my duty to hold accordingly now; but an examination of that case shows that the removal was sustainable, and was sustained, upon another ground. The defendant had made and filed in the state court its application in the manner prescribed by the old law in cases of prejudice and local influence; the affidavit being that the petitioner "had reason to believe, and did believe," that on account thereof the defendant could not obtain justice, etc. And it was in reference to that application that Judge JACKSON alludes to Judge DEADY's opinion. But it further appears that the defendant also made a distinct application for an order of removal, addressed to the federal court, in the *Whelan Case*, supported by an affidavit stating in direct terms that such prejudice, etc., existed; and I am satisfied that Judge JACKSON intended to put the stress of his holding upon that ground, and that to that extent only is the decision conclusive.

It is extremely difficult for me to think that the provisions for removal in this class of cases contained in the clause following subdivision 3, § 639, Rev. St., are not repealed by the provisions in section 2 of the

new act, under the operation of the repeal of conflicting laws contained in section 6 of that act. It seems impossible for the old law in reference to procedure to stand, with the express provisions of the new. As pointed out by Judge JACKSON at page 854, 35 Fed. Rep., in his comparison of the differences, the old law required that the application should be "addressed to the state court. Under the new act, it must be applied for to the circuit court, which acts upon the application." Under the old law, upon the filing of the proper petition and bond in the state court, jurisdiction in that court ceased, and was transferred to the circuit court, *ipso facto*. The circuit court was passive, and got jurisdiction by the case being brought into it. Under the new law, the circuit court itself receives and entertains the application, and acquires jurisdiction by its own machinery. It appears to me that these two methods are inconsistent and conflicting; and I cannot help thinking the old law is repealed.

If, then, the old provision for the method of removal is repealed, how is it to be "made to appear" to the circuit court that the case is one proper for removal? So far as known to me, it has never been held that, except by the warrant of the provision in the clause in the former statute, above referred to, an allegation of the fact of prejudice, etc., like the one in this affidavit, would be sufficient. By all analogies, it seems necessary to require that the fact should be made to appear by evidence which is by legal rule regarded as competent. By this test, it appears to me that it is not properly shown by the allegation that a party has good reason to believe, and does believe, that the fact is so. Such a statement is not competent evidence. True, congress may accept the sworn faith of the party as sufficient ground for removal, by an express declaration to that effect, as was done in the former law. But, without such declaration, it appears to me that the fact must be shown by legal evidence, and that if, as the circuit judge holds, it may be shown by a direct and positive averment of its existence, it is the least that could be regarded as sufficient. If the allegation is not controvertible, it makes it all the more necessary to attend to the argument from inconvenience in allowing such great facility in bringing cases into the federal courts under this clause of the statute. This argument from inconvenience could not prevail against plain language; but, when the statute is open to construction, it is of considerable weight. Broom, Leg. Max. 184. Thus, a more careful and mature consideration of the subject leads me to think, contrary to what seemed necessary when the order of removal was made, that the existence of prejudice and local influence was not made to appear by evidence competent to prove the fact, and that, therefore, the case should be remanded.

It is not necessary to pass upon the question whether the amount involved is sufficient to warrant a removal. That is one of the many unsettled points arising on this jurisdictional act which have given the judges so great a burden of difficulty and doubt. Let an order be entered remanding the case to the circuit court for the county of Muskegon. There will be no costs on the motion.

In re JACKSON.

(Circuit Court, D. Kansas. November 28, 1889.)

FEDERAL COURTS—JURISDICTION—"NO MAN'S LAND."

The Indian Territory is defined by Act Cong. June 30, 1834, (4 St. at Large, 729,) as all that part of the United States west of the Mississippi, and not in Missouri, Louisiana, and Arkansas, and all east of the river, and not within any state to which the Indian title has not yet been extinguished. The tract of land known as "No Man's Land" was not then a part of the United States, and many treaties and acts of congress passed afterwards, by implication at least, locate the western boundary of the Indian Territory at the 100th meridian, which is the eastern boundary of "No Man's Land." In others, this tract is clearly, or by implication, recognized as a part of the territory. Act Cong. 1889, (25 St. at Large, 733,) established a United States court with jurisdiction extending over the Indian Territory, bounded so as to include "No Man's Land." Section 17 attached to the eastern district of Texas all of the Indian Territory not otherwise assigned, which included this land, if it was a part of the territory. *Held*, that the jurisdiction of the United States court for the eastern district of Texas over this tract of land was sufficiently clear to grant a removal to the state of Texas of one indicted by that court for a crime committed in "No Man's Land," and arrested in another state.

Application for Habeas Corpus.

J. W. Ady and P. L. Soper, for the United States.

Hallowell & Hume and E. Hagan, for petitioner.

BREWER, C. J. In the case *Ex parte Jackson*, the facts are these: The petitioner was indicted by the federal court of the eastern district of Texas for the crime of murder, committed in the year 1888, in the district known as "No Man's Land." He was arrested in this state, and a removal is sought to the Texas district. To prevent that, this petition in *habeas corpus* has been filed; and the question presented is as to the jurisdiction of the Texas court over the territory and the offense, and the duty of this court on *habeas corpus*. If the jurisdiction of that court, both as to the territory and the offense, was clear, the duty of this court would be imperative to deny the petition, and see that the petitioner be removed to that district. On the other hand, if it were clear that that court did not have jurisdiction, either as to the territory or the offense, then it would in like manner be the imperative duty of this court to sustain the petition, and discharge the petitioner. But neither of those is this case. Again, if it was a case where the question was which of two courts had jurisdiction, then it would be the duty of this court to determine, if it were a matter of doubt, which most probably had jurisdiction, and send the petitioner there. But this case does not even present that question, for here, confessedly, no court has jurisdiction, unless it be the Texas court; and the question is, what is the duty of this court, under such circumstances as these? Conceding that the jurisdiction of the Texas court be doubtful, if it have no jurisdiction, then there is no jurisdiction to punish this offense. In a case like that, I conceive that if there be fair reason for believing that that court has jurisdiction, or that that court, being a court of equal authority with this, with the right to determine the extent of its own jurisdiction, would on inquiry hold in favor of that jurisdiction, then, as in no other way can inquiry be

made into this alleged offense, this court ought to remit the party to that court.

Has that court jurisdiction? The homicide took place in "No Man's Land," in 1888, as alleged. What is known as the "Indian country," or the "Indian Territory," was first defined and bounded by the act of June 30, 1834, (4 St. at Large, 729.) That definition is as follows:

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

Now the expressions "Indian country" and "Indian Territory" are used interchangeably in the statutes. We speak of the Indian Territory; but, politically, that is a mistake. There is no organization. It is more properly a territory referring simply to geographical extension, and not to any political organization. At the time this act of 1834 was passed, "No Man's Land" was not a part of the United States. It did not then come within "Indian country," as defined; and, unquestionably, many treaties and acts of congress have been made and passed since in which the western boundary of this Indian country, or Indian Territory, is, by implication at least, located on the 100th meridian, which is the eastern boundary of "No Man's Land." And yet this original territorial boundary may, without any undue stretch of language, be regarded as a shifting boundary. It is not a boundary prescribed for the purpose of political organization, or for a deed or other conveyance. It is a boundary for the mere purpose of defining the territory over which certain laws of the United States will have operation. Being such a boundary, it would not be improper to consider that boundary shifting, whenever other territory was properly subjected to the operation of the same laws. It would be changed by the organization of any part of this territory into a political territory of the United States. It might be changed whenever the territorial boundaries of the United States were extended westward, by purchase or conquest, into country unoccupied, save by the Indians. It may be regarded as a boundary certain, but shifting; something on the principle controlling the boundary of a lot on a river or on a lake. That boundary is certain, though it may be shifting. By accretions, the water-line may be extended far into the river or the lake; but still it is the water-front. So here, considering the purpose for which the Indian country was bounded, one may fairly infer that that boundary shifted as the territorial extensions of the United States increased, or as territory was carved out of it for political organization. That such is the real force of that description is evident from the case of *Ex parte Crow Dog*, in 109 U. S. 556, (3 Sup. Ct. Rep. 396.) The syllabus, and the opinion bears this out, reads as follows:

"The definition of the term 'Indian country' contained in chapter 161, § 1, of the Act of 1834, (4 St. 729,) though not incorporated in the Revised Statutes, and though repealed simultaneously with other enactments, may be referred to in order to determine what is meant by the term when used in the

statutes; and it applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not, and whether acquired before or since the passage of that act."

This territory was acquired since the passage of that act.

As I said, however, there are many treaties and statutes since that in which the implication is manifest that the 100th meridian was the western boundary, or was regarded as the western boundary, of the Indian Territory. That, of course, throws doubt upon the scope of that decision. On the other hand, we find some in which it is equally clear that this "No Man's Land" is recognized as a part of the Indian Territory, as in article 2 of the treaty with the Comanches and Kiowas, October 18, 1865, found in 14 Statutes at Large, 718. But, coming closer than that, in the act of 1883, in which there was an attempted partition of the jurisdiction over the Indian Territory between the district of Kansas, the northern district of Texas, and the eastern district of Arkansas, in describing that portion of the territory which was assigned to the district of Kansas, it is declared that "all that part of the Indian Territory lying north of the Canadian river and east of Texas and the one hundredth meridian" be annexed to and constitute a part of the United States judicial district of Kansas. "That part of the Indian Territory east of Texas and the one hundredth meridian" implying that there was some portion of the territory west of the one or the other of these two. And section 3 says:

"All that portion of the Indian Territory not annexed to the district of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district known as the 'Northern District of Texas.' " 22 St. 400.

Of course, this is mere implication, but it certainly is strong implication, that there was some territory lying west of the 100th meridian; and it could be only that which is known as "No Man's Land." That was in 1883.

Coming down to 1889, an act was passed to establish a United States court in the Indian Territory, which is found in 25 U. S. St. at Large, 783, in which the Indian Territory is bounded: "That a United States court is hereby established whose jurisdiction shall extend over the Indian Territory, bounded as follows:" (Then it bounds it so as to include "No Man's Land.") This is either a recognition by congress of that as the previous boundary of this Indian Territory, or is an assertion that henceforward such should be the boundary. The court created by this act was given jurisdiction of misdemeanors. The seventeenth section of that act attached to the eastern judicial district of Texas all that portion of the Indian Territory not otherwise assigned, and included "No Man's Land," if it were a part of the territory. Now, where a term is used and defined in the opening part of a statute, the use of that term thereafter in the statute is with the same meaning, and the same definition. The "Indian Territory" is bounded in the first section so as to in-

clude "No Man's Land." That term used thereafter, without any definition of boundary, means the same territory. Hence I have no question but that by said section 17 the jurisdiction over this "No Man's Land" was assigned to the eastern district of Texas. That, of course, was since the offense was charged to have been committed.

My conclusions, then, are these: That to-day, and since March, 1889, the court of the eastern district of Texas has jurisdiction over "No Man's Land." Probably, also, the court of the northern district of Texas had like jurisdiction prior thereto, and since 1883; and, there being a federal court, with jurisdiction territorially, with ministerial officers, a clerk, and a marshal, there is no trouble in finding all the machinery for purposes of trial. Under those circumstances, it seems to me that it is the duty of this court to deny this petition.

DE FOREST *et al.* v. THOMPSON, Commissioner, *et al.*

(Circuit Court, D. West Virginia. November 14, 1889.)

1. JURISDICTION OF FEDERAL COURTS—SUITS TO VACATE TAX-SALES.

The federal courts have jurisdiction of a suit between citizens of different states, to set aside sales of lands forfeited to the state, and deeds therefor, for illegality and irregularity, though such sales and deeds were made pursuant to an order of a state court of the county where the lands sold are situated.

2. SAME—SUITS BY FOREIGN EXECUTORS.

Where the will of the deceased owner of such lands, in whose name they were sold, vests the title thereto in his executors and trustees, who are citizens of another state, the latter may bring the suit in a federal court sitting in the state where the lands lie, though they have not qualified in that state, as they sue in their individual, and not in their representative, capacity.

3. EQUITY—JURISDICTION—MULTIPLICITY OF SUITS.

Where there are many defendants, each of whom claims a part of the land under a sale made under the same order of court relating to the whole, equity has jurisdiction in order to avoid a multiplicity of suits, though the sales were absolutely void, and plaintiffs have an adequate remedy at law.

4. TAXATION—SALE FOR NON-PAYMENT—PARTIES.

Where land is purchased by the state for non-payment of taxes, and is not redeemed by the owner within the statutory period, such owner is not a necessary party to proceedings by the commissioner of school lands to sell such land for the benefit of the school fund, under Code W. Va. c. 105, §§ 5, 6, as his title is gone.

5. SAME—IRREGULARITIES.

Failure of the sheriff to return a list of lands sold for taxes in West Virginia within 10 days, as prescribed by Code W. Va. c. 31, § 31, and failure of the recorder to note the time of filing such list, as required by the same statute, render the sales invalid.

6. SAME—EQUITY PLEADING—SUPPLEMENTAL BILLS.

Where an original bill assails such sales as void on other grounds, a supplemental bill, setting up the sheriff's failure to return the list within the statutory time as an additional reason for holding the sales void, does not make a new and inconsistent case.

In Equity.

Bills by R. W. De Forest and L. W. Knox, citizens of New York, trustees and executors of the estate of Burr Wakeman, deceased, against William Thompson, commissioner of school lands for Boone county, W.

Va., to set aside sales of lands made for the benefit of the school fund, and the deeds made thereunder.

Thomas L. Brown and James H. Ferguson, for plaintiffs.

James M. French, Joel E. Stollings, Watts & Kennedy, and Kenna & Chilton, for defendants.

Before HARLAN, Justice, and JACKSON, J.

JACKSON, J. It is alleged in the original and first amended bill in this cause that the plaintiff was the owner of 60,000 acres of land lying mostly in Boone county, in this state, a part of which is in controversy in this suit; that for the years 1869 and 1870 it was returned delinquent by the sheriff of Boone county for the non-payment of taxes thereon, in the name of the plaintiff; that on the 12th day of October, 1871, it was sold by the sheriff of Boone county for the non-payment of taxes thereon, and was purchased by the state, not being redeemed by the owner within the time prescribed by law; that the land was certified by the then auditor of state "as land within said Boone county, forfeited to the state of West Virginia in the name of Burr Wakeman, for the non-payment of the taxes thereon for the years 1869 and 1870;" that afterwards the defendant, Thompson, commissioner of school lands for Boone county, filed his petition in the circuit court for that county to have the said land sold for the benefit of the school fund, and, a decree being obtained for that purpose, the commissioner sold a portion of the land and made a conveyance to the purchasers thereof. The bills allege numerous irregularities and illegalities in the proceedings as reasons why the sales and deeds should be declared illegal and void. After the filing of the original and first amended bills the plaintiffs allege that they discovered other errors, irregularities, and illegalities in the proceedings of the sheriff and recorder of Boone county in relation to the sale of the land and the report thereof to the recorder by the sheriff, and the recordation thereof by the recorder, which would render the proceedings absolutely null and void, and that in fact no forfeiture of said tract of land ever occurred. For this reason the second amended and supplemental bill was filed, setting up these facts. The defendants filed their answer in reply to the allegations of the bill, amended and supplemental bill, setting up various defenses,—among others, the sale of the land for the non-payment of taxes under the decree of the circuit court of Boone county, relying upon the defense that the courts of the United States were without jurisdiction to pass upon the validity of the title to the lands claimed herein, for the reason that, the deeds having been made in pursuance of an order of the circuit court sitting for the county of Boone, where the lands lie, such sales could only be set aside and avoided by the decree of the court which directed them to be made. In this last position I do not concur. The plaintiffs are citizens of New York, and the defendants being citizens of West Virginia, the controversy between the parties is one between citizens of different states, and therefore, by the constitution and laws of the United States, is one of which the proper court of the United States may take cognizance in some form.

The question to be determined here is whether the orders of the Boone circuit court, under which the lands in dispute were sold, are conclusive and binding upon the plaintiffs, when assailed in an independent collateral proceeding, and may be decided as well here as in the state court. The presence of such a question in the case does not affect the jurisdiction of this court, for it is competent for the federal court in a controversy between citizens of different states to pass upon the question whether the state court had jurisdiction or power to order the lands in question sold by the school commissioner. *Payne v. Hook*, 7 Wall. 425; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619; *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. Rep. 237.

In the last case referred to the court said:

"These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice, in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise from time to time of the authority so obtained. As this case is within the equity jurisdiction of the circuit court, as defined by the constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what, according to the principles of equity, they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

Applying the principles announced in the foregoing decisions, it will hereafter be seen, in the discussion of this case, that it falls within the principles as announced by the court in the foregoing cases.

The next contention is that the plaintiffs, never having qualified as executors of Burr Wakeman in this state, could not bring this suit. This position cannot be maintained. In *Lewis v. McFarland*, 9 Cranch, 151, it was said that the principle that "letters testamentary give to the executor no authority to sue for the personal estate of the testator out of the jurisdiction of the power by which those letters are granted" does not extend to a suit for lands devised to an executor. This is not an action for the recovery of personal property. The purpose and object of this action is to set aside the sale of certain lands described in the bills and amended bills, and to vacate the deeds made in pursuance thereof. The plaintiffs in this action sue under the will of Burr Wakeman, which vested the title to his lands in his executors and trustees. They are therefore devisees and trustees suing for the protection of rights to the realty derived from and under that will, and not in their character as personal representatives, derived from the letters testamentary. By the will, the legal title to the land in controversy was vested in the plaintiffs in this action, and, as I have before said, being citizens of a different state from the defendants in this action, they were entitled to be heard in this court.

The next position insisted upon by the defendants to defeat the plaintiffs' action is that, if the plaintiffs' position is true, that the proceed-

ings were absolutely void under which the lands were sold, then the plaintiffs have a complete and adequate remedy at law, and this court, sitting in equity, is without jurisdiction to grant the relief asked for. It will be observed that the lands in question were sold by virtue of the proceedings in the Boone circuit court, and passed into the hands of numerous parties, each of whom claims under a sale made under the order of that court relating to the whole of the land in dispute. The state court based its proceedings upon steps previously taken upon the forfeiture of these lands as delinquent lands. The lands prior to the alleged forfeiture and sale under the order of the court constituted one body, and were held by one person, Burr Wakeman. If the attempt to forfeit them was not in law a forfeiture that divested his title, or if the proceedings in the Boone circuit court were unauthorized and void, then the title as to all the lands remains in Wakeman, and passed under his will to the plaintiffs. Each defendant's title depends upon the same questions, and those questions all have relation to the proceedings in the Boone circuit court, and to the attempt to forfeit the lands for non-payment of taxes. It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants, and succeeded, the judgment would not conclude the other defendants, although the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands, the possession of which is withheld by the defendants, each claiming a particular parcel, but all basing their claims upon the same proceedings instituted by the officers of the state, may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing in equity and bringing all the defendants before the court in one action they can avoid a multiplicity of suits? I think they can. 1 Pom. Eq. Jur. §§ 245-269, inclusive.

The contention that Wakeman, and his executors, since his death, were necessary parties to the proceedings in the Boone circuit court, is not sound. If the steps taken to forfeit the lands in question for the non-payment of taxes were in accordance with law, then the title passed from the owner to the state. The proceedings which the statute authorized to be instituted in the circuit court for the sale of forfeited land by the school commissioner (Code W. Va. c. 105, §§ 5, 6) constituted the mode ordained by the state for selling its own land. As the title of the former owner was gone, he had no right to be a party to those proceedings, or to be heard in reference thereto, in the court of original jurisdiction or in the supreme court of appeals of the state. His right was simply to redeem within a prescribed time. These principles are decided in *McClure v. Mailand*, 24 W. Va. 561. I am not inclined at this time to question the soundness of the decision of the court in that case, and therefore accept it as embodying a sound construction of the statutes of West Virginia relating to that subject. In the view I take of this case, it is unnecessary to pass upon all the questions considered by the court in that case, as the facts in this case differ materially from it.

The next question presented for consideration I hold to be vital,—the one upon which, it is apparent, the case rests. It is whether the sale of these lands was void. The Code of West Virginia provides for the sale of real estate by the sheriff of the county in which the lands, or a greater part of them, lie, for taxes, if it has been returned delinquent for the non-payment of the same. Code W. Va. c. 31, §§ 4-9, inclusive. Section 31, c. 31, Code, provides that when any real estate is offered for sale, and no person present bids the amount of taxes, interest, and commissions due thereon, the sheriff shall purchase the same on behalf of the state, for the taxes thereon, and the interest on the same, and shall make out a list thereof, under a caption provided for in that section, and underneath the caption "shall be the several columns provided for in the tenth section, with a like caption to each column, with one exception." The officer making the list is required to certify it under oath, and return the list, with a certificate of his oath attached, to the auditor of the county, now clerk of the county court, within 10 days after the sale, who should, within 20 days after the return, record the same in a well-bound book, and transmit the original to the auditor of the state. It is conceded that the sheriff made a sale, under this statute, of the lands in controversy, and purchased the same on account of the state. But, in so doing, it is claimed by the plaintiffs in this action, he failed to comply in several respects with the terms of the statute, and that in consequence of his failure the proceedings were irregular, and the deeds founded upon them are null and void. It will be observed that the heading of the list is prescribed by section 31, and the form of it, after the heading is made, must conform to the provisions of section 10. This section, among other things, requires the officer to return the "estate held" in the lands sold and purchased by the state, "in what district the land sold was situated and charged with taxes, and the description of the same." Section 13 requires and prescribes the form of an affidavit to "be appended to the list." Section 31 requires the heading of the list to contain the name of the county in which the land is sold, and the month and year in which the sale is made, as well as the year in which the land was sold for the non-payment of taxes. An inspection of the list returned shows that the officer in returning his list had failed to comply with each of the foregoing requirements, thereby showing great irregularity in the proceedings taken by him.

From what I have said, it appears that there were no less than seven requirements of the statute which the officer failed to comply with in making his report. It is claimed, however, that some of the requirements of the thirty-first section are merely directory, not mandatory upon the officer, and that the irregularities arising from the failure of the officer to comply with these provisions are not essential, and do not vitiate his proceedings. In the view I take of this case, it is unnecessary at this time to express my assent or dissent to that position. If it was necessary to decide this case, I would pass upon that question, but it is doubtful if I would be able to find any real or supposed reason why one positive requirement of the statute is more important than another. This

act of the legislature prescribes the terms upon which realty may be sold for taxes and the owner divested of his title. Should not every positive requirement of it be regarded as material, to be strictly complied with? Otherwise, may not the officer conducting the sale, to some extent, exercise the functions of a judicial officer, deciding what is necessary to be done to comply with the terms of the statute, instead of a ministerial officer, to execute its provisions? There would seem to be but one answer to this question. If he can omit any positive requirement of the statute, he may omit all, and thereby arbitrarily divest any owner of his title to realty in arrears for taxes. No judicial interposition is required to effect the sale of realty for the non-payment of taxes. It was intended that the statute should execute itself, and it would seem, for this reason, if no other, that every requirement should be strictly complied with. Ought we not to infer that the legislature, when it declared in its act that the terms upon which realty might be sold when delinquent for taxes, that it regarded all the requirements of the statute as essential? Otherwise, would it not have omitted to insert any provision that was not regarded by it as material? If this be the true construction of the statute, it would follow that the failure of the officer to comply with any positive requirement of it would vitiate the sale made by him, which would be fatal to the title of the defendant acquired through the state. But, as we have said, it is unnecessary to decide this question.

There yet remain two other grounds to be considered upon which complainants seek relief: *First*, it is alleged in the second amended and supplemental bill that the sheriff failed to return his list of lands sold as delinquent for taxes within 10 days after the sale and purchase of them by the state; *second*, that the recorder failed to note the time when the sheriff returned his list of sales. Both allegations are denied by the answer, and the defendants attempt to show that the statute was complied with in both respects. The evidence upon both points seems to be conflicting, but the weight of it strongly supports the conclusion that neither requirement of the statute was complied with, and the effort of the defendants to overthrow both provisions was clearly the result of an afterthought. The neglect of the officers to comply with either is such an irregularity as tends to prejudice the rights of the owner whose lands have been sold. He had a right to call at the office and demand the production of the officer's report for his examination. If he discovered it was not there within the prescribed time, or, being there, had not been filed within the time prescribed by the statute, or that the recorder had failed to note the filing of the same, he could rest upon his rights, feeling assured that the steps taken to sell his realty did not divest him of the title to it. Both provisions of the statute are mandatory, and were held by this court, in the case of *Rich v. Latham*¹ and others, in 1879, to be so essential that neglect of the officer to comply with either renders invalid the title acquired in pursuance of their action. And this, I think, is now the settled law of this state, as ruled in the case of *Barton's Heirs v.*

Gilchrist, 19 W. Va. 223; *Simpson v. Edmiston*, 23 W. Va. 675; *McCallister v. Cottrille*, 24 W. Va. 173.

Before leaving this branch of the case, the significant fact should not be overlooked that the last amended bill charges that the affidavit was not returned within the time required by the statute, to which allegation no answer has been offered or filed, although the absence of such an answer was commented on at the time of the hearing of this cause. I have heretofore spoken of this omission upon the part of the officer as being a positive requirement, and one which we hold to be essential. It is contended, however, by the defendants that the last amended and supplemental bill, setting up this omission of the officer, makes an entirely new case, inconsistent with the theory of the original and the first and second amended bills, and in support of this position defendants rely upon *Shields v. Barrow*, 17 How. 137. In this position I do not concur, for the reason that the case is entirely different from the one before us. The object of the present suit is to obtain a decree settling the right of the plaintiffs to these lands, as against the claim of the defendants, based upon certain proceedings taken by the officers of the state in connection with their forfeiture for the non-payment of taxes. The original bill assails the title of the defendants, derived from those proceedings, as void, and asks a decree declaring the title of the plaintiff to be good as against the defendant. The plaintiffs started out with the idea that the proceedings of the Boone circuit court were void, principally because they were not made parties thereto. The last amended bill only assigns an additional ground for holding such proceedings, and the sales under them, to be void. This proceeding being in a court of equity, under the rules of equity pleading, it does not make a new and different case. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, and the authorities there cited. It follows, from what we have said, that a decree against the defendants, declaring the sales to them by the commissioner, and the proceedings in the Boone circuit court, under which the sales were had, to be void as against the plaintiffs, will be passed.

HARLAN, Justice, concurring.

SOCIÉTÉ ANONYME DE LA DISTILLERIE DE LA LIQUEUR BENEDICTINE DE
L'ABBAYE DE FECAMP *v.* COOK *et al.*

(Circuit Court, S. D. New York. November, 11, 1889.)

FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

In an action to restrain defendants from using bottles and labels in imitation of those of the plaintiff, where the patent for the design of such bottles has expired, the question whether defendants are using the same in good faith, in which case their acts would be lawful, or for the purpose of misleading the public so believe that they are selling the article made by plaintiff, in which case the expiration of the patent would be no defense, does not arise under the laws of the United States so as to give the federal courts jurisdiction.

On motion to remand.

Charles Bulkley Hubbell, for complainant.

Gifford & Brown, for defendants.

WALLACE, J. The question which arises on this motion to remand this suit to the state court, from which it was removed, is whether the suit involves a federal question. The action is brought to restrain the defendants from unlawful competition in business, and the complaint alleges that the defendants are fraudulently selling a liquor or cordial in imitation of that of plaintiff, by using labels, bottles, and other accessories in imitation of those previously used by the plaintiff. The answer, among other things, alleges that letters patent of the United States for a design for a bottle were granted in 1868; that the term of the patent has expired; and that the bottles, labels, etc., which defendants are using, are those which have become public property ever since the expiration of the patent. If the defendants are in good faith using the bottles and labels of the patent, their acts to that extent are lawful, and would no more be an infringement of the rights of the plaintiff than if they were using them with the consent of the plaintiff, and had acquired a valid right to use them before the right of the plaintiff accrued. But if they are using them under false colors, as devices, among others, intended to lead the public to believe that they are selling the liquor made by the plaintiff, they cannot shelter themselves behind the expired patent. In either view of the facts that may appear, the question is one to be determined by the principles of general jurisprudence, and does not arise under the laws of the United States. The motion is granted.

THOMPSON *et al.* v. E. P. DONNELL MANUF'G Co.

(Circuit Court, N. D. Illinois. October 11, 1889.)

FEDERAL COURTS—COMITY.

The circuit court of the United States for the northern district of Illinois will, under the rule of comity, be governed, as to the infringement of a patent, by prior decisions of other circuits, as to the same patent, where the proof is the same.

In Equity.

Horace Barnard and J. G. Elliott, for complainants.

West & Bond, for defendant.

BLODGETT, J. In this suit complainant charges the infringement of United States letters patent No. 136,340, granted February 25, 1873, to Arza B. Keith, assignee of Samuel W. Shorey, for an "improvement in machines for forming staple seams in leather." In his specifications the inventor says:

"The invention relates to an organization of mechanism for uniting leather work by means of staples, or the formation of staple seams; * * * The machine being designed to cut the wire into staple-forming lengths, to form and drive the staples, to twist together the driven and protruded points of each, to cut off the excess of metal at the point, and to feed the work for insertion of successive staples in the formation of a continuous seam."

Whether this machine was ever successfully used for forming seams in leather by means of staples does not clearly appear by the proof. The only use to which it has been applied, so far as the disclosures in this record go, is for stapling or stitching printed pamphlets together; but this must be considered only as a new use of the machine not contemplated by the inventor at the time of his specifications, but clearly protected with the use to which the inventor proposed to apply it. The defenses set up are: Want of novelty, and non-infringement.

This patent has been before the United States circuit court of the southern district of New York on several occasions, and fully considered and adjudicated upon. The only controversy in this case, as in the prior case I have mentioned, is as to the charge of the infringement of the third claim of the patent, which is:

"In combination with the bender-foot, *g*, and driver, *x*, the inclined and retreating anvil, *n*, operating substantially as described."

In *Thompson v. Gildersleeve*, 34 Fed. Rep. 43, the defendant was charged with the infringement of this claim; and the validity of the claim, and the infringement of the patent by the defendant, were fully sustained. After the decision in that case, defendant substituted for the inclined and retreating support of the legs of the staple, while being driven, what is called in the arguments and briefs a "box supporter," which is a rectangular, instead of an inclined, support of the legs of the staple, so arranged as to retreat from within the staple as it is driven or forced into the paper by the driver. This modified form of construction was before the

same court in *Thompson v. American Bank Note Co.*, on an application for an injunction *pendente lite*; and the question as to the evasion of this claim of the patent by this modification was considered, and held against the defendant, and injunction awarded. 35 Fed. Rep. 203. The same case has since been brought to final hearing before that court, and a decree rendered, finding that the machine, as modified, still infringes the third claim of the patent. 39 Fed. Rep. 274. It also appears that the defendant, as the manufacturer of the machines in question in the *Gildersleeve and American Bank Note Co. Cases*, assumed and conducted the defense, and that the same proof which is now in the record in this case was put in and considered in both of these prior cases. Hence, waiving all question as to whether defendant is estopped in this case by these prior decisions, I have no doubt that under the rule of comity, which I have always attempted to apply in cases of this character, this court should be governed by the decisions on the same patent in prior cases, where the proof is the same. A decree may therefore be entered in this case finding that the third claim of complainants' patent is valid, and that the defendant infringes the same, and referring the case to a master to ascertain and report the damages.

AMERICAN LOAN & TRUST CO. v. EAST & WEST RY. CO. OF ALABAMA *et al.*

(Circuit Court, N. D. Alabama, S. D. November 11, 1889.)

EQUITY PRACTICE—EXCEPTIONS TO ANSWER.

When complainant allows the time fixed by rule of court for setting down exceptions filed to an answer for scandal, impertinence, and insufficiency to pass by, and the court, after examining the exceptions, is of opinion that the cause will be more speedily determined by a withdrawal of the exceptions, the time will not be enlarged, though good cause be shown, but complainant will be allowed to withdraw the exceptions, and reply to the answer.

In Equity. On exceptions to answer.

Robert Ludlow Fowler, for complainant.

Webb & Tillman, for defendant Schley.

PARDEE, J. In this cause, defendant James W. Schley filed an answer in which he reiterated certain matters before pleaded by him in a certain plea which had been overruled by the court. To this answer complainants filed exceptions on the 3d day of June, 1889, in time under the rules, as follows:

"(1) For that the said defendant hath answered to the bill, as matter of defense, the same identical matter heretofore introduced by said defendant in his pleas to the bill in this suit; which pleas, being brought to a hearing, have been adjudged bad, and overruled for insufficiency. Therefore, having due reference to the said pleas, and the order and decree thereon, the complainant excepts to the following part of said answer as insufficient; that is to

say: 'And this defendant is informed and believes, and upon such information states, that at the time of the creation and acceptance by complainant of the said trusts, as well as at the present time, and at the time of filing its said bill, the said complainant had no known place of business, and no authorized agent in the state of Alabama for the purpose of transacting its said business; and that by section 4 of article 14 of the constitution of Alabama, which was then and now in force, it is prescribed that no foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents, therein; and therefore this defendant pleads and says that the said complainant was not authorized by the laws of Alabama, within the state of Alabama, to accept and execute said trusts, and maintain this or any other suit within the state of Alabama, either in the state courts or in the courts of the United States, for the enforcement of said trust; and this defendant now pleads said disability in abatement of this suit.'

(2) And the complainant further excepts because that the said defendant hath reiterated said matter so above excepted to in the second paragraph of his said answer, and hath not to the best and utmost of his knowledge set forth the alleged agreement referred to by him as 'Exhibit D,' attached to the dependent bill filed by Grant Brothers. (3) And the complainant further excepts to the following portion of the third paragraph of said answer of Schley as scandalous, impertinent, and insufficient, to-wit, the averment that by acceptance of the trust referred to in the bill of complaint said trust company committed a fraud upon a confiding public. (4) And the complainant further excepts to all the matter contained in the third paragraph of the said answer (excepting the denials only) as impertinent and insufficient, particularly so much thereof as relates to the manner in which the original capital stock of the mortgagor company is alleged to have been paid up."

No further steps were taken in the matter until after the rule-day in July, and the rule-day in August following. In August the defendant Schley moved the court for an order dismissing the exceptions on the ground that the complainants had not complied with rule 27, in this: that they had not obtained an order referring said exceptions to the master to examine and report on the same on or before the succeeding rule-day, which was on the first Monday in July, 1889. During the same month comes the complainant, and sets down for hearing on the next succeeding rule-day thereafter the exceptions to the insufficient answer of Schley, and asking, if such exceptions be not allowed, then for leave to withdraw said exceptions, and file a general replication. Both of these last motions are now submitted for the determination of the court.

Under equity rule 27, which relates to scandal and impertinence, and rule 63, which provides for setting down exceptions for insufficiency, the complainant was too late. It may be that under rule 63, and the general equity practice, the court could now, upon cause shown, enlarge the time for filing exceptions, so that the complainant could raise the questions which are sought to be raised by his exceptions to the answer; but I have read the exceptions, and conclude that the case will be best speeded by not enlarging the time to file exceptions, but by allowing the complainants to withdraw all exceptions on file, and file a general replication by the first rule-day, which will be the first Monday in December next.

BAIRD v. WARWICK MACHINE Co. et al.*(Circuit Court, S. D. New York. November 23, 1889.)***PRELIMINARY INJUNCTIONS—FRAUDULENT CONVEYANCES.**

A preliminary injunction will not be granted to restrain foreclosure of a chattel mortgage on property purchased by plaintiff, after the execution of the mortgage, at execution sale, on the ground that the mortgage is contrary to the statutes against fraudulent conveyances, where plaintiff was not a creditor, and the execution creditors are not made parties to the suit.

In Equity. On motion for preliminary injunction.

David Willcox, for plaintiff.

Henry Bacon, for defendant.

WHEELER, J. This is a motion for a preliminary injunction to restrain foreclosure of a chattel mortgage, made by the defendant corporation, of property since purchased by the plaintiff at a sale on execution against the corporation. The mortgage is alleged to be void because made after refusal of payment of debts, because made to officers of the corporation, and because made in contemplation of insolvency, contrary to the statutes of the state. 2 Rev. St. N. Y. (7th Ed.) p. 1534, § 4; 3 Rev. St. N. Y. (8th Ed.) p. 1729, § 4. These are statutes against fraudulent conveyances. The validity of the conveyances depends upon extrinsic facts; and they are good as between the parties to them, and all others except those sought to be defrauded. The plaintiff was not a creditor, and not one sought to be defrauded, and had no right to defeat the mortgage until after he bought the property. His right is vested in the particular property which he bought, and he has no right to have the mortgage set aside wholly. The execution creditors who may have that right are not parties to the suit, either personally or by a representation of them all. The case is not like *Clark v. Smith*, 13 Pet. 203, or *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. Rep. 799, relied upon by the plaintiff. In those cases the instruments creating the incumbrance could be set aside. Here the plaintiff is seeking to settle a disputed right to specific personal property in this mode, in advance of a trial at law. The propriety of this is too doubtful to warrant a preliminary injunction. Motion denied.

EAST OMAHA LAND CO. v. JEFFRIES.*(Circuit Court, D. Nebraska. March 1, 1889.)***1. BOUNDARIES—ACCRETIONS—CONVEYANCE.**

Rev. St. U. S. § 2396, provides that "the boundaries and contents of the several sections, half sections, and quarter sections of the public lands shall be ascertained" as follows: "All the corners marked in the surveys returned by the surveyor general shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections not marked in the surveys shall be placed, as nearly as possible, equidistant

from those two corners which stand on the same line. * * * Boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners * * * to the water-course," etc. *Held*, that in surveying a lot bordering on a river the water-course becomes the boundary, and continues so, no matter how much it shifts by accretion, and conveyances of the lot pass all, including such accretion, to that line.

2. SAME.

The facts that rapid changes in the banks of the Missouri river are constantly going on, and that 40 acres have been added to adjoining land, do not overthrow an averment of a bill to quiet title to such addition, on the ground of accretion, that it was by an imperceptible increase, where it was nearly 20 years in forming.

In Equity. On demurrer to bill to quiet title.

James M. Woolworth and Chas. J. Greene, for plaintiff.

Finley Burke, for defendant.

BREWER, J. This is a bill, filed by the complainant, to quiet its title to a tract of about 20 acres, which lies in what was at one time the bed of the Missouri river. Complainant claims that the premises in question were formed by accretions against land, title to which he derives through several mesne conveyances from the person who originally entered the same, and that by accretion the new land became a part of that which was bought of the government. The facts alleged are that in 1851 the United States, in surveying township 75 north, range 44 west, in Iowa, found section 21 to be fractional, and subdivided it so as to produce lot 4, containing 37.44 acres. Field-notes and plats were duly made, returned, and approved in the general land-office. They show the meander line of lot 4, its course and distances; the north boundary of the lot being the Missouri river, along whose banks this meander line was run. In 1853, one Edward Jeffries entered this lot, and in 1855 a patent was issued to him. The complainant claims title by mesne conveyances from Jeffries, the last deed (the deed to complainant) being dated March 26, 1888. The meander line was the same, or nearly the same, when Jeffries entered the land as when the survey was made, but about the time of the entry land began to be formed along the bank by natural causes and imperceptible degrees; that is, by the current and the waters of the river washing and depositing against and along the north line of said lot earth, sand, and other material, so that by 1870 a tract of 40 acres and more had been formed by accretion. In 1877 the river suddenly cut through its banks, on a point more than a mile south of its original bed, and changed its course so as to leave high and dry all the region through which it had flowed from 1855 to 1877.

The case is before the court upon demurrer to the bill, and the question is whether this body of land, formed by this gradual and imperceptible addition, belonged to the owner of lot 4, and passed by the several conveyances of lot 4 to complainant. Counsel for defendant challenge the application of the doctrine of accretion to the changes caused by the Missouri river. I shall not consider that question, but assume that the doctrine of accretion applies here as well as elsewhere. He also criti-

cises the language of the bill, which alleges that when the land was entered the left bank was *nearly* where it was in 1851, when the survey was made. I pass that by, also, and assume for the purposes of this case that the doctrine of accretion applies, and that Edward Jeffries, when he entered the land, took all the land to the Missouri river. Complainant insists that the meander line is not the line of boundary; and that this is so is settled by the case of *Railway Co. v. Schurmeir*, 7 Wall. 272. I quote the language of the court:

"Express decision of the supreme court of the state was that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion of the state court we entirely concur. Meander lines are run, in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the water-course, and not the meander line, as actually run on the land, is the boundary."

In that case the meander line ignored a tract of 2.78 acres, which in time of high water was an island, but in time of low water connected with the main-land; and it was held by the supreme court that the patent from the government of the fractional lot adjoining took this tract as a part, although outside of the limits of the meander line.

But the question in this case lies deeper than this. It is not what belongs by the law of accretion to the owner of lot 4, but what passes by a deed of lot 4; and it is insisted by counsel for defendant that the patent took only to the river line, as it stood when the survey was made, and that every subsequent deed describing the property only as "Lot 4" conveyed no more. In other words, he insists that land which is formed by accretion does not pass by a conveyance describing the lands to which the accretion has been made; and in this proposition I think he is correct. In the case of *Granger v. Swart*, 1 Woolw. 88, Mr. Justice MILLER, of this circuit, charging the jury, held that a patent for a fractional lot carried the ground to the river bank, as it was at the time the survey was made, but that, if between the time of the survey and the time of the entry a body of land had been formed by accretion, it remained the property of the government, and did not pass by the entry and patent. The same doctrine seems to have been recognized by the supreme court of this state in *Lammers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 28 N. W. Rep. 303. But for this court the question seems to be put at rest by the decision of the supreme court of the United States in the case of *Jones v. Johnston*, 18 How. 150, which involved a question as to lands in the city of Chicago bordering on the lake. I quote this from the opinion:

"Now, one answer to this assumption is that a grantee can acquire by his deed only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it, and cannot acquire lands outside of the description, by way of appurtenance or accession. Lord Coke says: 'A thing corporeall cannot properly be appendant to a thing cor-

corporeal, nor a thing incorporeal to a thing incorporeal.' Co. Litt. 121b. And this court, in *Harris v. Elliott*, 10 Pet. 54, after approving of the maxim of Coke, observed that 'according to this rule land cannot be appurtenant to land.' In the case of *Jackson v. Hathaway*, 15 Johns. 454, the court say 'a mere easement may without express words pass, as an incident to the principal object of the grant; but it would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted, by precise and definite boundaries.' See, also, *Leonard v. White*, 7 Mass. 6."

And again:

"Any alluvial accretions since the deed belong to the plaintiff, as owner of the adjoining land. Any past accretions belonged to the then owner; and whoever sets up a title to them must show a deed of the same, as in the case of any other description of land. The case of *Lamb v. Rickets*, 11 Ohio, 311, exemplifies the principle for which we are contending. The defendant had agreed to convey a piece of land, called the 'Hamlin Lot,' containing forty-two acres, more or less, and also two other small lots, of ten acres, with a proviso, if the Hamlin lot and the two others contained more than fifty-two acres, the excess was reserved. The defendant conveyed the Hamlin lot, and refused to convey the other two. A bill was filed to compel a conveyance. The Hamlin lot was bounded by one of its lines on the bank of the Tuscarawas river, and has been originally conveyed to the defendant, and by him to the plaintiff, as containing forty-two acres, more or less. The defense set up to the bill was that before the defendant conveyed the lot to the plaintiff large accessions had been made from the river to the lot, and that these alluvial formations made up the quantity of fifty-two acres. The plaintiff claimed that the quantity should be determined according to the old boundary of the lot upon the bank of the river, which would be but some forty-two acres. But the court held that the question was not as the bank of the river was twenty-five or thirty years ago, but as it was when the Hamlin tract was conveyed to the plaintiff, and estimated the quantity of land conveyed accordingly."

As I read this opinion of the supreme court, it asserts this doctrine: that, while alluvial accretions belong to the owner of the adjoining land, they do not pass by the conveyance of that land. In other words, if the owner of lot 4, in the case at bar, became through accretions the owner of 40 acres adjacent, his conveyance of lot 4 carried the lot as it stood, and not the 40 acres of which he had become the owner by the matter of accretions. If he intended to convey this additional tract, by apt language he should describe it. His conveyance is limited to that which he described, although it may be true that the boundaries of lot 4 are not the meander line as run by the surveyors, but the bank of the river as it stood when the surveys were made. If he wished to convey that which had formed since, and which had become his through accretions, he should by apt words describe this added land which he proposed to convey. Not having conveyed these accretions, they remain his. The complainant's title is limited to lot 4. That lot was bounded by the river line at the time of the survey and the entry. The lands outside of that it has never purchased. That is the land in controversy. To it the complainant has no title, and the demurrer must be sustained.

ON PETITION FOR REHEARING.

(December 18, 1889.)

BREWER, J. This case was submitted to me last winter on demurrer to the bill. On examination of the questions, it seemed to me that the demurrer was well taken, and I accordingly prepared an opinion sustaining it. An application for a rehearing was filed, and the case is before me now on such application. For the facts of the case, I refer to the former opinion.

The first question is whether the doctrine of accretion applies. In my former opinion, I assumed that it did; but that assumption is strongly challenged by counsel for defendant. While the allegation in the bill is of an imperceptible increase, one of the characteristics and tests of accretions, yet counsel urge that I am bound to take judicial notice of the character of the Missouri river, and the soil through which it flows, and of the rapid changes in the banks which are constantly going on, and also that the extent of the total increase, as disclosed by the bill, is so great as to forbid the idea of that necessary imperceptible increase. I cannot assent to this. While it is true the increase is great, many acres having been added, yet the time during which this increase was made was nearly 20 years, and, obviously, during that time an increase might be going on, imperceptible from day to day and from week to week, which during the lapse of these many years would result in the addition of all the land, as alleged. Hence, notwithstanding what is known of the character of the river, and the soil through which it flows, no conclusions flowing therefrom can overthrow the plain averments of the bill.

Passing now to the question which I ruled in favor of the defendant, I am constrained to believe that I erred therein. It was held that a deed to lot 4 conveyed lot 4 only, as it existed at the time of the survey, and that all accretions remained the property of the prior owner, unless expressly named in the deed. The ruling was based principally upon the case of *Jones v. Johnston*, 18 How. 150, and singularly it is that case which, after reargument and re-examination, leads me to change my opinion. Section 2396 of the Revised Statutes provides how the boundaries and contents of the several sections, half sections, and quarter sections of the public lands may be ascertained:

"Sec. 2396. The boundaries and contents of the several sections, half sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles: *First.* All the corners marked in the surveys returned by the surveyor general shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equidistant from those two corners which stand on the same line. *Second.* The boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained by running straight

lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township. *Third.* Each section or subdivision of section, the contents whereof have been returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make a part."

Obviously, then, in surveying land bordering upon a river the opposite corners of the quarter sections are fixed, and the side lines are extended from these corners, parallel with each other, until they meet the water-course; and that water-course, and not any line that is run along it, becomes the boundary. This was settled by the case of *Railway Co. v. Schurmeir*, 7 Wall. 272. Now in the case in 18 How., *supra*, the court held that land outside of fixed lines, boundaries of a tract, could not be appurtenant to it, quoting Lord Coke to the effect that a thing corporeal cannot properly be appurtenant to a thing corporeal. The lots in that case, as shown by the plat, were bounded on the north by North Water street, and were included within lines dropped from fixed corners on that street, at right angles with the same, and extended until they intersected the lake shore. Now, it was with reference to accretions formed at these side lines that the court used the language referred to. The said lines, being definite and fixed, run at right angles to North Water street, were and continued to be the boundaries of the lots named, no matter what accretions formed outside those lines. And in further illustration of this was the language used which I quoted in the former opinion. But, while this was laid down as the rule for accretions formed outside of the fixed side lines, a different rule was stated in reference to land formed by accretions at the end of the lot, where the water-front was the boundary. It affirmed that where the water-line was the boundary it remained the boundary, no matter where that line might be. Thus this language is used:

"Now, in order to determine what land was conveyed to the plaintiff by his deed of 22d October, 1885, all that was necessary was to locate the lot upon the ground in conformity to the description at that date. The calls in the deed, having reference to the plat, furnished the necessary data for the location. There was the fixed line north, on the ground; the lake, a natural object, south; and the lot inclosed between two lines extending at right angles from the corners on Water street to the lake. If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water-line, though it may gradually and imperceptibly change, is just as fixed a boundary, in the eye of the law, as the former. I speak not now of sudden and considerable changes, which are governed by different principles."

And again:

"But the true answer to the position assumed, and which governed the trial below, is that the water boundary on the lake is to be deemed the true southern boundary of the lot at the date of the conveyance; as much so as North Water street was its northern boundary. And the plaintiff is carried by his deed to it, not because of the alluvial deposit, if any, between the water-line at the time of the survey and plat and the line at the date of the deed having passed as appurtenant to the lot, but because one of the calls given in the deed requires that the side lines should be thus extended."

In other words, the supreme court seems to have laid down this proposition, that where a water-line is the boundary of a named lot that line remains the boundary, no matter how it shifts, and a deed describing the lot by number or name conveys the land up to that shifting line, exactly as it does up to the fixed side line. Supporting this doctrine are the cases of *Lamb v. Rickets*, 11 Ohio, 311; *Giraud's Lessee v. Hughes*, 1 Gill & J. 249; *Kraut v. Crawford*, 18 Iowa, 549; *Glover v. Shields*, 32 Barb. 374. And, independent of authority, any other rule would be attended with great, if not insurmountable, practical difficulties. Supposing a chain of title to this very lot, (lot 4) in which, during a succession of years, there appears every two or three weeks a conveyance. The boundary on the river is gradually extending, but extending so slowly that during the time of possession of any grantor the increase would be imperceptible. How, then, can the portion thus reserved be distinguished from the portion conveyed? It is true that between the time of possession of the patentee and the last grantee the change becomes evident; but is there any reason why all this increase should belong to the patentee, and not be distributed among the various holders in the chain of title? And how can it be distributed? This practical difficulty in the application of the rule announced in the former opinion has led to a careful re-examination of the question in the light of the authorities, and especially of the case in 18 How., and I am compelled to hold that there was error in the former opinion. The true rule is that, so long as the doctrine of accretion applies, the water-line, if named as the boundary, continues the boundary, no matter how much it may shift, and the deed of the lot carries all to such line. The petition for a rehearing must be sustained, and the demurrer to the bill will be overruled.

DE BARY BAYA MERCHANTS' LINE v. JACKSONVILLE, T. & K. W. RY. CO.¹

(Circuit Court, N. D. Florida. April 13, 1889.)

1. CARRIERS—DISCRIMINATION IN CHARGES—INJUNCTION—PLEADING.

A bill seeking injunction against extortionate charges must allege that complainant has no other means of carrying on his business than those wherein he is so overcharged.

2. SAME.

A bill alleging discrimination in charges must aver that there are some parties who are charged less than complainant.

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

3. WHARVES—WHARFAGE—COMPENSATION.

A reasonable compensation can be charged by the owner of a public or private wharf for its use by other parties.

4. SAME—EXTORTIONATE CHARGES.

Extortionate wharfage charges can be prevented only by the state.

In Equity. Bill for injunction.

The bill alleges, in substance, that the complainant owns and operates a line of steamers for the transportation of passengers and freight on the St. John's river, between Jacksonville and Palatka and intervening points on said river; that there is also another line of steamers on said river, engaged in a like business, called "The People's Line;" that the defendant railway company owns and operates a railroad with branches and connecting lines between the same points, and that in connection with its business it owns and maintains, and is the proprietor of, wharves at Palatka and other points between Jacksonville and Palatka, named in the bill; that the defendant charges the complainant wharfage on all freight delivered by complainant on said wharves for transshipment over defendant's and connecting lines to points further south and west; that such wharfage charge is an illegal and unjust discrimination against complainant, and tends to create a monopoly for the transportation of freight in the defendant to the detriment of commerce and the great damage of complainant; that it is extortionate, etc. It is prayed that defendant be enjoined from charging said wharfage, etc.

H. Bisbee, for complainant.

TOULMIN, J., (*orally*.) 1. There is no allegation in the bill that complainant has no other means of carrying on its business and delivering its freight at Palatka and other points named in the bill for transshipment over defendant's railroad than over the alleged wharves of the defendant.

2. There is no allegation in the bill that there are any other shippers of freight from said wharves over the defendant's railroad except "The People's Line" of steamers, and the bill shows that "The People's Line" is charged wharfage. The bill does allege that said defendant railway company does not charge or collect the said so-called "wharfage" from any other shippers except "The People's Line" of steamers, but, as I have said, fails to allege that there are any other shippers. It is implied in the bill, but is not distinctly averred, as it should be if it be a fact. There is a general averment of discrimination, but no statement of fact which shows any such discrimination. But it may be said that these are but technical objections, and that the bill could be amended to meet them. It would be as well, therefore, for me to express my views on the merits of the proposition contended for by the complainant, and to state why I would be constrained to deny the injunction prayed for, even if the bill was amended.

3. Conceding that the defendant charged wharfage to the complainant as complained of, the question is, is it illegal or unauthorized by law? "There is no principle that interposes any hindrance to the re-

covery from any vessel landing at a wharf owned by an individual or by a municipal or other corporation a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures, erected by individual enterprise, and recognized everywhere as property, a reasonable compensation can be exacted." *Packet Co. v. Keokuk*, 95 U. S. 80, 85; *Cannon v. New Orleans*, 20 Wall. 577; *Packet Co. v. Aiken*, 16 Fed. Rep. 895. The statutes of Florida authorize railroad companies to build and maintain wharves as incidental to their business, and for the use and convenience of passengers and freight transported over their roads. If the defendant has built and maintained a wharf at Palatka or any other point on the St. John's river, and such wharf is either a private or public wharf, has the complainant a right to use it without the payment of a reasonable compensation therefor, without the consent of the defendant? I think not. At least I am not so convinced that the charge of wharfage by the defendant is such as to authorize me to grant the extraordinary process of injunction as prayed for by the complainant. This is my view of the case on the allegations of the bill, and when they are considered in connection with the affidavit filed on behalf of the defendant, which states that the defendant does not collect such wharfage anywhere except at Palatka, and not there for its own use and benefit, but as agent for the owner of the wharf who resides in New York, it seems clear to me that I should not grant the injunction. Now, if the wharfage charged is extortionate it is for the state so to regulate it as to prevent extortion. *Packet Co. v. Aiken*, *supra*. The application for an injunction is denied.

RINDSKOPF *et al.* v. VAUGHAN.

(Circuit Court, D. Indiana. November 22, 1889.)

1. CHATTEL MORTGAGE—CHANGE OF POSSESSION.

Under the statute of Indiana a mortgage of a stock of merchandise is valid, where the mortgagor is allowed to remain in possession and sell in the ordinary course of business, applying the proceeds of sales to the payment of the debts secured.

2. SAME—INTENT TO DEFRAUD CREDITORS.

A mortgage executed with the fraudulent intent to cheat, hinder, or delay creditors,—accepted by the mortgagee with a knowledge of such fraudulent intent, he participating therein,—is void as against creditors.

3. SAME—CONDITIONS.

A provision, in a chattel mortgage, giving the mortgagee possession if the property is assigned, is valid and enforceable.

At Law.

Action to replevin a stock of merchandise, under the provisions of a chattel mortgage.

Morris, Newberger & Curtis, for plaintiffs.

Mark E. Forkner, J. H. Mellett, and W. O. Barnard, for defendants.

Woods, J., (*charging jury.*) The essential question in dispute here, gentlemen of the jury, is whether or not the mortgage made by Vaughan on the 6th day of July to plaintiffs is a valid mortgage. Its validity is questioned on the alleged ground that it was made with intent to cheat, hinder, and delay the creditors of Vaughan. The statute of Indiana provides—quoting it as nearly as I can from recollection—that any conveyance or disposition of property made with the fraudulent intent to cheat, hinder, or delay creditors shall be void. It seems—and in referring to the facts I shall, at present at least, only refer to such as are undisputed—that, prior to the date of this mortgage, Mr. Vaughan had been in business at New Castle, in this state, as a retail merchant; that he had become largely indebted, his liabilities equaling or exceeding his assets, so that it may well be said that he was insolvent. He was indebted to these plaintiffs in the sum of \$7,200, or thereabout. On the day stated, (July 6th,) he made this mortgage to secure that indebtedness, evidenced by new notes given upon that day, due at different times,—at stated periods during five or six months from date. In addition to the \$7,200 of indebtedness existing at the time, about which there seems to be no question, \$800 was advanced on that day by plaintiffs to Mr. Vaughan, for the purpose of paying a debt that he specially desired to pay, and for the payment of which he used that money immediately; and that amount was secured by the mortgage, as well as by additional collaterals. On the same day, Mr. Vaughan disposed of other assets, by way of securing other creditors,—that is, on the same day and the following day, or in the early hours of the Monday following, the mortgage having been made on Saturday; and about 7 o'clock on Monday evening an assignment under the state statute was made by Mr. Vaughan for the benefit of all creditors,—Mr. Thompson, the defendant in this case, being the assignee named in that instrument. The execution of this assignment, by reason of the terms of the mortgage, created a right on the part of the mortgagees, if the mortgage is upheld as valid, to claim possession of the goods at once. It is provided in the mortgage that the mortgagor shall retain possession of the goods, selling them in the ordinary course of business, accounting for the proceeds from week to week to the plaintiffs,—the mortgagees; and another clause of the mortgage shows that the phrase “to account”—or whatever the exact phrase in that connection is—means “to pay over the proceeds.” The phrase “to account” might be ambiguous; but a subsequent expression in the mortgage shows that the parties meant that the proceeds of the goods should be paid over. After the execution of the assignment to Mr. Thompson, plaintiffs had some negotiations with the assignee, and, these negotiations failing, they claimed possession of the goods; and, possession being refused, they brought this suit, and, by virtue of the writ in the case, obtained possession of the goods, giving the bond required by the law. They then advertised the goods for sale; made a sale, the regularity of which is not questioned, so far as the forms of procedure, the notice, and so forth, are concerned. The sale was made at public auction, the plaintiffs themselves, in effect, becoming the pur-

chasers; because it is not to be disguised, and, indeed, is not disputed by the plaintiffs' attorneys, that Mr. Bliss, who purchased at the sale, bought for them. There is nothing illegal in that. They had a right to have the goods bid in by a third person for their benefit, if they saw fit to do so. They are now in court before you, and the question is whether this mortgage is valid or not. If the mortgage was valid, they acquired a perfect title to the goods, and your verdict should be in their favor. If the mortgage was fraudulent,—that is, if it was made by Mr. Vaughan with the intent to cheat or fraudulently hinder or delay his creditors, and the plaintiffs accepted it with a knowledge of the fraud, participating in the fraudulent intent,—the mortgage is void, and your verdict should be for the defendant. The exact issue, therefore, is whether the mortgage was made with a fraudulent intent on the part of Mr. Vaughan to cheat, hinder, or delay his creditors, and accepted by the plaintiffs with the knowledge of that design and with intent to promote its accomplishment. Now, this issue has, by reason of the development of the testimony before you, been confused a little—both in the development of the testimony and in the argument—with other questions, which are not really in issue. There is testimony tending to show, and it was argued before you, that the plaintiffs deceived Mr. Vaughan, in order to get him to execute the mortgage, by promising to sell him goods; holding out inducements to him; and thereby fraudulently obtained the mortgage. That is not the fraud in issue here. If they did by deceitful promises raise expectations in the mind of Mr. Vaughan, and thereby procured his consent to execute the mortgage, the fraud is immaterial, unless there was such an agreement or understanding produced in Mr. Vaughan's mind as tended to the injury of creditors. Any secret understanding, any agreement or understanding between Vaughan and the plaintiffs for Vaughan's benefit which tended to the injury of the creditors, would constitute the fraud charged; but the mere procuring of Vaughan by deceitful promises to sell him goods, or to keep him on his feet or to keep him going by selling him goods, to execute the mortgage, would not be such a fraud as would support this issue.

Further, it has been argued that the plaintiffs promised Mr. Vaughan that they would sell him goods, and that that promise entered into the consideration of the mortgage, and that the plaintiffs, having broken this contract, are not entitled to enforce the mortgage. I instruct you that that is entirely immaterial. Such promises would not constitute a binding contract, if they were made; but, whether that would be so or not, whether they might have been so made as to constitute an element of the consideration of the mortgage, and a binding covenant on the part of the plaintiffs to furnish goods, that is not a matter that tends to establish a purpose to defraud creditors; and such breach of contract is not the fraud charged.

Coming, then, to the question whether the mortgage was made with the intent to defraud, you will observe that it is not a question whether the mortgage would delay other creditors,—that is, not the sole question,—but the question is whether it was made with a fraudulent intent to

delay. Of course, as has been stated in argument, the mere placing of a mortgage upon a stock of goods, the debtor having no other assets, necessarily hinders the collection of other debts; and the rule of evidence is well known, that men are presumed to intend the natural and necessary consequences of their acts. But if, from the mere fact that hindrance and delay necessarily result from the execution of such a mortgage, it should be taken to be a fraudulent hindrance, then, of course, every chattel mortgage executed by one situated as Mr. Vaughan was—not having other property with which to pay his debts—would necessarily be fraudulent. But it is lawful for an embarrassed debtor to prefer one creditor over another. He has a right to pay one, and let another go unpaid. He has a right to secure one, and leave another unsecured; and such delay and hindrance as necessarily arise from such a preference of one creditor over another is not a fraudulent hindrance, in the sense of the law. And, if the parties intended no delay, no hindrance, to creditors, more than necessarily arose from the execution of the mortgage on the goods, then it was not such a fraudulent intent, within the statute, as to make the mortgage void. But if the parties intended, beyond securing the plaintiffs' debt or demand, that the mortgage should be used as a device or means for baffling creditors, the intention was fraudulent, and the mortgage invalid. In the face of the mortgage, there is nothing which the court can say is unlawful. It is given to secure notes that are made to become due within a short time. The mortgagor is allowed to remain in possession of the goods; but he is required to keep strict account, and pay over the proceeds, less the expenses of the business, to the creditor. And, if the parties intended no more than results from the terms of the instrument, and the delays and troubles to other creditors that would result from a fair enforcement of it according to its terms, the court cannot say to you that there was anything fraudulent in it. But I repeat that, if it was meant to be used as a device for accomplishing more than that, it was fraudulent. Now, how has it been suggested, or how does the evidence show, if at all, that there was any purpose to use the mortgage otherwise than as a security for the indebtedness which it purports to secure? The suggestion is made that there is no specific description of the goods in the mortgage; that they are simply described as goods in a certain store-room, on premises described; and it is suggested that, if the business went on, necessarily other goods must have been brought into the establishment, and when other creditors should have come to seek their rights they would have been unable to determine what was covered by the mortgage and what was not covered; that this was necessarily the intention of the parties, and that it was a fraudulent intention. If the parties did intend that,—did intend by this general description of the goods to hold it over the stock, and to bring in other goods and thereby deprive other creditors of the fair opportunity to reach goods not really covered by the mortgage,—it was a fraudulent intention. Do you necessarily infer that that was the intention of the parties, from the terms of the mortgage? As a matter of law, you cannot do so. It is a question of fact for you, under all the circumstances

and proof, to determine whether there was any fraudulent intent. It is manifest that the mortgage might have been used in the way suggested; but it is not an uncommon thing, I think, to describe stocks of goods in that way, and to leave the mortgagor in possession with the privilege of going on, selling the goods, and accounting for the proceeds. Whether or not it was intended to be used in that way would depend largely on the subsequent conduct of the parties. Of course, it would have been easy to confuse the goods, and it would be easy to prevent confusion. It could have been prevented by taking an inventory of the goods on hand, or by keeping a careful inventory of the new goods brought in; so marking them that they could be distinguished from the goods that were there at the time the mortgage was made.

You have no right to infer a fraudulent intent without proof; and the rule is that fraud is not to be presumed upon slight circumstances. You are not to surmise fraud, or presume it without proof, either direct or circumstantial, of so convincing a degree as to produce a firm conviction in your minds of the fact that it existed. It is not required that it shall be proved beyond a reasonable doubt; but it must be proved clearly and satisfactorily. Then, I say, whether the parties meant to use the mortgage to cover up new goods that should be brought into the establishment is a question of fact for you. The mortgage itself furnishes no proof of such intent, because it is perfectly evident that by honest conduct under the mortgage no such result would necessarily follow; and it is to be observed that, as a matter of fact, business was not continued under the mortgage at all. But, of course, if, when the mortgage was made, they intended to do that, and the intention to make an assignment was formed afterwards, the making of the assignment would not affect the purpose with which the mortgage was made. The argument of counsel—the last counsel who presented the case for the defense—is that there was a sudden change of intention, and that both intentions were fraudulent,—the original intention being to improperly use the mortgage in the way of carrying on the business; the second purpose, as claimed by counsel, being that the plaintiffs should ostensibly and formally foreclose the mortgage, advertise and sell the goods, buy them in themselves, and then turn them over to Mr. Vaughan, and he become indebted to them again,—practically reinstating the original status. Of course, if this had been the original intention when the mortgage was made, it would have been fraudulent; certainly, if the goods were worth more than the mortgage, and probably so even if the goods were worth only the amount of the debt. And upon this phase of the case the value of the goods cuts a considerable figure; because if the mortgage debt was equal to the value of the goods, once they were mortgaged and pledged for that debt, it would be immaterial to creditors what was done with them afterwards, because there would be nothing in them for creditors, no matter how the mortgage was handled. But if there was a probable valuable margin in the goods, over and above the mortgage debt, and the object was, through the mortgage, to transfer the title from Mr. Vaughan to the plaintiffs, and then back, either directly to Mr.

Vaughan or into the hands of a third person, for his benefit, so that he should get that margin, of course that would have been a fraud. It would have been a fraudulent use of the mortgage, and, if that had been the intention when the mortgage was made, of course it would invalidate the mortgage; and, if it was substituted for a prior fraudulent intent, the mortgage is none the less invalid on account of the change of purpose. Then this question of fraud, gentlemen, as I think, lies right here: Did Mr. Vaughan and these plaintiffs intend originally to use the mortgage to cover up goods and keep creditors off, delaying them more than the mere fact of the mortgage, as an honest security, would do? It is not claimed that there was any purpose to finally cheat; but it is insisted that there was a purpose to improperly and unnecessarily delay other creditors. If that was so, the mortgage was invalid. If there was no such fraudulent intent, then the mortgage is not invalid, and your verdict should be for the plaintiffs.

Another question—I have already indicated its importance as bearing upon the question of fraud—is the value of the goods, which you must state in your verdict, if you find for the defendant. I believe it is not necessary to be stated, if your verdict be for the plaintiff. The value of the goods is what they would fairly sell for in the condition they were in, taking advantage of the market as it was. You have heard all the testimony bearing on that subject, and will determine for yourselves what the amount should be. Of course, proof of what was made by the sale of the goods at retail, though it may aid you in determining what the wholesale value was, does not of itself determine that value. In other words, the retail proceeds are not, of course, to be treated as the value, although they may furnish you material assistance in determining what the wholesale value was. I shall not review the evidence. The questions at issue have been fully and ably discussed by counsel on both sides; and, with the knowledge of affairs which you doubtless have, you will appreciate the force of the evidence upon the points in dispute.

Ex parte KIEFFER.

(Circuit Court, D. Kansas. November 23, 1889.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MEAT INSPECTION.

Ordinances 619 and 620 of the city of Topeka, in regard to meat inspection, providing that the animal must be inspected before slaughtering, and must be slaughtered within one mile of the city limits, the effect of which is to exclude dressed meat brought from a distance, are unconstitutional, as interfering with free commerce between the states.¹

2. HABEAS CORPUS—ISSUANCE—DISCRETION OF COURT.

The right of appeal being an inadequate protection, by reason of its delay, to the person convicted and sentenced to imprisonment for the violation of such ordinances,

¹For discussions as to the constitutionality of the Minnesota meat inspection law, see *Swift v. Sphipin*, 89 Fed. Rep. 630; *In re Barber*, Id. 641.

and as their enforcement would stop the traffic in dressed meat with citizens of other states, the federal court, in the exercise of its discretion, may properly hold that such person has a right to a *habeas corpus* in order to a speedy determination of the constitutionality of such ordinances.

Petition for Writ of Habeas Corpus.

Geo. W. McCrary and Herald & Pierce, for petitioner.

Hazen & Isenhardt, for the City of Topeka.

BREWER, J. In the case *Ex parte Kieffer*, the facts are these: The petitioner was prosecuted in the police court of this city for violating the meat inspection ordinances. He was found guilty, and sentenced. He sues out this writ of *habeas corpus*, claiming that these ordinances are in conflict with the constitution of the United States, and therefore his imprisonment illegal.

At the outset we are met by this question: Is this a case in which the writ of *habeas corpus* should be allowed, even though these ordinances be deemed invalid? The cases of *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 784, and *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. Rep. 848, affirm that there is a discretion in the federal courts in the matter of *habeas corpus*, both before and after trial and judgment in the state court; and, in cases in which the act under which the prosecution is had is challenged as in conflict with the federal constitution. The court, in one—perhaps both—of these opinions declares that it is not to be assumed that the state courts will not administer the law correctly, and accord to the party all the rights guarantied to him by the federal constitution. Therefore it is often the proper way to decline to allow the writ, leaving the party to enforce his rights in the state courts. So it is argued that, if it be true that these ordinances are in conflict with the federal constitution, the petitioner has his remedy. He can appeal his case from the police to the district court; from there to the supreme court of the state; and thence to the supreme court of the United States. While that is true, yet he has no adequate relief in that way. He is now under sentence, and he cannot appeal without bond. He will be subjected to trial in the district court, possibly to an inquiry in the supreme court of the state, and finally in the supreme court of the United States. He must bear the expense, and suffer the delay. This is not a case prior to trial and judgment. It is a case after trial and after judgment. He has experimented with the state court, and it has decided against him. While he has, of course, the right of appeal, yet this is a burden, and personally, to him, it is an inadequate protection to say: "You can appeal, and go through that channel to the supreme court of the United States."

But that is not the only consideration. If these ordinances are invalid, they are invalid because of an attempt to interfere with commerce, and prevent the free exchange of commodities between the citizens of another state and those of this city. Few persons can stand the expense of litigation running through that channel to the supreme court. Length of time would pass before the judgment of that court could be obtained. In the mean time, if these ordinances are enforced,—not only against

this petitioner, but against whoever may see fit to engage in this business,—there is an interference with the exchange of commodities between the citizens of other states and those of this city; and the result will be to stop such traffic. Now, when that would be the natural result, when that is declared to be the intended purpose of this legislation, this court may, in the exercise of its discretion, properly hold, after a case has passed to judgment in the state court, that the party has a right to a speedy inquiry and determination in the federal court as to whether such ordinances are in conflict with the constitution of the United States. The public, as well as the individual, are interested in a speedy settlement of this matter.

There are two ordinances, Nos. 619 and 620, by which inspection is provided. That a municipality has power to provide for the inspection of articles of food is not open to question; and, if the sole purpose and object of these ordinances was inspection, there would be no federal question. But the court is not limited to any section, or even to any particular ordinance; for, if there be two ordinances, or two statutes, passed at the same or different times, bearing upon the same subject-matter, they are to be construed as but one act. And the court may even look beyond the letter of the statute, to the purpose which lies behind it,—just as in the ordinances passed in San Francisco, which provided for shaving the heads of all city prisoners. This was apparently a mere ordinance for the health and cleanliness of the prisoners; but the court, looking at it, saw that it was aimed at the Chinese, and intended to humiliate them by shaving off that which to them is sacred, and declared the ordinance void. So in the *Mugler Case*, 8 Sup. Ct. Rep. 273, that went up from this state, where the prohibitory law was sought to be declared unconstitutional, the proposition was submitted to the court in argument, that possibly, under the guise of police regulation, interference might be had with legitimate business, or the exchange of legitimate commodities; and the court said:

"We are not limited to the letter of the statute. We can look beyond that, and see what is the spirit and meaning of the law, and determine whether, under the guise of police regulation, rights guaranteed by the federal constitution are infringed."

And so here. When you look at this statute, it is not inspection solely. The animal must be inspected before slaughtering, as well as the meat after slaughtering, and the slaughtering must be within one mile of the city limits. In other words, if that ordinance be in force, no meat can be brought here from a distance. The animal must be brought here to be slaughtered, and must be slaughtered here. This puts an end for this city to what has become a recognized industry in this country,—the shipping of dressed beef; and it is not open to doubt that one of the objects of these ordinances is to protect the local butchering business, and prevent competition from those large establishments in other states,—and thus it is an interference with the free commerce between the states, and of course, in conflict with the commerce clause of the federal constitution. I shall not attempt to enter into a discussion

of that question. It has been before two or three federal courts, and two or three state courts, and the same principle has been enunciated in the supreme court of the United States in several cases; and there is really nothing now to be said. The moment you find any act of the legislature, or any ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commerce clause of the United States constitution. It was urged that a part of these ordinances might stand,—that part which simply provided for inspection. Of course, it is true, sometimes, that a part of a statute may be void, and another part valid; but when they are interlocked, so that one depends upon the other, there can be no separation. Both must fall. It may be that in many cases the inspection of food would be desirable, and the food would be refused because it was unwholesome; but it is also clear, under these ordinances, that it cannot be approved, if it was slaughtered more than a mile from this city. It is a matter in which, for this case, at least, the court cannot take the ordinance to pieces, and say there are certain sections which shall stand. The different parts of the ordinance or ordinances are interlocked, and are dependent one upon the other. I have no question but that they are in violation of the rights guaranteed by the federal constitution, and especially its commerce clause. The petitioner will be discharged.

UNITED STATES v. BREEN.

(Circuit Court, E. D. Louisiana. November 4, 1889.)

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—PROTECTING IMPROVEMENTS ON MISSISSIPPI.

Act Cong. Aug. 11, 1888, § 5, (25 St. 424,) authorizing the secretary of war to make such rules and regulations as may be necessary to protect improvements on the Mississippi, and providing that any violation of such rules shall constitute a misdemeanor, etc., is not invalid as conferring legislative authority on the secretary, as he is only authorized to make the rules, and it is the act of congress which declares the violation to be a misdemeanor.

On Demurrer to Indictment.

Chas. Parlange, Dist. Atty.

J. R. Beckwith and E. W. Huntington, for defendant.

Before LAMAR, Justice, and PARDEE, J.

LAMAR, Justice. The question now for decision arises upon defendant's demurrer to the indictment against him, which, in substance, alleges that, under the provisions of section 5 of the act of congress, approved August 11, 1888, (25 St. 424,) the secretary of war was authorized to make such rules and regulations as might be necessary to protect the improvements then being made on the South pass of the Mississippi river, and to prevent any obstructions in said pass or injury to the work

then being done by the government upon the improvements being made; that the act further provided that any violation of the rules and regulations so made should constitute a misdemeanor against the United States; and that upon conviction for such violation, in any court of the United States having jurisdiction thereof, the defendant should be fined a sum not exceeding \$500, and be imprisoned not exceeding six months, at the discretion of the court. The indictment further charges that the secretary of war, in pursuance of the authority so vested in him, did make, among other rules and regulations, the following:

"(1) Steam-vessels navigating the South pass are required to reduce their speed to not exceeding ten miles per hour, and from the pilot's station, at Picayune bayou, to the sea end of the jetties, the speed shall not exceed six miles per hour."

The indictment further alleges that after the making and promulgation of said rules and regulations, on the 4th day of November, 1888, within the jurisdiction of said court, the said Edward Breen unlawfully and willfully did violate the said rules and regulations, he (the said Edward Breen) then and there being and acting as pilot in and on board a certain steamer vessel, Ayshire, which vessel was then and there navigating the said South pass of said Mississippi river; and then and there having exercised the direction, management, and control of the navigation of said vessel, said Edward Breen did not then and there, as by said rules and regulations required, reduce the speed of said vessel to not exceeding 10 miles per hour, but did then and there navigate the said vessel at a greater rate of speed than 10 miles, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

To the charges made in this indictment the defendant has interposed his general demurrer. The only ground relied upon in behalf of the defendant is, that the authority conferred by the act of congress on the secretary of war to make and promulgate said rules and regulations is legislative, and cannot, under the constitution of the United States, be, by act of congress, conferred upon the secretary of war, or any one else, so as to make a violation thereof a crime against the United States. Whether this is so or not is the only question to be determined.

If the law empowered the secretary of war, by rule or regulation, to make a certain act criminal, and punishable as such, then this prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the secretary is authorized to do is to make the rule and regulation. It is the act of congress which declares that the unlawful and willful violation of such rule and regulation, after it is promulgated, shall be held a misdemeanor by the person violating the same, and that such person shall be sentenced to pay a fine not exceeding \$500, and shall suffer imprisonment not exceeding six months, as a penalty therefor. Numerous acts of congress have been passed authorizing the postmaster general, and other members of the executive department, to make rules and regulations for the business pertaining to their respective depart-

ments, and declaring that, when made and promulgated, a willful and unlawful violation of them should be held a crime against the United States, and the violators punished as prescribed in the act. The supreme court of the United States is authorized by act of congress to adopt certain rules for the government of the inferior courts, which, when made, have the force and effect of law as much as if such rules were directly enacted by congress, and approved by the president. The same effect is to be given to the rule and regulation made by the secretary in this case. The act of congress denounces the violation of it as a crime, and prescribes the penalty. The criminality of the violation of the rule, and the liability of the offender to indictment and to punishment upon trial and conviction, result directly and exclusively from the legislation of congress. Numerous decisions made by the supreme court of the United States might be cited to maintain the position stated, but they are so well known to the profession that reference to them is deemed unnecessary. The demurrer is therefore overruled.

PARDEE, J. I concur in the foregoing opinion and ruling.

BOWLING *et al.* v. TAYLOR.

(Circuit Court, D. Connecticut. November 21, 1889.)

1. CONTRACTS—RESTRAINT OF TRADE.

Complainants, who were manufacturing under patents stays which consisted of a stiffening blade having a sheet of rubber on each side, and an outer layer of cloth over each sheet, and defendant, who was making two kinds of stays,—the "Bridgeport" and the "Self-Attaching,"—both of which complainants claimed to be infringements on their patent, entered into an agreement by which complainants licensed defendant to make the "Self-Attaching," provided he would not make the "Bridgeport" stay; and defendant agreed to make no stays consisting of a steel, a layer of gutta-percha, and two outer layers of fabric. By a supplemental agreement they confined themselves to the manufacture of the "Self-Attaching" by the defendant, and the "Ypsilanti No. 1" by complainants, the latter being a stay of the double layer kind; but it was agreed that complainants might put a cheaper double layer stay on the market, provided they would furnish defendant, at a certain price, the same quantity of such cheaper stay as should be sold by themselves. Complainants put a cheaper stay—"Ypsilanti No. 2"—on the market, and filled defendant's orders for the same, and afterwards, against the protest of defendant, began to make and sell a still cheaper stay, called the "America," of which they offered to let defendant have the same quantity as sold by them, at the same price as was paid by their agent. Defendant refused to take them, and, claiming that complainants had broken their agreement in selling the cheaper stay, "America," to the injury of the sale of "Ypsilanti No. 2," he commenced the manufacture of the "Bridgeport," and also of a stay in which glue or paste was substituted for gutta-percha. Held, that this contract was not in restraint of trade.

2. SAME—BREACH—INJUNCTION.

Nor was there such material breach of the contract by complainants as would justify refusal of defendant to carry out his part of the contract; for which reason a temporary injunction should be granted against the manufacture by defendant of stays containing a stiffening blade with one or two layers of gutta-percha, and two outer layers of fabric, but not against the manufacture of the stay in which paste or glue is substituted for gutta-percha.

In Equity. Motion for preliminary injunction.

Greenbaum & Hayes, for complainants.

Sherman H. Hubbard and Henry Stoddard, for defendant.

SHIPMAN, J. This is a motion for a preliminary injunction in a bill in equity, by citizens of the state of Michigan, against a citizen of the state of Connecticut, which is brought for a permanent injunction against the further violation by the defendant of his agreement not to make ladies' stays in the manner alleged to have been secured to the complainants by their patent.

On October 5, 1888, the complainants were manufacturing, under three patents to E. C. Bowling and one to Elsie M. Smith, ladies' dress stays, which consisted of a stiffening blade, having a sheet of rubber on each side thereof, and an outer covering of cloth over each sheet. The defendant was also then manufacturing a ladies' stay, called the "Bridgeport Stay," consisting of a stiffening blade, with a single layer of gutta-percha on one side, and an outer layer of fabric on each side. He was also manufacturing, under a patent to Roscoe B. Wheeler, a stay called the "Self-Attaching Stay," consisting of a blade, a gutta-percha strip on one side, and a layer of cloth on the other side. Each of these forms was claimed by the plaintiffs to be an infringement of the principal Bowling patent, a reissue of which had been applied for. They had also commenced in the patent-office an interference proceeding in regard to the Wheeler patent, and had threatened the defendant with a suit. On October 5, 1888, the parties entered into a written agreement, which was amended on the same day by a subsequent agreement, which agreements were, in substance, as follows: The complainants licensed the defendant, under their patents, to make and sell stays "designed to operate upon the self-attaching principle," *i. e.*, "the Self-Attaching Stay" described in the Wheeler patent, provided he should make no Bridgeport stays, except he could sell 3,000 gross then in process of construction, and fill all orders theretofore received. The complainants agreed not to make the self-attaching stays of the Wheeler patent, and to make no effort to annul or disturb it; and the defendant agreed that he would make no stays consisting of a steel, a layer of gutta-percha, and two outer layers of textile fabric. Minimum prices were fixed for the self-attaching and the double layer stays, which the complainants were then making. The complainants sold to the defendant their interest in the English and French patents of Wheeler. By the supplemental agreement the parties agreed to confine their manufacture respectively to the stays known as the "Self-Attaching" and the "Ypsilanti No. 1." If, however, the complainants should deem it advisable to put upon the market a cheap stay of the double layer kind, they should, upon demand, furnish the defendant, at a price of 50 cents per gross, a quantity of said stays equal to that put out and sold by the complainants. In the event of the putting out of this cheap stay, the net price to the trade should be the same by both parties; the complainants to fix the price. The cheap stay, called "Ypsilanti No. 2," was immediately put upon the market; the price was fixed; the defendant commenced to order; and his orders

were filled. The anticipated reissue was delayed, and, for a time, denied; and infringers sprang up, who put cheap goods upon the market. The firm which sold all of the complainants' stays in the city of New York, other than those sold by Taylor, was very anxious that the complainants should make a cheaper stay than the "No. 2," which would cost $36\frac{1}{2}$ cents per gross, and which they would sell from 25 to 35 cents, —at a loss to themselves,—and thus undersell the cheap goods of their rivals, and destroy competition; and in January, 1889, the complainants promised that they would send the New York firm 6,000 gross of these cheap goods. They informed the defendant of this plan on January 4 or 5, 1889, and asked him if he would take some of these goods at $36\frac{1}{2}$ cents, and sell at a loss. He declined, and said that such a course would injure the sales of "No. 2;" and that it was a breach of the contract; and that he would resume the manufacture of the Bridgeport stay. On January 9, 1889, complainants telegraphed defendant as follows: "After consultation, we are agreed that the fewer cheap stays made, the better. Shall ship Model Co. only enough for present orders." Upon receipt of this telegram, defendant telegraphed complainants, asking at what price they could furnish 10,000 gross of these cheap stays, and on January 10th wrote complainants, protesting against the sale of this cheap edition of No. 2 stay, and stating that his attorney regarded it as an abandonment of the contract. On January 11th complainants telegraphed defendant: "Cannot fill orders for cheap stays under 30 days. Price, $36\frac{1}{2}$ cents;"—and on January 16th, upon the return of Mr. Bowling, he telegraphed defendant: "Have limited Model Co. to 6,000 gross cheap stays. Will place you on equal terms as to price and quantity. Price 31 cents, net cash, f. o. b. Ypsilanti." This stay was called "The American." The defendant resumed the manufacture of the Bridgeport stay, at a cheap rate. In July, 1889, the reissue of the Bowling patent was granted, and thereafter in Detroit, in Bridgeport, and in New York, and by correspondence, both by telegraph and by mail, much talk and negotiation were had between the parties respecting the discontinuance by the defendant of the manufacture of his cheap stays. This negotiation ended as follows. On August 23, 1889, defendant wrote complainants the following letter:

"OFFICE OF THOS. P. TAYLOR, MANUFACTURER OF FOLDING BUSTLES,
DRESS STAYS, DRESS SHIELDS, DRESS EXTENDERS, CORSET
CLASPS, AND STEELS.

"(Dictated.)

BRIDGEPORT, CONN., August 23rd, 1889.

"*The Ypsilanti Dress Stay Co., Ypsilanti, Mich.*—GENTLEMEN: Since my letter of recent date, I have decided to discontinue the manufacture of the cheap stays which have been the subject of our recent controversy, and to manufacture, instead, a stay of a different character, which will not in any way come under your patents. I will put out samples of the Ypsilanti No. 2 stay at once, and will endeavor to push their sale in accordance with the terms of our contract. I should also like to request immediate information as to what you intend to do with me about the cheaper stay, which you are now selling under the name of "American." In accordance with my talk with Mr. Bowling when here, I shall be entitled to a large quantity of these stays at

cost. Kindly figure out the cost, and let me know in what quantity you can supply them; and I will place an order at once. With best regards, I am,
 "Yours, very truly,

THOMAS P. TAYLOR.

"P. S. I have about 1,200 lbs. thin gutta-percha, running 17 to 18 yds. to the pound, which I should like to sell at \$1.25 per pound."

He also sent them a sample of his proposed cheap stay, which, if I understand the matter correctly, did not contain gutta-percha, but was made with paste or glue. The complainants telegraphed defendant, August 29th: "You are entitled to about 13,000 gross cheap stays, at 31 cents gross. Unless you stop at once manufacturing and selling cheap stays, will push suit against you." And, in reply to the defendant's telegram, "What do you mean by cheap stays. Does the stay with glue come under your patent?" complainants telegraphed: "Under your contract, you have no right to make stays like sample sent us." The defendant replied, on August 31st, that this telegram put an end to negotiations, so far as he was concerned, and is continuing the manufacture of the Bridgeport stay.

It is not intended to give either a complete and detailed statement, or a summary of the conversation, correspondence, and negotiations, as detailed by the defendant, from September, 1888, to August 31, 1889, but to give so much as will explain the leading matter of defense in the affidavits and in the argument, viz., an alleged breach of contract by the complainants in putting upon the market their cheap "American" stay, to the injury of the sale of "No. 2." Much has been attempted to be made of the complainants' conduct in this regard; but the correspondence shows, to my mind that, if the outcry which was made was not made merely to accomplish business purposes, an undue and exaggerated importance has been given to the matter. It appears that about 13,000 gross of this cheap stay, amounting to \$5,000, are all that have been sold; and the correspondence from complainants' telegram of January 9th to the defendant's letter of August 23d, much weakens the weight which is attempted to be given to this alleged breach of contract, if it does not show that it has no weight at all. The correspondence does not now show to me that up to the present time there is an adequate reason why the contract should not be carried out in accordance with a fair and reasonable construction of it. I might discuss the various matters of defense more at length, but I prefer to postpone such discussion until full proofs have been made. The defendants insist that the contract is void because it is in restraint of trade, was unreasonable and oppressive, and attempted to create a monopoly. If the construction was true which he seeks in argument to place upon the contract, viz., that he is excluded for all future time, from the manufacture of any stay produced by any other method or by any other person, but can only manufacture the "Self-Attaching Stay," the argument of the defendant would have more weight. But the contract was one in regard to the manner in which the parties should exercise their alleged patent-rights, and had reference merely to the manufacture of goods under the specified patents.

If I correctly understand the character of the stay which the defendant

proposed to make in his letter of August 23d, and a sample of which he sent to the complainants, it did not contain gutta-percha or its equivalent, and its manufacture should not have been objected to by the complainants; but, inasmuch as, long prior thereto, the defendant had been improperly violating his agreement, I do not think that the subsequent error of the complainants ought to be considered an adequate excuse for his conduct. They should, however, withdraw their opposition or objection to his manufacturing a paste stay. Let a preliminary injunction issue, restraining the defendant from the manufacture or sale, *pendente lite*, of stays containing a stiffening blade, with one or two layers of gutta-percha and two outer layers of fabric; it being also provided that the substitution of paste or glue for gutta-percha is not, during the continuance of the injunction, to be considered a breach of it.

BURNHAM v. RUNKLE.

(Circuit Court, D. New Jersey. November 15, 1889.)

CONTRACT—CONSTRUCTION—NOVATION.

M., employed by defendant to raise money to be deposited as a guaranty for fulfillment of a contract awarded to defendant, borrowed the money from plaintiff, and deposited it, and defendant undertook to pay this money to M. if it should be forfeited. Defendant failed to perform the contract, by reason of which the deposit was forfeited, and he became liable to M. for the amount and interest, and also liable for damages for breach of contract. To secure release from liability for damages, defendant executed a power of attorney to J., authorizing him to receive anything due him under the contract, and to do anything necessary to obtain his release, etc.; and J. entered into an agreement with plaintiff by which he agreed, on behalf of defendant, that defendant would pay to plaintiff the balance due him on account of amount loaned by plaintiff to M., for which defendant was responsible to said M. *Held*; that defendant was bound by the agreement to pay plaintiff the balance due from M.

At Law. Trial by the court, a jury having been waived by the stipulation of the parties.

Action by Santiago J. Burnham, a citizen of London, England, who sues for the use of Francisco G. Mediavilla, against Daniel Runkle, a citizen of New Jersey, to recover money due on a written agreement.

Babbitt & Lawrence, for plaintiff.

Wallis & Edwards, for defendant.

WALES, J. This action is founded on a written agreement, which was entered into by the plaintiff and defendant, and grew out of certain transactions connected with negotiations for the loan of a large sum of money to the city of Havana, in the island of Cuba, and for obtaining the award of a contract to the defendant and others for the construction of water-works for supplying the city with water. On an examination of the testimony, and a consideration of the oral and written arguments of counsel, the court finds the following facts to be proved by the evidence,

or legally inferable therefrom, and on which judgment will be rendered:

(1) On the 18th of March, 1882, contracts for a loan and water-works were awarded by the city of Havana to Daniel Runkle, the defendant, Walter H. Gilson, James H. Lyles, and Maddison & Co., of London; and, on the 27th of the same March, Lino Martinez deposited the sum of \$64,000, in Spanish gold, in the municipal treasury of Havana, "as a guaranty for the propositions which Messrs. Gilson, Runkle, and Lyles, and Maddison & Co., of London, have presented to the municipality of Havana for the loan of \$5,600,000."

(2) Martinez had been employed by Runkle, who was acting for himself and his co-contractors, to raise the amount required to be deposited as a guaranty for the fulfillment of the contract; and in pursuance of this employment Martinez had borrowed the sum of \$64,000 from the plaintiff, Burnham.

(3) Runkle, Gilson, and Lyles undertook to repay this sum of \$64,000 to Martinez at any time he should ask for the same, if it should be demanded by the city in consequence of their not having carried out the contracts for the water-works, or for any cause for which the city might retain the deposit, and, as a remuneration, and for the payment of interest to Martinez, they assigned to him the amount of \$25,000, payable monthly, at the rate of 1.137 per cent., from the amounts they should receive for the works. This undertaking fell through, in consequence of the final abandonment of the contracts, but the fact remains that it was the understanding of all the parties that Martinez was to be repaid the sum of \$64,000, with interest, and also to be remunerated for his services or expenses.

(4) Subsequently to these proceedings Runkle became the assignee of all the rights and interests of his co-contractors, under their contract with the city of Havana, and thenceforward was solely entitled to all the profits that might accrue from its performance, and liable for the consequences of its non-performance.

(5) Runkle failed to perform the contract for the water-works, and, by reason of his default, the sum deposited with the city of Havana, as a guaranty, was forfeited, and he became liable for such damages as were sustained by the city on account of his failure. He also became responsible to Martinez for the repayment of the guaranty deposit, with interest, and the expenses incurred in effecting the loan from Burnham, amounting in all to the sum of \$83,087.36, as per account stated between Burnham and Martinez, on the 4th of August, 1884.

(6) Runkle, being desirous of procuring a full and general release from all liability on account of his connection with the contract for the loan and water-works, executed in due form, on the 25th of June, 1884, a letter of attorney to Jose M. Mestré, who was then in the city of Havana, authorizing him to demand and receive such sum or sums of money and property of any kind, of right belonging to Runkle, "under or in connection with the contracts for the loan and water-works, made in consequence of the public bidding therefor, on the 18th of March, 1882, and which loan and contract were awarded to me, [him,] together

with Walter H. Gilson and Maddison and Company, and also James H. Lyles," and "to do all things necessary in the judgment of my said attorney, and to obtain my release from all liability as one of the contractors in connection with the said loan and water-works; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done, in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present," etc.

(7) By virtue of the authority conferred on him by the aforesaid letter of attorney, Mestré, on the 4th of August, 1884, acting for and in the name of Runkle, entered into a written agreement or stipulation, in the Spanish language, with Burnham, of which the following is a translation:

"This present is to certify, to which I desire to give all the force of a public instrument, that I, Mr. S. J. Burnham, having received from Mr. Lino Martinez the sum of sixty-four thousand dollars gold, on account of the sum of \$83,087.36 which results in my favor from the account that under this date has been presented to Mr. Lino Martinez in relation to the drafts drawn on the 24th of March, 1882, by Mr. H. J. Overmann upon Mr. E. C. Maddison, of London, and indorsed to my order by the said Mr. Lino Martinez, the which were protested for non-payment, and protected in due course by the Messrs. Baring Brothers and Company, of London, as the representatives of the Messrs. J. C. Burnham and Company, have agreed, in regard to the balance of \$19,087.36 that still remains unpaid, as follows: Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Mr. Walter H. Gilson, who in his turn was the assignee of Mr. E. C. Maddison, for himself and for the firm of Maddison and Company, I bind myself to place at the disposal of said Mr. Runkle the shares of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison & Company deposited in my hands, and transferred to me as guaranty for the reimbursement of the amount of the aforesaid drafts, and the expenses and interest relating thereto, so soon as such balance of \$19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which it is to be done within the period of three months, counting from the date hereof; it being left to his discretion either to do so directly, or to direct that, if the said shares deposited there be sold, (in accordance with such instructions that for such purpose he may give,) such portion as may be necessary for the reimbursement of such balance of \$19,087.36, which being covered the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares. The sum owing shall carry interest at nine per cent. per annum until its complete payment. Mr. Jose Manuel Mestré, as the attorney in fact of Mr. Runkle, subscribes this present stipulation by way of assent, in the name of his principal. That, in order that it may have all its due effect, this is done and signed in triplicate, of the same tenor, one for each party, at Havana, the 4th of August, 1884.

"MEMORANDUM AS TO CORRECTIONS.

"*Nota.* At the moment of signing, Mr. S. J. Burnham stated that he assigns and transfers to Mr. Candido Zabarte y Paris, all the rights and rights of action that belong to him under the foregoing instrument, subrogating him in his place and stead, by reason of having received from him the aforesaid balance of \$19,087.36; but on the understanding that said Burnham remains always bounded to sell the shares of stock in question to the order of Mr.

Runkle, as set forth, and to deliver to the latter the balance of the proceeds of the sale, and the shares remaining. Dated as above.

[Signed]

"JOSE MANL. MESTRE.

"S. J. BURNHAM.

"L. MARTINEZ.

"CANDO. ZABARTE Y PARIS.

"As witnesses:

"E. COSCULLUELA.

"ANTONIO PAIS."

(8) Runkle had no property or debts belonging to or due to him, in the city of Havana, and the letter of attorney was executed for the sole purpose of authorizing Mestré to procure his release from any and all liability as a contractor in connection with the water-works; and there is no proof that Mestré received notice of the revocation of the letter before he signed the agreement with Burnham.

(9) Martinez exerted himself to obtain from the authorities of Havana the release of Runkle, and the return of the deposit money, in consideration of Runkle entering into the agreement with Burnham.

(10) The right of action, accruing to Burnham under the agreement, was assigned by him to Candido Zabarte y Paris, and by the latter to Francisco G. Mediavilla.

CONCLUSION.

The opinion of the court is that the agreement, of August 4, 1884, was assented to by Runkle, through Mestré, who had full power, under the letter of attorney, to bind his principal. The consideration for the agreement, on the part of Runkle, was his release from liability under his contract with the city of Havana, the return of the deposit money, both obtained by Martinez, and the remuneration to Martinez for interest and expenses incurred in making the loan from Burnham, and for Martinez's personal services in effecting this consummation. In making the agreement, of August 4th, Runkle only exchanged creditors. Martinez was indebted to Burnham in the sum of \$19,087.36, and Runkle was indebted to Martinez for a like amount. By the agreement, Runkle assumed the payment of this sum to Burnham in the manner set out in the agreement.

Judgment will be entered for the plaintiff for \$19,087.36, with interest at the rate of 9 per cent. per annum from August 4, 1884, to the date of the entry thereof,—that is, for the period of 5 years, 3 months, and 11 days,—being \$9,070.46, amounting, principal and interest, to the sum of \$28,157.82.

BARR v. PITTSBURGH PLATE-GLASS Co. et al.*(Circuit Court, W. D. Pennsylvania. November 21, 1889.)***CORPORATIONS—RIGHTS OF STOCKHOLDERS—INJUNCTION AGAINST CORPORATION.**

A stockholder in a manufacturing corporation filed a bill against the corporation, and all the directors thereof, and another stockholder, charging that the latter defendants had entered into a conspiracy to do an unlawful and fraudulent act, in furtherance of their individual interests, which would destroy or seriously impair the value of the property of the corporation; that the directors and their co-defendant stockholder held among themselves seven-tenths of the stock of the corporation, and that they had procured a vote of the stockholders authorizing the directors to carry out the project,—the bill praying for an injunction to restrain the corporation from consummating the fraudulent transaction. Upon demurrer to the bill, *held*, that the plaintiff could maintain the bill to protect his individual rights, and that his suit was not to be defeated because the bill did not show a previous effort on his part to secure redress by an appeal to the directors or stockholders for remedial action.

In Equity. *Sur* special demurrers to the bill of complaint.
S. Schoyer, Jr., S. B. Schoyer, and W. R. Errett, for complainant.
D. T. Watson and Dalzell, Scott & Gordon, for defendants.
Before McKENNA and ACHESON, JJ.

PER CURIAM. In so far, at least, as the bill relates to the Ford City Works, it is not founded, as the demurrers assume, upon a right of action belonging solely to the corporation defendant; but it is really based on the plaintiff's individual rights. The injury here complained of directly affects the plaintiff personally, and he seeks the protecting power of the court against the alleged fraud of the governing board of directors. The controversy is between the plaintiff and the directors of the corporation and another stockholder, who, in violation of the plaintiff's rights, are about to proceed to do an unlawful act, which will destroy or seriously impair the value of property in which the plaintiff has an interest. No one outside of the corporation has any concern in the controversy, nor is any outsider here sued. The corporation itself is a real defendant, the bill praying for an injunction to restrain it from consummating the alleged fraudulent transaction. The bill alleges not only that all the directors are acting in their own interest, and in fraud of the rights of the plaintiff, but also that they and their co-conspirator (a defendant herein) together hold seven-tenths of the stock of the corporation; and, further, that they have procured a vote of the stockholders authorizing them to carry out the contemplated fraudulent project. In view, then, of these allegations, which for the present we must accept as true, it would be most unreasonable to defeat the plaintiff's suit because the bill does not show a previous effort on his part to obtain redress within the corporation by an appeal for remedial action to the directors or stockholders. The demurrers must be overruled, with leave to the defendants to answer the bill within 30 days; and it is so ordered.

SOWLES v. WITTERS *et al.*

(Circuit Court, D. Vermont. November 9, 1889.)

JUDGMENT—MUTUAL JUDGMENTS—SET-OFF.

Where complainant has a decree in equity that defendant pay her dividends on stock held by her, and defendant has against complainant an unsatisfied judgment at law for an assessment on said stock, the court, on motion, will order the amounts to be paid under the decree applied on the judgment, though the judgment was at a former term, and complainant intends to appeal therefrom.

In Equity. Motion to set off decree in equity against a judgment at law obtained at a former term by defendant against complainant.

Kittredge Haskins, for oratrix.

Chester W. Witters, *pro se.*

Edward A. Sowles, *pro se.*

WHEELER, J. The oratrix has an order for a decree that she is a creditor of the First National Bank of St. Albans to the amount of \$26,034.75, and that the defendant pay her dividends thereon. *Sowles v. Witters*, 39 Fed. Rep. 403. The records of this court show that the defendant has an unsatisfied judgment against her for an assessment upon her stock in the same bank. *Witters v. Sowles*, 38 Fed. Rep. 700. The defendant moves, on settlement of the decree, that the amounts to be paid to her be decreed to be applied on the judgment against her, instead of paid to her in money. The oratrix objects because the judgment was at a former term and at law, and because she intends to prosecute a writ of error and an appeal from the judgment and decree. The decree would not disturb the judgment of the former term, but only satisfy it so far; and the judgment is in this court, although on the law side, and can be found by mere inspection of the record without trial. A court may always inspect its own records to ascertain what is there, although it may not have power, after the terms, to alter judgments and decrees shown by them. The writ of error does not vacate the judgment, and cannot now operate as a *supersedeas*. If the judgment is enforced, she will pay its amount to the defendant; if the decree is enforced, he will pay the amount of these dividends to her. The receipts and payments are in the same right in each behalf. Circuity will be avoided, and the judgment and decree be both carried out, by making the decree for the application of the dividends upon the judgment. The power of the court to so frame its decree as to make this set-off seems to be ample. *Conable v. Bucklin*, 2 Aikens, 221; *Rix v. Nevins*, 26 Vt. 384; *Sellick v. Munson*, 2 Vt. 13. Let the decree be so drawn and entered.

BAILEY v. HURLBUT *et al.*

(Circuit Court, D. Connecticut. November 8, 1892.)

MORTGAGES—EVIDENCE.

Defendant, who was executor of his father's estate, obtained money from a bank on the check of a third person, with which he paid mortgages on his father's land, and took an assignment thereof to himself, receiving also a quitclaim deed to the land from the mortgagees. He deposited the mortgages with the bank as security for the check. On its dishonor he obtained money from plaintiff's assignor with which to pay it, and assigned to him the mortgages, quitclaim deed, and a warranty deed to another tract, as security. The check was also sent to plaintiff's assignor, but he returned it to the original payee. *Held*, that the loan was made to defendant, and not to the drawer of the check, and the securities bound defendant and the land.

In Equity. On bill for foreclosure.

Edwin B. Gager, for plaintiff.

Wm. F. Hurlbut, for defendants.

SHIPMAN, J. This is a bill in equity for the foreclosure of mortgages upon real estate. Prior to April 11, 1881, Joseph W. Hurlbut had mortgaged his homestead in Winchester, Conn., to the Winsted Savings Bank, by two mortgages, to secure two notes for \$1,000 and \$500, respectively, and had died leaving a last will, by which he appointed his son William F. Hurlbut his executor, and devised one-third of said land to him, and one-third to him as trustee for Warren P. Hurlbut, and said savings bank had obtained a decree for the foreclosure of said mortgages. On said day Joseph M. Hurlbut, of Brooklyn, N. Y., another son of Joseph W., delivered to said William F. a check of Henry A. Taylor upon a bank in Rochester, N. Y., for the sum of \$2,600, to the order of Joseph M., and by him indorsed, and also subsequently indorsed by said William F. The money upon said check was advanced to William F. by the Hurlbut National Bank of Winsted, and, with the exception of about \$30, was paid to said savings bank for an assignment of said mortgages, and in payment of a mortgage of about \$500 upon another piece of land which had been executed by William F. individually. The savings bank quitclaimed their interest in said mortgaged homestead to William F. The two mortgage notes and deeds of said premises were delivered to said national bank to be held in escrow for the time, and to become, if need be, security for the payment of said check. It was unpaid, and earnest demand was immediately made upon William F. for payment. Joseph M. induced Henry F. Shoemaker to undertake to loan to William F. the money to take up the check. Shoemaker sent his lawyer, Theodore B. Gates, to Winsted to make said loan, if the security seemed sufficient. William F. wanted that Taylor should be Shoemaker's debtor, and that the securities should be assigned to Shoemaker, as security for the payment of Taylor's debt. Gates thereupon returned to New York, but Shoemaker refused to accept Taylor as his debtor, and Joseph M. ineffectually attempted to induce Taylor to agree to indemnify William F. Thereupon, on April 26, 1881, Gates sent to William F. a certified check for \$2,607.25, the amount of

Taylor's protested check, and interest and expenses thereon, which William delivered to said Hurlbut Bank, received the deeds of said mortgaged property, executed an absolute quitclaim deed of said homestead to said Shoemaker, and also an absolute warranty deed of another piece of real estate, as described in the bill of complaint, and sent to Gates the two mortgages on the homestead, with the two notes and the warranty and quitclaim deeds and the Taylor check. Gates subsequently returned the check to Joseph M. The two mortgages, notes, and quitclaim deed were security for the payment of the Shoemaker loan, and the warranty deed was intended to be additional security for the same debt, if such security was needed. It was accepted by Shoemaker as such security, and was thereafter recorded. Neither interest nor principal has ever been paid upon said loan of \$2,607.25, but the whole is now due. Said Shoemaker subsequently assigned, for value, all said debt and all said security to the plaintiff, who, or his assignor, has paid taxes to the amount of \$127.43, as alleged in the bill of complaint, upon said mortgaged pieces of real estate.

It is claimed by the plaintiff that the fees and expenses of said Gates, amounting to \$120, were to become a part of said loan, were to be included in said security, and were to be repaid by William F. The negotiations with Shoemaker for said loan were conducted by Joseph M., who was anxious to preserve the homestead, and prevent its being lost to the Hurlbut family, and I have no doubt that he promised repayment of the \$120; but it is not proved that William knew of or ratified this promise, or made himself responsible for the repayment. The only question in dispute in the case is whether the loan of \$2,607.25 was made to William F. or to Taylor, and whether the deeds and securities which were given by William were security for the payment of Taylor's or his own debt. The history of the transaction, and, especially, the testimony of Gen. Gates, leave no doubt in my mind that the theory of the plaintiff is the correct one. Let a decree be entered for the payment by said William F. to the plaintiff of \$2,607.25, the interest thereon, said taxes, and the costs of this suit, within such reasonable time as shall be designated, and, in default of such payment, for a foreclosure in accordance with the prayer in the fourth count of the complaint.

UNITED STATES v. RICHMOND MIN. CO.

(Circuit Court, D. Nevada. November 23, 1889.)

PUBLIC LANDS—RIGHT TO TIMBER CUT FOR MINING PURPOSES.

The defendant, a corporation engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction works. The cord-wood, and the wood from which the charcoal was manufactured, were cut upon unsurveyed, public lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts, or not far remote from known mines. *Held*, that this was mineral land within the meaning of the act of congress

of June 3, 1878, permitting timber to be taken therefrom for "building, agricultural mining, or other domestic purposes;" and that defendant could lawfully purchase such wood and coal for said use under the license given by said act.

(*Syllabus by the Court.*)

At Law. Replevin.

J. W. Whitcher, U. S. Atty., and Henry Rivers, for plaintiff.

Wren & Cheney, for defendant.

SABIN, J. This is an action of replevin, brought by plaintiff to recover from the defendant the possession of 10,000 bushels of charcoal, of the alleged value of \$1,800, and 300 cords of wood, of the alleged value of \$2,100, the same being at the yard and premises of the defendant at the town of Eureka, in this state. The complaint alleges that said coal was manufactured from wood cut and removed from the unsurveyed public timber lands of plaintiff within said state, and that said 300 cords of wood were cut and removed from said lands, and all so cut and removed unlawfully and without the consent of plaintiff, and that plaintiff is now the owner thereof. Plaintiff demands judgment for the recovery of the possession of said coal and wood, or for the value thereof, in the sum of \$3,900, if recovery of possession cannot be had. The answer of defendant denies that plaintiff is the owner of said personal property; denies that said wood was cut from the lands mentioned in the complaint; denies that defendant wrongfully or unlawfully or without plaintiff's consent took possession of said property, or wrongfully or unlawfully withholds possession of the same, or any part thereof, from plaintiff. The case was tried before the court, without a jury. The findings of fact upon the evidence submitted are brief, and as follows:

"(1) That the defendant, the Richmond Mining Company of Nevada, is a corporation duly organized and existing under and by virtue of the laws of the state of Nevada, engaged in the business of mining, purchasing, and reducing ores, and separating gold and silver from lead, in the town and county of Eureka, state aforesaid, and was such corporation and so engaged at the time of, and long prior to, the commencement of this action. (2) That at the time of the commencement of this action said defendant was in possession of 16 cords of wood, of the value of six dollars per cord, and seven thousand bushels of charcoal, of the value of 21 cents per bushel, at its works in said town; and that said wood, and the wood from which said charcoal was manufactured, was cut upon the unsurveyed mineral lands of the United States, not subject to entry under any existing law of the United States except for mineral entry; and that said wood was cut, and said charcoal was burned, by *bona fide* residents of the said state, for use in the said county, and sold to said defendant for use in carrying on its said business in said town, at a distance of about three miles from its mines. (3) That the trees from which said wood was cut were a species of scrubby nut pine, cedar, and what is locally called 'Mountain Mahogany,' about ten or twelve feet in height on an average, with bodies from four to eight feet in length, and less than twelve inches in diameter, and unfit for manufacture into either lumber or timber."

I believe the correctness of these findings is not questioned by either party.

The defendant justifies its purchase and possession of said coal and wood under the provisions of an act of congress, approved June 3, 1878,

(20 U. S. St. p. 88, c. 150.) The section of said act under consideration reads as follows:

"That all citizens of the United States, and other persons, *bona fide* residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations."

From the findings of fact as above set forth it would seem that defendant's justification of the purchase and possession of this coal and wood is complete. It was shown in evidence, and admitted, that the land upon which all of this wood was cut and removed was and is unsurveyed public land of plaintiff. A large number of witnesses was examined as to the character of this land, whether mineral or not, and whether more valuable for the timber or wood thereon than for known mines. The witnesses differed in their judgment as to the character of this land, or at least as to the particular, limited part thereof, the *locus in quo*, from which this wood had been removed. On this point, the most of the witnesses for plaintiff were teamsters, or men engaged in cutting, hauling, or furnishing wood or coal to those desiring to purchase it. Their evidence, generally, was to the effect that upon the particular tracts of land upon the hills or mountains, whence this wood had been removed, they had never seen any well-known mines, nor had they observed marked or well-defined traces of mineral-bearing ledges. By their own evidence it appeared that they were not looking for mines or ledges, not interested especially in them, and their observation was only the most cursory. They were in no wise skilled in discovering or noting mineral signs and traces, and it would have been purely accidental had any of them, in walking over or along a rich ledge, discovered its existence, or discerned that it might be valuable. I do not question the integrity or truthfulness of any of these witnesses. I doubt not they were honest, and testified to matters as they saw them,—or, rather, did not see them. The value of negative evidence is often slight. It is often unsatisfactory, unless it be shown that the witness possessed thorough knowledge of the subject; that he had ample field for observation and that his attention was closely called to the matter under discussion. None of these conditions obtain as to these witnesses. On the part of the defense it was shown that this wood was cut, if not wholly within the limits of an organized "mining district," yet certainly adjacent thereto, and much of it not far from known and recognized mines, and all within what is commonly known and recognized as a mineral region,—a tract of country where mines have been found, and may be sought for with reasonable hope of

success. It was shown that, beginning at or near the town of Palisade, in this state, a range of mountains extends in a southerly direction for at least 150 miles; that this range bears mineral nearly its whole length; that it has been prospected over for the past 20 years, and is being constantly prospected for mines, and that new discoveries are being made; that between Palisade and the town of Eureka, a distance of about 90 miles, 8 or 10 or more mining districts have been organized, in all of which mines of value have been found; that many of these mining districts are contiguous, and cover nearly all of the distance between the two towns named; that these mining districts extend south from Eureka for a distance of from 60 to 70 miles, in many of which rich mines have been found. The United States topographical surveys confirm this evidence. This mountain range is intersected in some places by low passes and valleys, and different parts of it have local names, but it virtually constitutes a continuous range, though broken in places, on which mines of great value have been found, and doubtless others remain to be found. It is one of the richest mining belts or zones in the state. The Eureka mining district alone is reported to have produced between eighty and ninety millions of dollars since its discovery, and large mining operations are still going on there. Upon this mountain range, and upon the foot-hills adjacent thereto, is found the timber or trees of the character and quality mentioned in the findings of fact above set forth. It was upon this mountain range and upon the foot-hills adjacent that the wood in controversy was cut, and much of it within the limits of organized mining districts, and not far remote from known mines. It can hardly be questioned or doubted that the land upon which this wood was cut is properly classified and recognized as mineral land, and strictly within the purview of the act of congress above cited. This land has no value except for its minerals. It is mountainous, or broken foot-hills, with no soil, and not capable of cultivation. The wood growing thereon is fit only for domestic use; it has no value as timber to be made into lumber. It is the discovery and opening and working of mines that creates a demand for this timber or wood. The test of the land department as to whether a timber or mineral entry should be allowed, to-wit, "Which is the land most valuable for, its timber or known mines?" does not apply in cases like the one before us. The test is very proper in the cases where it is used, as applied to a limited tract of land; but as applied to a large tract of land extending, as this mineral range does, for hundreds of miles, it has no application, for the land has no value for its wood, or anything else, until the discovery and opening of mines creates a market, and gives a value to the wood. During the 25 years that Nevada has been a state none of this land has been surveyed, except in isolated places in the valleys. It will not be contended that the benefits of the statute are limited to the use of the wood or timber growing upon known mining claims. Such a construction would wholly defeat the object and purpose of the statute, since such timber or wood belongs to the owner of the claim.

It is urged with some earnestness that, as it is shown this wood and coal were to be used in the reduction of ores and refining the product

thereof, such a use is not a mining use properly; that reducing ores by mill or furnace process, and refining the bullion, is not a part of mining. If not properly a part of mining, it certainly is incident to it, and closely connected with it. In a very restricted sense it may be true that mining is limited to the breaking down or digging up of ore in place. In its ordinary and usual sense mining embraces many things connected therewith, and it calls to its aid the services of many classes of persons not at all skilled in, or wholly ignorant of, the manual labor of mining. I put not to dwell upon this point, we may concede that reducing ores and refining the product may not be strictly mining. Still this business by itself is a domestic industry of the highest importance to the miner and to the public. Without reduction works it would profit the miner or the public but little to mine the ore. Reducing ores is certainly a lawful pursuit or business, and those engaged in it within the state are with in the benefits conferred by the statute, and entitled to use this wood or timber for this purpose. The miner is not the only person benefited by the statute. It applies to all alike who use this wood or timber for domestic or local use within the state. And it matters not whether such reduction works, mills, or furnaces are engaged in reducing ores from mines owned by the proprietors of the works, or are engaged in reducing purchased ores, or in what is usually called "custom work," for pay, toll, or tribute from the owner of the ores reduced. All industries within the state, not prohibited from such use, are within the protection of the statute. I have, therefore, no doubt, under the evidence in this case, but that the defendant had full right to purchase this coal and wood, and use the same at its reduction works, and that the statute above cited is a complete defense to this action. It follows, therefore, that judgment must be entered for the defendant, and it is so ordered.

UNITED STATES v. EUREKA & P. R. Co.

(Circuit Court, D. Nevada. November 23, 1889.)

PUBLIC LANDS—TIMBER—CUT FOR USE BY RAILROAD COMPANY.

The defendant, a railroad corporation, purchased for use upon its locomotives and cars, wood severed from the public mineral lands. *Held*, that such purchase and use was unlawful, and that the United States could recover from defendant the value of the wood so severed and purchased by it.

(*Syllabus by the Court.*)

At Law. Replevin.

J. W. Whitcher, U. S. Atty., and Henry Rivers, for plaintiff.

Wren & Chesney, for defendant.

SABIN, J. This is an action of replevin, brought by plaintiff to recover from defendant the possession of 2,000 cords of pine, cedar, and mahog-

any wood, or the value thereof, alleged at the sum of \$10,000, in case recovery of possession of said wood cannot be had. The complaint alleges that said wood was severed from the public lands of plaintiff, in the state of Nevada, without the consent of plaintiff; that on or about December 1, 1888, at the county of Eureka, in said state, defendant wrongfully, unlawfully, and without plaintiff's consent took all of said wood from the possession of plaintiff, to its damage in said sum of \$10,000. The answer of defendant denies plaintiff's ownership of said wood, or that there was more than 550 cords of the same; denies that it was severed from the public lands of the United States; denies that at the date alleged, or at any other time, defendant wrongfully, unlawfully, or without plaintiff's consent took all or any of said wood from the possession of plaintiff. It alleges that defendant is operating its railroad, running from the town of Eureka to the town of Palisade, in said Eureka county, a distance of about 85 miles; that the wood used upon its locomotives was not cut by defendant, but the same was delivered to it by residents of the state, along the line of said road, for use upon its locomotives, and in operating its railroad; denies that said wood was or is of any greater value than four dollars per cord. The case was tried by the court, without a jury. The whole case is summed up in the findings of fact, which are as follows:

"(1) That the defendant is and was at all the times mentioned in the complaint a corporation duly organized and existing under and by virtue of the laws of the state of Nevada, and engaged in doing business as a common carrier exclusively in the county of Eureka, in said state; that on the 1st day of December, A. D. 1888, and for a long time prior thereto, the above-named plaintiffs were, ever since have been, and now are, the owners of thirteen hundred cords of pine, cedar, and mahogany wood which lies along the line and within one hundred feet of the track of the Eureka & Palisade Railroad Company, in Eureka county, state of Nevada, between the towns of Eureka and Palisade, in said county, and at and between the various stations on said road between said towns, and which said wood was and is of the value of five thousand and two hundred (\$5,200) dollars in gold coin of the government of the United States. (2) Said wood was severed from the public lands of the United States, which lands are situated within the state and district of Nevada, and are unsurveyed and mineral in character, and not subject to entry except for mineral entry; that said wood was so severed by *bona fide* residents of the state of Nevada, and by them sold to defendant. (3) That on or about the 1st day of December, A. D. 1888, at the county and state aforesaid, said defendant wrongfully, unlawfully, and without the consent of plaintiff took all of said wood into its possession, and now does wrongfully, unlawfully, and against the wishes of plaintiff withhold and detain from the possession of the plaintiff seven hundred and fifty (750) cords of said wood of the value of four (\$4.00) dollars per cord; and there was seized at said time, under a writ of replevin, in said action, five hundred and fifty cords of the wood described in the complaint, which said five hundred and fifty cords of wood is now in the possession of the United States marshal in and for said district. Said five hundred and fifty cords of wood is of the value of four (\$4.00) dollars per cord. (4) That during all of the times mentioned in the complaint the defendant owned and operated a railway between the towns of Eureka and Palisade, in said county and state, of about the length of eighty-five (85) miles; that during all of said times said railroad was largely engaged in the transportation of

the gold, silver, and lead products of the Eureka and other adjacent mining districts to a market, and in transporting mining and other supplies in said region. (5) That at all of said times all of the locomotives used upon said road were what is known as 'wood burners,' and that a considerable quantity of wood is necessarily consumed in operating said locomotives. (6) That said wood was cut from cedar trees of a length of from ten to twelve feet, including the branches, the bodies of which are from four to eight feet in length, and the largest of which do not exceed ten or twelve inches in diameter at the roots. That said trees are of a stunted, irregular growth, and unfit for timber, lumber, or manufacturing purposes. That said trees are valuable only for firewood and other domestic purposes. That said cedar trees, and trees of nut pine, and what is called 'mountain mahogany,' of similar character and dimensions as said cedar trees, comprise all the trees that grow upon said lands."

These findings of fact are admitted to be correct, as shown by the evidence submitted. Defendant seeks to justify its purchase and possession of said wood under an act of congress approved June 3, 1878, (20 U. S. St. p. 88, c. 150.) The first section of this act, and under which justification is sought, reads as follows:

"That all citizens of the United States, and other persons, *bona fide* residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations."

Unfortunately for the defendant, the proviso contained in the last lines of the section renders it impossible for the court to entertain this defense. The proviso is clear, certain, and unambiguous. There is no place for interpretation or construction as to its meaning. It means just what it says: "The provisions of this act shall not extend to railroad corporations." No exceptions are made. It applies to all alike, and it must be enforced against all alike. If this defendant can, under this act, purchase and use this wood and timber, in like manner can every other railroad in the state do so. There are within the limits of the state nearly or quite 900 miles of railroads, to-wit: The Central Pacific, 448 miles; the Eureka & Palisade, 85 miles; the Nevada & Oregon, 28 miles; the Virginia & Truckee, 52 miles; the Carson & Colorado, 192 miles; the Nevada Central, 93 miles. There are other projected lines of road which may be built in the near future. If any one of these companies can, under this act, obtain its supply of fuel from the public lands of the United States, then all can, and it matters not whether the lands are mineral or non-mineral lands from which the fuel is severed. This act, the first section of which is above quoted, originated in the senate. The

discussion of the bill in the senate was thorough and animated. The bill passed that body, and went to the house of representatives. There it was amended in some respects, and, among others, by the addition of the proviso above quoted. This amendment was adopted in the house without discussion. The bill was returned to the senate, and there the amendment was accepted and adopted without debate. 7 Cong. Rec., 45th Cong., 2d Sess., pt. 4, pp. 3328 and 3450. This shows the unanimity of congress on this subject. The proviso had only to be suggested to be adopted by both houses without debate. It is the duty of the courts to enforce this statute without equivocation. Without positive license by statute, or other competent authority, no person or corporation can lawfully cut or use the timber cut upon the public lands, be they mineral lands or otherwise. The United States, as proprietor of the public lands, may call upon the courts, by injunction, and by all other appropriate remedies, to stay and prevent waste and spoliation of the public domain, and to enforce any statutes, penal or other, enacted for that purpose. The policy of this amendment or proviso, its seeming hardship upon railroads, is pressed upon the attention of the court. The policy of a statute, its severity or hardship or inconvenience, is a matter for the consideration of congress, not of the courts. Courts are to enforce laws, not make them; to execute, not avoid them. I am not, however, inclined to question the wisdom and prudence of this proviso to this statute. The supply of timber, even for fuel, in Nevada, is limited, and not evenly distributed. The consumption of fuel by railroads is large and constant. If they are permitted to denude the public lands of the fuel thereon, the act of congress referred to becomes of little benefit to the people of the state, and the result would be that the railroads, and the people also, residents of the state, would ere long be compelled to seek their fuel supplies from abroad and beyond the limits of the state. This would be very oppressive to the great mass of the people of the state. It is, however, not a difficult matter for the railroad companies, having their own ample means of transportation, to procure their fuel supplies from lawful sources. This timber and wood mentioned in the statute is by the statute devoted to the lawful uses of the people, *bona fide* residents of the state, to aid in the material development of the various industries of the state. The statute is beneficent in its purpose and object, but from its benefits all railroads are excluded. It may be a serious question if those persons that cut this wood upon the public lands, and sold and delivered it to the defendant, are not subject to criminal prosecution for so doing. It was not cut by them for a lawful purpose. It was cut in defiance of the statute, unlawfully and wrongfully, and in so cutting and removing it they acquired no title thereto as against the rightful owner, the United States. And the defendant, in purchasing this wood from parties having no lawful title thereto, acquired no title that can be maintained against the rightful owner, the plaintiff in this action.

Judgment must be entered for the plaintiff for the recovery of the possession of 1,800 cords of wood mentioned in the complaint, or for the

value thereof in case delivery of possession cannot be had, at the sum of \$4 per cord, amounting in the aggregate to the sum of \$5,200, lawful money, and for costs, and it is so ordered.

EASTERN TOWNSHIPS BANK v. ST. JOHNSBURY & L. C. R. Co.

(Circuit Court, D. Vermont. November 7, 1889.)

1. RAILROAD COMPANIES—LEASE—ULTRA VIRES.

Under R. L. Vt. § 3303, authorizing railroad companies to lease and operate the roads of other companies, a contract of lease by which the lessee guarantees the payment of the interest on bonds given in payment for the construction of the road, the interest being the same amount, and payable at the same times as the agreed rent, is valid.

2. SAME—GUARANTY TO PAY INTEREST—CONSTRUCTION.

A guaranty to "pay the interest upon the within bond as specified in the interest coupons thereto attached," is not a separate promise to pay each coupon, but is a guaranty of the whole interest to become due on the bonds, and, though each coupon is for less than \$100, the guaranty is not prohibited by R. L. Vt. § 8350, requiring the obligations of a railroad company to be for not less than \$100 each.

3. SAME—NEGOTIABILITY OF GUARANTY.

Although the bonds and coupons are negotiable, the guaranty is not, it being neither a bill nor a note, which instruments are alone negotiable under R. L. Vt. §§ 2002, 2003, and the guarantor may make any defense to an action on his contract by the transferee of the bonds or coupons that he could have made if sued by the original payee in the bonds.

At Law.

Dickerman & Young and Albert P. Cross, for plaintiff.

Stephen C. Shurtleff and Richard Olney, for defendant.

WHEELER, J. The defendant joined with other railroad companies in taking a lease of the railroad of the Canada Junction Railroad Company, not built, but agreed to be built by Bradley Barlow, and in the execution of this guaranty upon 150 \$1,000 negotiable bonds of that company, which Barlow was to have in payment for building the road: "For value received in the use and operating of the Canada Junction Railroad under a lease thereof and assignments of said lease, the Montreal, Portland & Boston Railway Company, the Southeastern Railway Company of Canada, and the St. Johnsbury & Lake Champlain Railroad Company of Vermont, do hereby jointly and severally guaranty the payment of the interest upon the within bond, as specified in the interest coupons thereto attached at the place and at the several dates therein specified." The rent was equal to the coupons, which were themselves negotiable, in amount and times of payment. The bonds, with the guaranty upon them, and coupons attached, were delivered to Barlow, and by him pledged to the Vermont National Bank of St. Albans, and by that bank to the plaintiff, to secure advances of money. Barlow failed without accomplishing but a small part of the building of the road, and his failure caused the enterprise of building the road, and the

Vermont National Bank, to fail. The road has never been built, and through the failure and default of Barlow, the defendant, with the other railroad companies, has been deprived of the use and operating of it for which the guaranty was made.

This suit is brought by the plaintiff, as holder of the bonds and coupons for value, upon the guaranty, to recover the amount of the coupons due, and has been heard by the court upon written waiver by the parties of a trial by jury. The defendant contends that the guaranty was without the scope of its corporate powers, and therefore void; and relies upon *Thomas v. Railroad Co.*, 101 U. S. 71, *Railroad Co. v. Railroad Co.*, 118 U. S. 290, 630, 6 Sup. Ct. Rep. 1094, and *Navigation Co. v. Railway Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409, in support of this position; and that, "if not, the consideration has so far failed, through the default of Barlow, to whom the bonds were first delivered, that it has ceased to be binding. In those cases no power had been conferred upon the corporations in question, by their charters or the laws under which they existed, to enter into the contracts held to be *ultra vires* and void. The laws of Vermont, under which the defendant has and exercises its corporate powers, provide that "railroad companies in this state may make contracts and arrangements with each other, and with railroad corporations incorporated under the laws of other of the United States, or under the authority of the government of Canada, for leasing and running the roads of the respective corporations, or a part thereof, by either of their respective companies." R. L. Vt. § 3303. This statute conferred ample power upon the defendant corporation to take the lease, and to agree to pay the rent as it should fall due, and doubtless to arrange for paying the rent, by paying coupons of the same amount or guarantying their payment. *Railroad Co. v. Railroad Co.*, 34 Vt. 1, 50 Vt. 500; *Langdon v. Railroad Co.*, 54 Vt. 593; *Hazard v. Railroad Co.*, 17 Fed. Rep. 753. To hold these arrangements to be within the corporate powers of the defendant appears to be in accordance with the principles of, and not contrary to, the decisions of the supreme court of the United States referred to. The laws of the state also provide that "a railroad corporation, if it so votes at a meeting of its stockholders called for that purpose, may issue its notes or bonds in sums not less than one hundred dollars to raise money or to extinguish any debt or liability of the company, on time not to exceed thirty years, and at a rate of interest not to exceed seven per cent." R. L. Vt. § 3350. In a class of cases absolute guarantors of payment of promissory notes by indorsement upon the notes themselves have been holden as makers. *Hough v. Gray*, 19 Wend. 202; *Miller v. Gaston*, 2 Hill, 188; *Edw. Bills*, 220. These guaranties are not upon the coupons, strictly, but upon the bonds separate from the coupons. If, however, they should be considered as being upon the coupons, so that each coupon would be a note of which the defendant was maker, the statute would not cover them, but might impliedly exclude them as notes of the defendant, because each one is less in amount than the statute allows. To hold the defendant to be a guarantor of the interest on the bonds, instead of a maker of the coupon,

seems to be most consistent; for the parties are to be presumed to have intended that this contract should be good rather than void.

The undertaking of the defendant as it stands on each bond is to be construed in view of the circumstances apparent to all under which it was entered into. The road was to be built before the use and operating could be had. The value received in the use and operating acknowledged was to be received afterwards, before the respective installments would fall due. The meaning of the contract seems to have been that for the use and operating of the road the defendant and the other companies would see the interest paid. They assumed that the road should earn enough to pay the interest as it should fall due, and that the earnings should be applied to the payment of it, if not paid otherwise. The consideration was future, and if it failed the agreement would fail for want of any.

The guaranty named no particular person as guarantee, but was open to whoever should acquire the bonds first. *Watson v. McLaren*, 19 Wend. 557. Barlow was the first to acquire these bonds as holder. Had he kept them he could not have enforced them, as to either principal or interest, against the maker; for they were made and delivered to him for building the road, and when he failed to do that the consideration failed. Relief of the maker would relieve the guarantor. This consideration as to the maker rests upon the supposition that the instruments, although under seal of the corporation, and in form and name bonds, are simple contracts, whose consideration may be inquired into. If, however, the seals conclusively import consideration for the bonds, as such, in respect to the maker, the guaranty is not under seal, and is unquestionably a mere simple contract. The consideration of that which was expressed to be the use and operating the road, and different from that of the bonds, has failed also through the default of Barlow. He could not deprive the defendant of the consideration of this contract and at the same time enforce it. The plaintiff is not entitled to recover upon this guaranty unless it has some right superior to Barlow's. The only source for such right is the supposition that the guaranty had the qualities of negotiable paper, and was current for what it appeared to be to those taking it, without notice of infirmity, for value. The bonds and coupons are expressly negotiable. The guaranty is not by its own terms made to be so. The negotiability of the instruments with which it is connected does not appear to be sufficient to make it so. The statute declaring negotiability of bills and notes, taken from that of 3 & 4 Anne, c. 9, does not extend to any other instrument. R. L. Vt. §§ 2002, 2003; Edw. Bills, 219. These collateral contracts, made by those not parties to the notes, are not generally understood to partake of the negotiability of the instruments on which they may be placed. *Taylor v. Binney*, 7 Mass. 479; *True v. Fuller*, 21 Pick. 140; *Watson v. McLaren*, 19 Wend. 557; *Miller v. Gaston*, 2 Hill, 188; Story, Prom. Notes, § 484; *Sandford v. Norton*, 14 Vt. 228; *Sylvester v. Downer*, 20 Vt. 355. Especially must this be true where, as here, the principal of the instrument upon which the guaranty is placed is not included in the guaranty, and the guaranty expressly rests upon

a separate consideration. This guaranty appears from all these considerations to have been a mere simple contract with Barlow collateral to the bonds, whose character was apparent upon its face, and which could not be enlarged or made more indefensible in the hands of subsequent holders, with or without further notice, and whether for value or otherwise. *Trust Co. v. Bank*, 101 U. S. 68. The Vermont National Bank acquired all the rights that Barlow had to the bonds and coupons, with the guaranty on the bonds, including the right to enforce the guaranty in his name so far, and so far only, as he could enforce it for any purpose. The plaintiff took the same rights, and does not now appear to have in any manner acquired any greater. No view of these instruments is presented, or presents itself, upon which the plaintiff appears to be entitled to recover in this case. The judgment here must therefore be for the defendant.

CENTRAL TRUST CO. OF NEW YORK v. ST. LOUIS, A. & T. RY. CO.

(Circuit Court, E. D. Arkansas. October 30, 1889.)

RECEIVERS—ACTIONS AGAINST—SERVICE OF PROCESS.

Act Cong. March 3, 1887, §§ 2, 3, (24 U. S. St. 554,) provide that receivers in possession of property shall manage it according to the laws of the state where it is situated, and may be sued without leave of the court by whom they were appointed. In Arkansas service of process on the clerk or station agent of a railroad company is good service on the company. *Held* that, where receivers of a railroad running through Arkansas, who were appointed in that state, had removed into another state, the court would authorize them to be sued in the state courts of Arkansas by service on their station agents or clerks therein.

In Equity. Application to establish validity of service in suits against receivers.

The defendant company own and operated a railroad, beginning in Missouri, and running across the state of Arkansas into Texas. On a bill for foreclosure, filed by the trustees of the mortgage bondholders in the eastern district of Missouri, a receiver was appointed, and upon a like bill filed in this district the same person was appointed receiver in this district, and afterwards a second receiver was appointed to act jointly with the first. The receivers established their office in St. Louis, Mo. Complaint was made to the court in Arkansas that persons having claims against the receivers which they refused to allow were prevented from establishing the justice of their claims by suit in the state courts, because personal service of the summons could not be had on the receivers, and the validity of service on their station agents was disputed.

CALDWELL, J., (after stating the facts as above.) A recent act of congress contains these provisions:

"Sec. 2. That whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according

to the requirements of the valid laws of the state in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding \$3,000, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.

"Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." Sections 2, 3, Act March 3, 1887, (24 U. S. St. 554.)

These sections were re-enacted in act of August 13, 1888, (25 U. S. St. 436.) This act was intended to correct abuses that had grown up under the old practice, some of which were pointed out before the passage of the act, in the opinion of this court in *Dow v. Railroad Co.*, 20 Fed. Rep. 267. The act abrogates the old rule on the subject of suing receivers. It is no longer unlawful to sue a receiver appointed by a United States court without leave of the court appointing the receiver. The court now has no discretion to say when its receiver may be sued. The act gives the right, without condition or qualification. It is a right not to be nullified, evaded, or abridged. No conditions can be imposed on its exercise. The court must give effect to the act. It has no discretion to do anything else. "Rights under our system of law and procedure do not vest in the discretionary authority of any officer, judicial or otherwise." *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708. The road the receivers are operating under the authority of this court runs clear across the state, a distance of 300 miles; but the receivers have established their office in St. Louis, Mo., where they remain, and when sued cannot be found and personally served with process in this state. The right to sue the receivers necessarily carries with it the right to serve the required process to make the suit effectual. This is implied in the act. What is implied in an act is as much a part of it as what is expressed. Process need not be served on the railroad receivers personally. It would be impracticable to do so in many cases. It is impracticable in this case. The receivers, like the railroad company, can operate the road only through their agents, who must always be within the jurisdiction of the courts of the state in which the road is operated. For a court to permit its receivers to remain beyond the jurisdiction of the state courts, and refuse to give effect to service on their agents in the state, would effectually preclude the citizen from suing them in the state courts, and would be a complete nullification of the act of congress.

It has long been the rule in this district that receivers of railroads appointed by this court might be sued without the special leave of the court, and that service of the summons on his station agents should be good service on the receiver. This practice is now in harmony with the act of congress and the statutes of this state. In this state service on the

"clerk or agent of any station" of a railroad company is good service on the company. The receivers take the place of the railroad company in the operation of the road. The act of congress requires them to operate the road conformably to the laws of the state, and as the railroad company was bound to operate it. The station agents become the receivers' agents, and service on them ought to be good service on the receivers; and under the act of congress and the statutes of this state, it probably is; but to remove any doubt the court will pass the following order:

"The Central Trust Company, New York, vs. The St. Louis, Arkansas & Texas Railway Company, in Arkansas and Missouri.

"It appearing to the court that S. W. Fordyce and A. H. Swanson, the receivers in this cause, have established their office, and have their official domicile as such receivers, in St. Louis, Mo., and that they cannot be personally served with process issued against them by the courts in this state, because they are not found in the state, it is therefore ordered that the service of a copy of any summons or writ, heretofore or hereafter issued against said receivers in this state, upon the clerk or station agent of said receivers at any station or depot of said railroad in the county where the same was or may be issued, shall be deemed and considered as a good and valid service of such summons or writ on said receivers."

The receivers are instructed, and desire, to settle all valid claims against them without suit.

It is proper to add that, when the receivers or their agents have settled and allowed a claim, it will be paid in due course of administration, and a suit and judgment on such claim will not hasten its payment.

NEW ORLEANS, M. & T. R. Co. v. NEGROTTO.

(Circuit Court, E. D. Louisiana. November 16, 1889.)

TAXATION—ERRONEOUS ASSESSMENT.

Under Act La. 1882, No. 96, § 8, requiring each tax assessor to ascertain the taxable property in his district, both by examination of the records of conveyances and by inquiries, etc., an assessment in the name of former owners, whose title has been divested by bankruptcy sale, and who are not in possession, and an adjudication of the land to the state for non-payment of the taxes, are void.

In Equity. On motion for injunction.

Bayne & Denegre, for complainant.

J. R. Beckwith, for defendant.

PARDEE, J. On July 31, 1866, the city of New Orleans, by proper act, sold and conveyed to Messrs. Kennedy & McKeon, a commercial firm doing business and residing in the city of New Orleans, two certain batture lots in the square No. 17 A, bounded by Notre Dame, Julia, Delta, and Water streets. January 3, 1868, Charles McKeon individually, and as a member of the commercial firm of Kennedy & McKeon, made a surrender in bankruptcy, and on the 4th day of January, 1868,

was duly adjudicated a bankrupt individually, and as a member of said firm. On his schedules, the said bankrupt surrendered the property aforesaid, and thereafter it was taken possession of by the assignee under the orders of the bankrupt court, and held as a part of the estate of said bankrupt. Thereafter, as a part of the said estate, it was ordered sold, and was sold at auction, and one W. S. Williams became the purchaser on the 17th day of March, 1871. The assignee in bankruptcy, by proper conveyance, conveyed the said property, in pursuance of said sale, to said W. S. Williams. Afterwards, on the 22d day of August, 1883, the said W. S. Williams, in an act reciting the aforesaid sale and purchase in bankruptcy, declared that said lots were purchased by him for the New Orleans, Mobile & Texas Railroad Company, and he therein assigned and conveyed said property, with all rights and claims, to the New Orleans, Mobile & Texas Railroad Company. Both of the two last-mentioned acts were duly registered in the conveyance office in the city of New Orleans on February 11, 1885. Immediately after the sale, as aforesaid, by the assignee in bankruptcy, to said Williams, complainant entered into the possession of said property, and built thereon section-houses, and ever since has been in the open, notorious, and public possession thereof. In the years 1882 and 1883 the said property was listed and assessed for taxes to the state of Louisiana in the name of Daniel Kennedy and Charles W. McKeon. The said taxes, so listed and assessed, not being paid, on November 24, 1884, the state tax collector of the first district of the city of New Orleans, by his deputy, claiming to act under authority of and in compliance with act No. 96 of 1882 of the Laws of Louisiana, offered the said property for sale for such delinquent taxes, and at such sale adjudicated the same to the state of Louisiana. Afterwards, on the 4th day of February, 1885, the said state tax collector executed a conveyance of said property to the state by two distinct acts of sale,—one on the adjudication for taxes due in 1882, and the other upon the adjudication for taxes due in 1883. On the 13th day of June, 1889, Mr. Harrison Parker, state tax collector of the first district of the city of New Orleans, claiming to act under act No. 80, (approved July 12, 1888,) of the Laws of the State of Louisiana for 1888, and claiming to have complied with all the requirements and formalities of said law, proceeded to offer for sale, and did sell, the aforesaid property to D. Negrotto, Jr.; and afterwards, on the 15th day of August, 1889, by public acts before a notary, in pursuance of said sale, did execute to said Negrotto deeds of sale of the property aforesaid, therein reciting a compliance with requirements of the said act of 1888 in all particulars. The complainant brings a bill to quiet his title as against the said Negrotto, and to cancel and annul the aforesaid conveyances as clouds upon his title. The defendant has filed an answer demurring to the jurisdiction of the court, exhibiting his deeds under the act of 1888, and claiming thereunder a perfect title.

The case has been submitted upon a motion for an injunction *pendente lite*. It seems clear that under the sale in bankruptcy, and the title in pursuance thereof, Williams became and was possessed of the legal

title to the property in question; and that by his subsequent conveyance to the complainant, and the complainant's open, notorious, and adverse possession for over 15 years, the complainant acquired and has a full and complete legal title by deed and prescription; at all events, complainant has sufficient and adequate legal title to maintain the suit to remove a cloud from his title. It also appears certain that, in 1882 and 1883, Daniel Kennedy and Charles McKeon were not the owners nor possessors of the said property, and that for those years the said property was assessed in the name of a person not the owner. It has long been well settled in Louisiana that an assessment of property not made in the name of the owner, when the law requires that property shall be assessed in the name of the owner, is a nullity, and, if assessed in any other name, the assessment is defective, and cannot be the basis for a legal tax-sale. In the case of *Maspereau v. New Orleans*, 38 La. Ann. 400, the supreme court of the state, in speaking of an assessment for the year 1882, where the plaintiff had purchased in July, 1881, and where the assessment of 1882 was in the name of her vendor, said: "It requires no argument to say that the assessment of 1882 was an absolute nullity, and that it could not be the basis for a lawful tax-sale;" citing *Laque v. Boagni*, 32 La. Ann. 912; *Guidry v. Broussard*, Id. 924; *Marin v. Sheriff*, 30 La. Ann. 293; and, to the same effect, cases may be cited from the tenth Annual to the fortieth. The law in force at the time the assessment in 1882 was made, (Act 96 of 1882, § 8,) provided that "each tax assessor, on or after the 1st day of January, shall diligently examine the records in the offices of mortgages and conveyances, and the abstract of land-entries, and shall otherwise make faithful inquiry and investigation, to ascertain what taxable property in his district or parish belongs to residents, and to absent owners, and to unknown owners," etc.; and section 7 of the same act provided "that if the lands to be assessed be a tract or a lot known by a name, or if the owner's name be known, it shall be designated by those particulars and by its boundaries." Under a law to the same purport, the supreme court of the state, in the case of *Marin v. Sheriff*, *supra*, said:

"Reference to the public archives is one of the means of ascertaining the title to and description of immovables subject to assessment; but it is not the only one. The law is imperative. The assessor must, by diligent inquiry, ascertain the names of all the inhabitants of their respective parishes, whether taxable for licenses or for property, or on both, and also all the taxable property within the same."

At the time of the assessment in question, the records of the bankruptcy court in New Orleans were teeming with transfers of titles to immovable property in the city of New Orleans, and such records were open to inquiry by tax assessors. If the tax assessor in the first district of New Orleans had examined those records, or had examined the property itself, he would have been at once informed by inspection who was the true owner of the property in controversy. The complainant's bill, supported by affidavits, shows many minor irregularities on the part of the officials of the state in advertising, selling, and conveying the prop-

erty under the requirements of acts of 1882 and 1888; but it is not necessary to consider them at this time. For the purposes of this motion, it is sufficient to find that the complainant's title is a legal one, and that the title relied upon by the defendant is a nullity, under the act of 1882, under which the property was assessed, advertised, and adjudicated to the state, because the property was not assessed in the name of the owner.

The effect of the act of 1888, and the defendant's deeds thereunder, remains to be considered. The said act of 1888 in terms provides for the advertisement and sale of all immovable property bid in for, and adjudicated to, the state for taxes for the year 1880 and subsequent years. It declares that all assessments on such property are legal and binding in every respect on parties interested in the property, and that the titles to the state, as acquired under adjudications for unpaid taxes, are good and perfect. Section 4 of said act is as follows:

"That each tax collector shall, as soon as said adjudications to bidders are made and complied with, execute to each purchaser a deed of sale, in authentic form, of each specific piece of property, a duly-certified copy of which deed shall be *prima facie* evidence of the following facts: (1) That the property conveyed in said deed was subject to taxation at the time of the assessments thereof; (2) that none of the taxes for which said property was adjudicated to the state were paid; (3) that the property was not redeemed at the time prescribed by law. And the said duly-certified copy of said deed shall be conclusive evidence of the following facts: (1) That the property was listed and assessed according to law; (2) that the taxes were levied according to law; (3) that the property described in said deed was adjudicated to the state according to law; (4) that the property was advertised according to law; (5) that the property was adjudicated and sold to the purchaser as stated in said deed; (6) that all the prerequisites of the law were complied with by all the officers from the listing and assessments of said property inclusive, up to, and including the execution and registry of the deed to the purchaser. And duly-certified copies of said deeds shall be full proof of all contained therein. The proof of payment of only a portion of the taxes for which the property was adjudicated to the state shall not in any manner affect the validity of the sale to the purchaser; and, in order to invalidate the sale to the purchaser, it shall be necessary for the party attacking it to prove that all the taxes for all the year for which the property was adjudicated to the state had been paid before the adjudication to the state, or that the property was redeemed, according to law, for all the year for which it was adjudicated to the state, or that the same was exempt from taxation for all the year for which it was adjudicated to the state."

The effect of this act has never been passed upon by the supreme court of the state; but one similar in many respects, and, as I think, different in material matters, has been recognized as valid, as to the effect of the deed of sale executed in accordance with its provisions. *In re Lake*, 40 La. Ann. 142, 3 South. Rep. 479; *In re Douglass*, 6 South. Rep. 675. The title to the act does not state one of its objects to be the validation of assessments, adjudications, or titles theretofore made. See Const. La. art. 29. The act seems to go beyond the constitution, for article 210 of the Louisiana constitution declares "that all deeds of sale made, or that may be made, by collectors of taxes shall be received by courts in evi-

dence as *prima facie* valid sales." The same article of the constitution declares that, prior to the sale of property for taxes, the delinquent shall have notice which shall not be by publication, except in case of unknown owner, and that the property shall be advertised for sale in the manner provided for judicial sales. The act of 1888 presumes notice and advertisement, and, as a healing act, it dispenses with the constitutional requirements to a valid tax-sale. The act is retrospective with regard to assessments and adjudications prior to 1888. See article 8, Rev. Civil Code; article 155, Const. La. It purports, in terms, to cure defects that under the settled jurisprudence of the state are absolute nullities. It is a legislative declaration on the part of the state of title in itself. These objections are so serious that at present I am not prepared to give full effect to said act in this case, nor, in fact, any more effect to defendant's deeds of sale as evidence than the constitution of the state declares deeds of sale made by collectors of taxes shall have. The case may be prepared for final hearing, and then submitted to a full bench. In the mean time, the injunction *pendente* may issue on complainant's giving bond, with security, in the sum of \$2,000.

WOLF *et al.* v. COOK *et al.*

(Circuit Court, E. D. Wisconsin. November 25, 1889.)

1. AMENDMENTS—WRIT OF ATTACHMENT.

Rev. St. Wis. §§ 2829, 2830, require the courts to disregard any errors not affecting substantial right, and give power to amend any process by correcting mistakes at any stage in the proceedings. Rev. St. U. S. §§ 943, 954, provide that the courts may allow amendment of any process when the defect is not prejudicial, and that no writ shall be abated or quashed for want of form. Section 646 provides that on removal of a suit from the state court any attachment shall hold the goods, the same as under the state laws. *Held*, that where a seal is omitted by mistake from a writ of attachment issued in a suit begun in a Wisconsin court, but removed to the federal court, the latter court will regard the writ as amended in that particular, as it would have been so amendable under the state laws.

2. SAME—WAIVER.

By moving to set aside the levy on other grounds, and failing to object to the defective writ before filing the statutory bond for the release of the property, defendants waive all objection to the writ.

3. SAME.

By giving bond and receiving restitution of the property seized, defendants waive the objection that the property was not subject to attachment.

4. PLEADING—PENDENCY OF PRIOR SUIT.

Pendency of a libel in admiralty against a vessel is no bar to an attachment suit at law against the owners, for the same cause of action.

5. ABUSE OF PROCESS.

Whether the levy of an attachment in an action *in personam* upon the *res* bonded in a proceeding *in rem* for the same debt is abuse of process, *quære*.

At Law.

In May, 1889, the plaintiffs brought suit in the circuit court of Milwaukee county, to recover an alleged balance of account of \$14,999.41, for services, materials, and moneys furnished the defendants between

October 1, 1887, and June 16, 1888. At the institution of the suit a writ of attachment was issued against the property of the defendants, as non-residents of the state, by virtue whereof the sheriff of Milwaukee county, on the 20th day of May, 1889, seized the steam propeller Huron City, then at the port of Milwaukee, as the property of the defendants. On the 23d of May, the attached property still remaining in the custody of the sheriff, the defendants moved the court to set aside the levy under the writ, because, as alleged, the vessel seized was not subject to attachment in the action. This motion proceeded upon the ground that in June, 1888, the plaintiffs filed their libel in the district court of the United States for the district of Indiana against the propeller Huron City, for the same debt sought to be recovered in this suit, and claimed to be a lien upon the vessel, enforceable in the admiralty. In that admiralty proceeding, process was issued, under which the vessel was seized by the marshal, and held in custody until the filing of the usual stipulation by the claimants (defendants in this action) in the sum of \$25,000, with surety, conditioned to abide by and pay the money awarded by the final decree in such admiralty proceeding, when the vessel was released and surrendered into the possession of the claimants, (defendants in this suit.) It was also alleged that the amount claimed by the libel is the same liability and claim sought to be recovered in this action. The libel alleges repairs and supplies furnished the Huron City at the port of Milwaukee between October 1, 1887, and June 16, 1888, and a balance due therefor of \$15,149.23. It is conceded that the claim here includes, with other charges, the claim preferred in the libel. The admiralty proceeding is still pending. On the 24th day of May the state court overruled the motion to set aside the levy. On the next day the defendants duly delivered a bond, pursuant to statute, conditioned to pay such judgment as might be rendered in the suit; and thereupon the vessel was released. On the 19th day of June, upon the *ex parte* application of the defendants, the state court ordered that the defendants' application to vacate the levy "stand for a rehearing," and assigned such rehearing for June 29th. The motion upon which that order was granted alleges for cause that the property attached was not subject to seizure, and is grounded upon the same facts and records considered upon the original hearing of the motion. The only new fact disclosed is the giving of the bond, and the release of the vessel, subsequently to the order of May 24th. Upon the 22d day of June the defendants filed in the state court their petition and bond for the removal of the cause to the federal court; and such order was made, accordingly, on that day. The defendants now here renew the motion pending in the state court at the time of the removal of the cause, for the release of the levy under the writ of attachment. They reassert here the grounds upon which the motion there was based, and urge the further ground that the writ of attachment was void upon its face, and no lawful levy could be made thereunder. It appears from the record that the writ issued out of circuit court, but, by misprision of the clerk, was sealed with the seal of the superior court; both courts having the same clerk. The plaintiffs, on their part, move to amend

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the writ of attachment by affixing the proper seal of the state circuit court. This is opposed by the defendants, who assert that the writ is without seal, and therefore a mere nullity, and not amendable.

Geo. D. Van Dyke, for plaintiffs.

E. P. Smith and Geo. P. Miller, for defendants.

JENKINS, J., (*after stating the facts as above.*) Undoubtedly, at common law, an unsealed writ was void. *Insurance Co. v. Hallock*, 6 Wall. 556. The rule grew out of the conditions of society and the necessities of the state. An original writ issued out of chancery, and in the name of the king, the "fountain of all justice." It was a grant of jurisdiction from the sovereign to the court to which it was returnable; a sort of commission to the court of law to hear the cause. It was called by Coke "the heart-strings of the common law." The seal to the writ was the symbol of sovereign power; the authentication to the king's commission, the basis of all jurisdiction. Without the seal, the writ was void; conferring no right to the exercise of judicial authority, because the commission lacked the expression of royal sanction manifested by the great seal of state. Judicial writs were issued by the courts, and bore *teste* in the name of the chief justice of the court by which they were issued. The seal of the court authenticated the exercise of delegated judicial authority, not the grant of jurisdiction, and so possibly was of inferior consideration.

It is in the conditions of ancient society that we must search for the importance attached to the seal. In early times, with respect to all instruments, whether private or public, the seal was the chief and essential proof of the authenticity of the document. It was guarded with jealous care, to prevent its unauthorized use. One instance is recorded of a seal separable into four parts; the parts assigned to separate keepers, as additional security against its fraudulent employment. In that day the seal upon its face identified its owner. Writing was not common as now, and there was necessity to authenticate the execution of documents by some solemn act, speaking the consent of the party. The seal met that necessity; as to private writings, a substitute for the signature. It is, however, a long way from the speaking seal of that day to the "unsightly excrescence," the meaningless, printed scroll, or written scrawl, of the present. In the march of civilization and the diffusion of knowledge, the private seal has outlived its usefulness. That it still exists an essential to the validity of any private writing, is but another illustration of the truth that the customs of a people long survive the necessity which gave them birth. There is much sound common sense in the railing sarcasm of Judge LUMPKIN upon the subject of the seal, in *Lowe v. Morris*, 13 Ga. 150,—carried, perhaps, too far, when applied to official seals. Formality is yet a necessity in the administration of government. The compulsion of authority is still essential to the well-being of society, and authority needs the concomitants that appeal to the senses, exacting obedience, commanding respect. The average mind yet needs mental crutches. These are found in ceremonial dress, giving

solemnity and impressing the imagination. Without any undue reverence for formality, it is, to my thinking, still most necessary and proper that judicial process, and the proceedings of judicial tribunals, should be characterized by such adherence to form and ceremony as shall secure decorum, and add dignity and impressiveness to the administration of justice. But formality should never be permitted to work injustice, or deny substantial right. The importance attached to the seal to writs was founded, not only in the reverence paid to all manifestations of kingly authority, and in the customs of society, but also in the necessities of the state. The seals of courts were lodged with custodians appointed by the king, and the sealing of the writ had to be purchased. This was a profitable source of revenue to the crown, and may have been the chief reason for the stringency of the rule.

I find no authority in England to amend the writ with respect to the seal. As early as the time of Henry VI., parliament intervened to mitigate the rigor of the law, and to prevent miscarriage of justice arising from the subtleties of the common-law lawyers, and the mischievous errors of the clerks of courts, and by statute (8 Hen. VI. c. 12,) authorized the courts to amend writs and process issued by them, and to reform all therein arising from misprision of the clerk. This act clearly, I think, did not apply to original writs, which theoretically were issued by the king himself, not out of courts of law, and were sealed with the great seal,—never in the custody of the courts to whom power of amendment was granted by the act. I think, also, the statute had no reference to the seal to judicial writs, since its omission could not arise from misprision of the clerk, who was not its custodian. It was assumed otherwise, however, in *Hunter v. Turnpike Co.*, 56 Ind. 213; but I am referred to, and have found, no decision in England which recognizes any authority to amend any writ, original or judicial, with respect to the seal.

In this country, jurisdiction is vested by the constitution. The matter of revenue is not present, to complicate the question; and the clerk is custodian of the seal of the courts. There would seem to be no reason why power should not inhere in the court to correct all errors in its proceedings caused by its officers, whether with respect to the seal to a writ, or otherwise. *Cessat ratione legis cessat lex*. The power to amend by requiring the omitted signature of the clerk to the writ is allowed, upon the principle that a court will not permit its suitors to suffer from the misprision of its officers. I fail to discover any greater sanctity in the seal than in the signature of the official charged with the duty of issuing the writ. There are respectable authorities holding to the inherent power of courts to amend with respect to the seal. *Jackson v. Brown*, 4 Cow. 550; *People v. Dunning*, 1 Wend. 16; *People v. Steuben*, 5 Wend. 103; *Dominick v. Eacker*, 3 Barb. 17; *Sawyer v. Baker*, 3 Greenl. 29; *Seawell v. Bank*, 3 Dev. 279; *Purcell v. McFarland*, 1 Ired. 34; *Clark v. Hellen*, Id. 421; *Cartwright v. Chabert*, 3 Tex. 261; *Lowe v. Morris*, 13 Ga. 147; *Arnold v. Nye*, 23 Mich. 286, 293. In *Bailey v. Smith*, 12 Me. 196, the supreme court of Maine held the writ there not amendable with respect

to a seal, because an original writ, and therein distinguished its former decision in *Sawyer v. Baker*, *supra*, involving a final writ. It must be that the writ in *Bailey v. Smith* was a writ of error, this being the only original writ remaining. I wholly fail to appreciate the distinction drawn, since all writs, with us, emanate from the court. In *People v. Steuben*, *supra*, and *Lowe v. Morris*, *supra*, a writ of error was, however, held amendable. The right to amend here need not, however, be rested upon any question of inherent power.

The statutes of Wisconsin provide liberally for amendment of all errors. The courts are required to disregard any error or defect in any proceeding not affecting substantial right. Rev. St. Wis. 2829. Power is given at any stage of the action, before or after judgment, in furtherance of justice, to amend any process by correcting a mistake in any respect. Section 2830. The court of final resort of the state has repeatedly construed those statutes to authorize the affixing of a seal to a writ omitted through mistake. *Strong v. Catlin*, 3 Pin. 121; *Corwith v. Bank*, 18 Wis. 560; *Sabin v. Austin*, 19 Wis. 421. A like liberal rule was applied to amendments of criminal warrants. *Keehn v. Stein*, 72 Wis. 196, 39 N. W. Rep. 372. In other states the same construction has been given to like curative statutes. *Talcott v. Rosenberg*, 8 Abb. Pr. (N. S.) 287; *Murdough v. McPherrin*, 49 Iowa, 479. The federal government, equally with the governments of the states, has sought to cure all formal errors. It provides (Rev. St. § 948) that the court at any time may allow amendment of any process returnable to or before it when the defect is not prejudicial, and (Id. § 954) that no writ shall be abated, arrested, quashed, or reversed for defect or want of form.

It is, however, insisted that, the writ being absolutely void, under the rule of the federal court in *Insurance Co. v. Hallock*, *supra*, there was nothing to amend. If that be so, an anomalous result would follow. Here is a writ that, abiding in the state court, was not void,—merely defective, and amendable. Under the highest judicial authority of the state, it was a valid protection to the officer executing the writ. By the simple process of removal of the cause to the federal court, because of the diverse citizenship of the parties, that which was valid and effective becomes void, and as though it had never been,—a mere waste piece of paper. The executive officer of the state court, who, prior to the removal of the cause, was justified in the execution of the writ, by the mere act of removal becomes a trespasser *ab initio*. It would require a precise declaration of superior and constraining authority to require me to hold to such absurdity. I do not so read the decision in *Insurance Co. v. Hallock*. There no question of inherent power to amend, or of curative statutes, was invoked. Indeed, the statute authorizing amendment of process by the federal courts (Rev. St. 948) was enacted subsequently to that decision. The court, in its opinion, refers to the case of *Overton v. Cheek*, 22 How. 46, holding that a writ of error was void for want of a seal. Yet, since the statute, (17 St. 197,) it has been ruled by that court that a writ of error may be amended, where the seal to the writ is wanting. *Semmes v. U. S.*, 91 U. S. 21, 24. The ruling of *Pomeroy's*

Lessee v. Bank, 1 Wall. 592, cited in *Insurance Co. v. Hallock*, that a bill of exceptions must be under the seal of the judge, would seem overruled by *Generes v. Campbell*, 11 Wall. 193, but upon other grounds than here considered. In *Tilton v. Cofield*, 93 U. S. 167, the court cites approvingly the case of *Talcott v. Rosenberg*, *supra*, holding that a writ may be amended by adding the seal. The power so to amend has been recognized in other federal courts, (*Peaslee v. Haberstro*, 15 Blatchf. 472; *Dwight v. Merritt*, 4 Fed. Rep. 615; *Paper Co. v. Paper Co.*, 19 Fed. Rep. 252,) and is clearly within the intendment of the conformity act, (Rev. St. § 914.) The question affects the legality of a writ authorized by a state statute, and issued out of a state court, and its reformation under the laws of that state. Under the statutes of that state, as ruled by its highest tribunal, the writ was voidable,—not void,—and was amendable as to the seal. In such case the federal courts follow the construction of the state statute, declared by its court of last resort. *Bacon v. Insurance Co.*, 131 U. S. 258, 264, 9 Sup. Ct. Rep. 787. Removal proceedings possess no quality to invalidate what was valid. The case comes here as it stood when jurisdiction was yielded by the state court. *Duncan v. Gegan*, 101 U. S. 810. Whatever was valid there is valid here. Rev. St. § 646,¹ (18 St. 470.) Whatever was amendable there can be corrected here. Whatever defect was waived there is waived here. The removal is not effectual to work destruction to valid but defective process of the state court. It would be gross perversion of justice to permit it. I know of no federal authority, properly read, that would sanction it. The defendants cannot now complain of the defective writ. They waived all objection on that score by moving in the state court to set aside the levy thereunder upon other grounds, and by failure to raise the objection prior to the release of the property to them upon filing bond for the debt. Rev. St. Wis. §§ 2742–2744; *Dierolf v. Winterfield*, 24 Wis. 143; *Bank v. Miater*, 124 U. S. 721, 728, 8 Sup. Ct. Rep. 718.

It is not now practicable to cause the proper seal to be affixed to the writ, since the state court is divested of all jurisdiction of the cause. It would seem just, in the peculiar conditions, to enforce the equitable doctrine that the court will deem that done which ought to have been done. It will therefore be ordered that the writ stand amended, and be held valid and effectual, to all intents and purposes, as though the proper seal had been originally affixed thereto.

The pendency of the admiralty proceedings could not be well pleaded to the attachment suit. The one is a proceeding *in rem*, against the vessel; the other, an action *in personam*, against the owners. The two proceedings are also in different jurisdictions. *Harmer v. Bell*, *The Bold Buccleugh*, 22 Eng. Law & Eq. 62; *Insurance Co. v. Wager*, 35 Fed. Rep. 364.

But whether or not it is an abuse of process to levy an attachment in the action *in personam* upon the *res* that was bonded in the proceeding *in*

¹This section provides, *inter alia*, that on removal of a suit from a state court, any attachment shall hold the goods in the same manner as by the laws of the state it would have held them.

rem for the same debt is quite another question. By her discharge in the admiralty upon stipulation to meet the decree, the vessel is freed of the lien sought to be enforced against her in that proceeding. The libellants could not have recourse to the ship again for the same claim, except, possibly, as they might have resort to any other property of the owners. And while, technically, the right may exist to proceed against the owner *in personam* for the same debt, and in that action to attach the vessel, I am strongly inclined to the opinion that courts should view such a proceeding with great distrust, as burdensome and oppressive, and an abuse of the process of the court. *The Bold Buccleugh*, *supra*, holds not to the contrary. There, in admiralty, in a proceeding *in rem*, there was a plea of *lis alibi pendens* of a suit *in personam* in Scotland. The court rightly held this plea not sustained. No question of abuse of process was preferred. It is also to be noted that at once, upon the filing of the libel, instructions were sent to abandon the foreign proceedings; and the answer to the plea was that there was no longer any suit pending. There is strong intimation in *Insurance Co. v. Alexandre*, 16 Fed. Rep. 279, 282, that such additional attachment of property in a subsequent suit ought not to be permitted, except for good cause shown. I am, however, relieved from determining this question by the act of the defendants. Upon their application the state court granted rehearing of their motion to set aside the levy. This vacated the order of May 24th, and left the motion pending. The condition of the case as it came to this court then was that, pending a motion to set aside the levy, the defendants gave bond, and received restitution of the property seized. That act operated as a waiver of the motion, a waiver of any irregularity or defect in the process, and a waiver of any claim that the property attached could not rightfully be subjected to seizure. *Bank v. Mixer*, 124 U. S. 721, 728, 8 Sup. Ct. Rep. 718; *Dierolf v. Winterfield*, 24 Wis. 143. It is true that since the last-cited decision the law has been amended to permit a traverse, after bond given, of the affidavit upon which the writ issued, (Laws Wis. 1881, c. 329;) but in all other respects the bond is a substitute for the attachment, and "the action shall thenceforward proceed as if no writ of attachment had been issued," (Rev. St. Wis. § 2743.) The giving of the bond waived every right to object to the writ, and the proceedings thereunder,—the writ not being void,—except the right to traverse the facts alleged as ground for issuing the writ. The defendants, therefore, by their own act recognized that the vessel was rightly subject to seizure under the writ, and cannot now be heard to the contrary. An order will be entered, granting the plaintiffs' motion to amend, and denying the defendants' motion to set aside the levy under the writ.

DOGGETT, BASSETT & HILLS CO. v. BLACK *et al.*

(Circuit Court, D. Indiana. November 8, 1889.)

ATTACHMENT—DELIVERY BOND.

Accidental destruction of the property by fire is no defense to an action on the delivery bond authorized by Rev. St. Ind. § 924, providing that defendant in attachment may keep the property by executing an undertaking that the property shall be properly kept and taken care of, and shall be delivered on demand to satisfy judgment, or that he will pay the appraised value of the property.

At Law.

Morris, Newburger & Curtis, for plaintiff.

Claypool & Ketcham, for defendants.

GRESHAM, J. The plaintiff, the Doggett, Bassett & Hills Company, brought a suit in attachment in this court against the defendant William D. Black, to recover a debt, and on the 1st day of November, 1883, the marshal, under the writ which had issued to him in the suit, seized a stock of dry goods, the property of Black. Black executed a delivery bond, in which his co-defendant in this suit joined as surety, and the goods remained in Black's possession. The obligation of the bond was that the attached property "shall be delivered up to said marshal * * * upon demand, when said officer may be ready to receive the same, in as good condition as the same is at this date, to be sold by said marshal by virtue of any execution or judgment which may be rendered in said action against said Black. Further, that said Black may sell said property at private sale, and when so sold shall pay the cash value thereof to said marshal, to be applied on said execution." The goods were afterwards destroyed by fire, without fault or negligence on Black's part, and on the trial of the suit the plaintiff obtained judgment for \$2,222, and the attachment was sustained. Not being able to get the attached goods or other property on demand, to satisfy the execution that had issued to the marshal, he returned it unsatisfied, and this suit was brought on the bond against the principal and surety. The latter answered in several paragraphs, in the second of which he averred the loss of the property, as already stated, to which the plaintiff demurred.

Section 924 of the Revised Statutes of Indiana provides that "the defendant or other person having possession of property attached may have the same, or any part thereof, delivered to him by executing * * * a written undertaking, * * * payable to the plaintiff, to the effect, that such property shall be properly kept and taken care of, and shall be delivered to the sheriff on demand, * * * to satisfy any judgment which may be recovered against him in the action, or that he will pay the appraised value of the property." The defendants were not prevented from fulfilling their obligation by the act of God, or the conduct of the plaintiff; its fulfillment was not made impossible by law; and the attachment was not dissolved. The sole ground of defense set up in the paragraph of the answer demurred to is that the attached property was

destroyed by accidental fire. That was not an act of God, and the court is not called upon to decide what the effect would have been had the fire started by lightning or by some other superhuman agency. The defendants' counsel insists that a delivery bond, executed in an attachment suit, is not an absolute contract for the return of the property on demand or the payment of its value; but that the purpose of the statute is that the defendant shall be permitted to retain possession of the property by giving a bond with surety that he will care for and keep it just as the officer would be required to care for and keep it if it remained in his possession, and that the liability of the latter is that of a bailee for hire only. If property in the custody of an officer under a writ of execution or attachment is lost or damaged while he is exercising that degree of care over it which is required of a bailee for hire, he is not liable. Authorities need not be cited in support of this proposition. But the relation that an officer sustains to property, thus in his custody, is not the relation that a defendant in attachment sustains to his own property after the execution of a delivery bond. The officer simply holds the property of the defendant to satisfy any judgment that may be obtained by the plaintiff, while the defendant retains possession of his own property for his own benefit, with the same power and dominion over it, including the right to sell, that he had before the levy of the attachment. The obligation of a delivery bond is that the defendant, the owner of the property, will properly keep and take care of it, and deliver it to the officer on demand, or pay its value at the time the bond is executed. If only part of the attached property is delivered to the officer, or if it is all delivered, but in a damaged or depreciated condition, the defendant and his surety in the bond are liable for the loss. If the property had remained in the custody of the marshal, and the attachment had failed, it would have been no defense, to an action on the attachment bond executed by the plaintiff, to have averred that the property had been destroyed by accidental fire while in the custody of the marshal, and it is equally clear that the averments contained in the second paragraph of the answer constitute no defense to the action. There is a wide difference between the possession of an officer, who levies on property under a writ of attachment and holds it for a particular purpose, and the possession of a defendant in an attachment suit of his own property after the execution of a delivery bond, and it does not follow that because the possession and liability of the former is that of a bailee for hire only the liability of the latter is the same. If the defendants' counsel are correct, a delivery bond is a mere contract of bailment, and the defendant in the action becomes bailee of his own property. Demurrer sustained.

HILL v. UNITED STATES.

*(Circuit Court, D. Massachusetts. November 21, 1889.)***CLERK OF COURT—ACTION FOR FEES—NATURALIZATION FEES.**

In an action against the United States by the clerk of a district court to recover fees due him, defendant cannot introduce evidence to prove, in the way of counter-claim, that plaintiff has received and failed to account for fees received by him in the naturalization of aliens, since he is not bound to account for such fees.

At Law. Action to recover of the United States fees due plaintiff as clerk.

John Lowell and Lewis S. Dabney, for plaintiff.

Owen A. Galvin, U. S. Atty.

Before COLT and NELSON, JJ.

NELSON, J. This is a suit to recover of the United States fees earned by the plaintiff as clerk of the district court of the United States for the district of Massachusetts. At the hearing the following facts were either admitted or proved, and are found by the court:

The plaintiff was appointed clerk of the United States district court for the district of Massachusetts on the 5th day of February, 1879, and duly qualified as such, and gave the necessary bond, and held said office until the 1st day of January, 1888. The plaintiff has transmitted to the attorney general, for each half year while he held said office, a return of the fees and emoluments of said office, verified by oath in the form authorized and required by the attorney general, and on blanks furnished by the department of justice, in which the fees and emoluments earned from the United States, from individuals, and in bankruptcy, have been stated, as likewise his office expenses, with accompanying vouchers, which returns were in each case duly certified by the judge of the United States district court, for the district of Massachusetts, in the manner required and the language set forth in said blank-accounts. The plaintiff has likewise forwarded to the first auditor of the treasury an abstract of compensation due him from government cases and for attendance in court in each half year, with the accompanying vouchers, which abstract was in each case formally proved by him in open court in the presence of the attorney of the United States for the district, as required by law, and was duly allowed by said court, and was duly audited and referred by the auditor to the first comptroller of the treasury. At the May term, 1885, of this court, the United States, by writ dated December 4, 1884, brought an action on his official bond against the plaintiff and his surety, in which the alleged breach of said bond was "that the said Hill has not properly accounted for all moneys coming into his hands as required by law, according to the condition of said bond." This cause was heard by the court on an agreed statement of facts, and on November 14, 1885, the judgment of said court was rendered therein for the defendant. This judgment was, on writ of error sued out by the United States, affirmed by the supreme court. The decision of the circuit court is reported, 25 Fed. Rep. 375, and that of the supreme court is reported, 120 U. S. 169, 7 Sup. Ct. Rep. 510.

At the May term, 1887, of this court, the United States, by writ dated April 29, 1887, brought a second action on his official bond against the plaintiff and his surety, in which the alleged breach of said bond was that "the said Hill has not properly accounted for all moneys coming into his hands, as required by law, according to the condition of said bond." A trial was had to a jury

therein, who rendered a verdict for the defendant, on which judgment for the defendant was given by the court, August 24, 1887. A writ of error sued out by the United States to the said circuit court on this judgment was by the supreme court dismissed. The decision of the supreme court is reported, 123 U. S. 681, 8 Sup. Ct. Rep. 308. In both these cases the breach alleged was that plaintiff had not accounted for fees earned in the naturalization of aliens. The fees earned by the plaintiff from the United States in government cases, and for attendance in court, amount, for the following half years, to the following sums:

For the half year ending June 30, 1883,	-	-	-	\$1,116 85
For the half year ending June 30, 1884,	-	-	-	1,384 37
For the half year ending December 31, 1884,	-	-	-	1,411 92
For the half year ending June 30, 1885,	-	-	-	1,064 70
For the half year ending December 31, 1885,	-	-	-	991 42
For the half year ending June 30, 1886,	-	-	-	1,129 96
For the half year ending December 31, 1886,	-	-	-	822 11
For the half year ending June 30, 1887,	-	-	-	1,166 37
For the half year ending December 31, 1887,	-	-	-	1,097 27

—amounting in the whole to \$10,184.97, of which no part has been paid to him. The sum which remains in each of said years, from 1883 to 1887, inclusive, after deducting the plaintiff's necessary office expenses and necessary clerk hire allowed by the attorney general from the total amount of fees and emoluments earned by the plaintiff, and returned by him in his said emolument returns to the attorney general, including the said sums earned and due to him from the said United States, is less than \$3,500. For the year 1887, the sum which remains after deducting the plaintiff's necessary office expenses and necessary clerk hire, at the rate allowed by the attorney general, from the total amount of fees and emoluments earned by said plaintiff, and returned by him in his said emolument returns to the attorney general, including the said sums of \$1,166.37 and \$1,097.27 earned and due to him from the said United States, which fees and emoluments and returns do not include any fees earned from the naturalization of aliens, is the sum of \$1,178.71. The fees which the defendant claims the plaintiff is by the laws of the United States authorized to charge for the naturalization of aliens, and for which the defendant claims the plaintiff is therefore by law bound to account to the said United States, amounted for said year 1887 to \$2,482. This sum, added to the other fees and emoluments received by the plaintiff, would, if he recovers from the defendant the sums earned by him from said defendant, give the plaintiff, after deducting his necessary office expenses and clerk hire, a sum exceeding \$3,500 by \$160.71, and the plaintiff consents that the said sum of \$160.71 may be deducted from the sums earned by him from the defendant in said year 1887, or may be set off against the sum which the court shall find he is entitled to recover.

The plaintiff's claim has never been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. The only objection made by the accounting officers of the treasury department to the plaintiff's accounts was that they did not include fees earned in naturalization cases, and no other objection was made to them at the hearing before this court, and it was conceded by the defendant that in all other respects the accounts were correctly stated. The defendant excepted to the jurisdiction of the court upon the ground that the plaintiff's claim exceeded \$10,000, within the meaning of the act of March 3, 1887. (24 St. 505.) But, as the plaintiff in his peti-

tion limited his claim to \$10,000, and expressly waived all right to recover a larger sum, the court overruled the exception, and decided that it had jurisdiction to hear and determine the case.

The defendant at the hearing made the following offer of proof:

"The defendant offers to prove that the said Hill has received during his tenure of office large sums of money, as the ordinary and usual fees, from the application of foreigners to be naturalized in the district court of which he was the clerk, and for the issuance of certain certificates of naturalization; for the filing of papers, the administration of oaths, and for other official acts required by law in the naturalization, in due manner, of foreigners. That the said Hill in the proceedings used the official seal of the court, administered oaths as clerk of said court, filed the papers as such, and performed all the acts necessary to make legal such naturalization as such clerk, and that the fees received by said Hill in naturalization cases were so received by him in the usual and ordinary performance of his duties as clerk, in his official character, and with the use of records and machinery of the office. That the clerks in nearly all the district courts, and, in the circuits, the clerks of the circuit courts, have always included fees received by them in naturalization cases in their accounts rendered to the defendant. That the secretary of the interior, as long as such judicial accounts were under his official control, always, when the matter was brought to his attention, insisted upon said clerks so doing. That, since such accounts were transferred to the department of justice, similar action was taken there by the same clerk who audited them in the department of the interior. That, without a single instance of omission on the part of either department, fees received by the clerks of the district and circuit courts in naturalization cases have been claimed as belonging to the defendant, and returns thereof and accounts therefor have been required, and that, if in any returns of such clerks such fees had been omitted, their official return has been demanded when such omissions has been known to said departments. That the omission of the said Hill and his predecessors to make returns of all accounts for such fees was unknown to the said departments examining and allowing such accounts, said departments believing the same to contain all fees received by them in naturalization cases, and that the departments passing upon these accounts were not aware of such omission until an examiner of said department of justice reported thereon in October, 1884. That the district court has approved the emolument returns of the plaintiff, who included therein no fees earned in naturalization cases, and the circuit court has approved the emolument returns of Circuit Clerk Stetson, who included one-half of said fees, retaining the other half himself. Under the third item of the answer, the defendant offers to prove that Hill earned large amounts of fees for the United States from individuals for the naturalization of aliens, and did not return the same in his emolument returns. The defendant offers to prove that the plaintiff failed to account for amounts earned in naturalization cases, amounting during his tenure of office to \$20,714. Under the fourth paragraph, the defendant offers to prove that the petitioner is indebted to the United States for official earnings during his tenure of office not accounted for, amounting to a large sum of money, viz., to \$20,714, and offers to prove that the petitioner is indebted to the United States amounting in excess of \$3,000 per annum during his tenure of office. Under the fifth paragraph, the defendant offers to prove that the petitioner earned for the United States from individuals large sums of money, viz., the sums set forth in the emolument returns rendered by him from time to time since the time of his appointment to the time of his resignation, in 1879, \$149; in 1880, \$1,086; in 1881, \$2,577; in 1882, \$969; in 1883, \$1,950; in 1884, \$3,223; in 1885, \$2,694; in 1886, \$1,568; in 1887, \$2,412; in 1888, \$4,086; amounting,

in all, to the sum of \$20,714. And also offers to prove that said Hill has received for services in cases of naturalization of aliens during his tenure of office, in 1879, \$149; in 1880, \$1,086; in 1881, \$2,577; in 1882, \$969; in 1883, \$1,950; in 1884, \$3,223; in 1885, \$2,694; in 1886, \$1,568; in 1887, \$2,412; in 1888, \$4,086; amounting in all to the sum of \$20,714. Under the sixth paragraph, the defendant offers to prove that the fees and emoluments earned for the United States, and unaccounted for during the term of said Hill's tenure of office, were as follows: Fees earned from individuals, viz., naturalization fees collected by the clerk, in gross sum amounting to \$20,714; and also which sum was received and earned by said clerk in filing and entering papers, and for divers other clerical duties relating to the naturalization of aliens; for administering oaths or affirmations in naturalization cases; for entering decrees in naturalization cases; for affixing seal of the court. The defendant offers to prove that the fees and emoluments earned for the United States under title 30, Rev. St., by said petitioner, were more than enough to pay said petitioner the sum of \$3,500 a year. Under this sixth paragraph, the defendant claims and offers to prove that the fees earned from individuals for the United States, (and included,) if added to the naturalization fees, (not included,) were more than enough to pay said Hill \$3,500. Under the seventh paragraph, where Hill sets up refusal of United States to pay, because, etc., the defendant offers to prove that the petitioner has not included in his said returns certain sums of money earned by him for the United States, and payable to the United States, in this: that he did not include in his emolument returns the sums earned by him under title 30, Rev. St., from individuals for official acts, according to section 828, Rev. St., and, as negating the reason for refusal alleged by Hill, and as assigning a reason therefor, that he has not accounted for large earnings for which he is legally responsible to the government under section 857, Rev. St., namely, the legal fees for naturalization of aliens under United States laws, amounting to \$10,357. Defendant also offers to prove that it has been for many years, and during the time of the tenure of office of said Hill it was, the general practice for the accounting officers to require said fees to be included in the emolument returns of clerks of courts of the United States. And the defendant offers to prove further that, Hill being legally accountable for such earnings, no settlement of his accounts has been practicable. The defendant offers to prove that no adjustment, so far as the accounts of the different accounting officers from time to time, charged with the duty of examining and adjusting the accounts of clerks of courts, show, has ever been made in which such inclusion has been knowingly excluded, and that the practice is to include all such fees. On the question of jurisdiction, the defendant offers to prove that Hill owes the United States more than \$10,357, made up of fees earned from individuals for the United States, and not accounted for."

The defendant also presented to the court the following requests for rulings in matters of law:

"The defendant asks the court to rule that the returns of fees and emoluments, transmitted by the plaintiff, were not full and complete returns of the fees and emoluments, as provided by law, in that the plaintiff had earned large amounts of fees for the United States from individuals for the naturalization of aliens, and did not include them in said returns. Under Hill's third item, defendant asks the court to rule, as a matter of law, that there is no requirement or authority of law by which a judge of the district court can lawfully pass upon or certify to the accuracy or amount of clerical earnings stated in an emolument return of a clerk; and defendant claims and asks the court to rule, as a matter of law, that that is the specific duty of the attorney general of the United States; and, further, as a matter of law, that the accounts, which

the law requires a judge of the United States court, (and as is in this case a district judge,) to pass upon and certify to the accuracy of, are accounts for services rendered to the United States under act of February 22, 1875, in causes in which the United States is a party in interest or of record. And, further, as a matter of law, that the items of earnings from 'individuals' included in the emolument returns are items for plaintiff to collect from individuals by direction of section 857, Rev. St., and, as a matter of law, these items are not for the official examination or certification of a judge, but are under the exclusive examination and action of the attorney general. Under the seventh paragraph, the defendant asks the court to rule, as a matter of law, that Hill was required to render a full, true, and lawful return of all fees and emoluments of every name and character earned from the United States and for the United States by him, and that he should have included in said returns all fees earned for and payable to the United States, and that he should, as a matter of law, have included in his emolument returns the sums earned by him, under title 30 of the Revised Statutes, from individuals for official acts taxable according to section 828, Rev. St., to-wit. the legal fees for the naturalization of aliens under the United States laws, and that, without such return, no sum can be ascertained to be due to said Hill, for which the said Hill is legally responsible to the defendant, under section 857, Rev. St. That, as a matter of law, the said Hill being legally accountable for such earnings, no settlement of his accounts has been practicable. As to the eighth paragraph, the defendant asks the court to rule, as a matter of law, that the judgment referred to in said suit has no bearing on the present suit, in this: That the questions involved in this suit were not presented by the record in the former suit; that the former suit was upon an agreed statement of facts, which were binding only for the purposes of that suit; that it was erroneously stated in said 'agreed facts' that it had been the practice of the accounting officers of the government not to exact an account of naturalization fees; and that the judgment in said suit was not rendered on the ground that the petitioner was not required to return the amounts earned for the United States, and unaccounted for, in the naturalization of foreigners. As to the ninth paragraph, defendant asks the court to rule, as a matter of law, that the judgment therein referred to was based on the allegation that he, the said Hill, was not required to include in his emolument returns sums that he had unofficially received from individuals in naturalization cases, and was not based on the allegation that said petitioner is required to include in his emoluments returns all his official earnings for the United States from individuals. As to the eleventh paragraph, the defendant claims and asks the court to rule, as a matter of law, that the judgment therein mentioned has no bearing on the present case, for the reasons before recited in the eighth and ninth paragraphs. As to the twelfth paragraph, defendant asks the court to rule, as a matter of law, as heretofore claimed in the decision of the supreme court in *U. S. v. Hill*, and the second case, *U. S. v. Hill*, in circuit court, is, that certain sums unofficially received by the petitioner, in connection with the naturalization of aliens, are not fees which Hill is required by the law to include in his emolument returns, and the defendant also asks the court to rule, as a matter of law, that said decision is no estoppel by way of judgment or otherwise to his defense in this suit, instituted by Hill, for sums due him, and which indebtedness is denied on the ground that nothing is due Hill who has not accounted for large sums due to the United States, and for which he is legally responsible."

The court declined to receive the proof offered, and declined also to give the rulings prayed for, holding that, as to so much of the plaintiff's claim as accrued prior to the year 1887, the same were immaterial, as

the defendant was concluded by the judgments against it in the suits referred to in the findings of fact, and that the plaintiff was not bound to account in this suit to the defendant for fees arising in naturalization cases. The proof and rulings were also immaterial as to so much of the plaintiff's claim as accrued in the year 1887, as the plaintiff consented at the hearing to have deducted from his claim the sum of \$160.71, which was all the defendant would be entitled to have deducted upon its own theory of the law and facts in the case. The plaintiff is entitled to have judgment entered in his favor for \$9,839.29, and costs taxed in accordance with section 15 of the act of March 3, 1887. (24 St. 508.)

COLT, J. I concur in the conclusions of Judge NELSON, in this case. The question of Hill's accountability to the United States for moneys alleged to have been earned by him as clerk of the district court in naturalization cases was determined by this court and by the supreme court in the case of *U. S. v. Hill*, reported in 25 Fed. Rep. 375, and 120 U. S. 169, 7 Sup. Ct. Rep. 510. In that case it was contended that Hill, as clerk of the district court, had received certain moneys in naturalization cases for which he should account to the United States in his emolument returns, and especially that he should account to the extent of his earnings in such cases under the fee bill of 1853, but the supreme court decided that Hill had received no moneys in naturalization cases to be accounted for in his emolument returns, and that the fee bill was not applicable to such cases. In the present case the defense is made to the plaintiff's claim that he has earned certain fees in naturalization cases which he has not included in his emolument returns. As the supreme court has decided that the fee bill is not applicable to naturalization cases, the offer of proof that Hill had performed certain acts, alleged or claimed as under the fee bill, by which he earned emoluments in such cases, was properly rejected, and the request for rulings, in effect, that Hill is accountable for earnings in naturalization cases under the fee bill, was properly denied. Judgment for plaintiff.

CRAWFORD v. UNITED STATES.

(District Court, E. D. Missouri, E. D. November 16, 1889.)

1. UNITED STATES COMMISSIONERS—DOCKET FEES.

Act Cong. Aug. 4, 1886, (24 U. S. St. 274,) entitled "An act making appropriations to supply deficiencies, * * * and for other purposes," which provides that commissioners shall receive no docket fees, abolishes docket fees altogether, and does not merely except the payment of such fees out of the appropriations thereby made.

2. SAME—DRAWING RECOGNIZANCES—SCALING BILL.

A commissioner's bill for drawing recognizances, cannot be scaled on the ground that the form of recognizance used by him was longer than necessary, where such form has for a long time been used in his district, and thus impliedly sanctioned by the court.

3. SAME—DRAWING COMPLAINTS.

A commissioner is entitled to fees for drawing complaints. Following *Rand v. U. S.*, 83 Fed. Rep. 666.

4. SAME—FILING FINAL BONDS.

Rev. St. U. S. § 847, providing for commissioners' fees, makes no provision for the allowance of a fee for "filing final bonds," and the commissioner is not entitled to compensation therefor.

5. SAME—ACKNOWLEDGMENTS.

Commissioners are entitled to the statutory fee for the acknowledgment of each surety on a bond, and not limited to one fee for all the acknowledgments to each bond.

6. SAME—ENTERING RETURNS OF WARRANTS.

Under Rev. St. U. S. § 847, providing that for issuing any warrant or writ, and for any other service, commissioners shall be allowed the same compensation as is allowed clerks for like services, and Rev. St. U. S. § 828, providing compensation to clerks for entering any return, etc., a commissioner is entitled to fees for entering returns of warrants and subpoenas in his docket.

7. SAME—STATEMENT OF PROCEEDINGS.

Where the commissioner, instead of returning into court a full transcript of proceedings had before him, returns the original papers, with a short statement, indorsed on the complaint, showing what action was taken by the committing magistrate or officer, he is entitled to a reasonable allowance for such indorsement.

8. SAME—SEVERAL PROSECUTIONS.

The commissioner will not be disallowed fees in two or more cases on the ground that they might have been prosecuted jointly with another case of the same character, where it appears that the district attorney directed the method of prosecution by several complaints, instead of one.

9. SAME—QUALIFYING SUPERVISORS.

Rev. St. U. S. § 2081, which provides the compensation to be paid to supervisors of election, does not provide for any allowance to be made them for the expense of qualifying for the discharge of their duties, and a commissioner is not entitled to fees for drawing affidavits and administering oaths in qualifying such supervisors, though he performed such services at the request of the chief supervisor.

At Law. Petition for the allowance of a claim against the United States for fees as commissioner.

Dickson & Smith, for plaintiff.

George D. Reynolds, U. S. Atty., for defendant.

THAYER, J. This is an action against the United States under the provisions of the act of March 3, 1887, (24 U. S. St. at Large, 505,) to recover the sum of \$371.75; the same being fees alleged to have been earned by the plaintiff, as United States commissioner, between March 10, 1887, and March 31, 1889. Accounts embracing the several sums now sued for have been presented to the treasury department for payment from time to time between the dates last mentioned; but the items in question have been stricken out and disallowed for various reasons. Attached to the petition in the case is a lengthy, detailed statement of the fees now in controversy, which embraces numerous small items. For convenience in the consideration of the same, they will be grouped into classes.

First. Docket fees in the sum of \$34 are claimed. The allowance of this item depends upon the decision of the question whether the proviso in the deficiency appropriation act of August 4, 1886,¹ (24 U. S. St. 274,) operated to abolish docket fees in future, or merely to except the payment of such fees out of the appropriation thereby made. It has been held that such fees, in view of the proviso, can no longer be al-

¹ Act Cong. Aug. 4, 1886, entitled "An act making appropriations to supply deficiencies, * * * and for other purposes," provides that commissioners "shall not be entitled to any docket fees."

lowed. *Vide Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 215; *Faris v. U. S.*, 23 Ct. Cl. 374; *Calvert v. U. S.*, 37 Fed. Rep. 762. On the other hand, it has been decided that they may be legally allowed, notwithstanding the proviso in question. *Vide Bell v. U. S.*, 35 Fed. Rep. 889; *Rand v. U. S.*, 36 Fed. Rep. 675; *Hoyne v. U. S.*, 38 Fed. Rep. 543. For reasons fully stated in *Strong v. U. S.* and *Faris v. U. S.*, *supra*, it appears to this court that congress intended to abolish docket fees in future; and the charge made in that behalf is accordingly disallowed.

Second. Fees charged for drawing "recognizances" and "complaints," amounting in the aggregate to \$107.05, form the next subject of contention. It is conceded by the government that a commissioner may charge for drawing recognizances; but it is contended that the form of bond in use in this district is too prolix. The comptroller has accordingly scaled the commissioner's bill, allowing him in some instances for only three folios, and in other instances for a less number, without any reference to the number of folios actually contained in the bonds taken. In some instances the charges contained in the commissioner's accounts for drawing complaints have only been scaled; in others, such charges have been disallowed *in toto*, on the theory that they are illegal. For drawing recognizances and complaints, I find, as a matter of fact, that the commissioner has only charged for the actual number of folios contained in the papers by him drawn. The form of recognizance now in use in this district has long been in use, and has been impliedly sanctioned by the court. I conclude, therefore, that the commissioner is entitled to the compensation claimed for drafting recognizances. The court fully agrees with what was said on that subject in *Rand v. U. S.*, 36 Fed. Rep. 673, 674. Some difference of opinion exists concerning the right of commissioners to charge for drawing complaints. The question has been considered at some length in two cases, to-wit, *Strong v. U. S.*, *supra*, and *Rand v. U. S.*, 38 Fed. Rep. 666, 667. I conclude that good and sufficient legal reasons are shown in the case last cited for allowing such fees, and that the due administration of the criminal law requires that such fees should be allowed. The plaintiff is accordingly entitled to recover all that is claimed in his account for drawing recognizances and complaints, to-wit, \$107.05.

Third. Plaintiff makes a small claim, amounting to \$4.50, for "filing final bonds." This, as I understand, is a claim for compensation for indorsing on a bond the date that it is presented to and accepted by the commissioner. Section 847, Rev. St. U. S., makes no provision for compensation for such service, nor does the statute in any place make it the duty of the commissioner to make such indorsements on bonds or recognizances. Final bonds taken by such officers are returned into court, and there filed. So far as I can see, it is wholly unnecessary to indorse and file bonds in the manner indicated. For these reasons the claim is disallowed.

Fourth. Claim is made for taking acknowledgments to bonds, at the rate of 25 cents for each person who acknowledges the same. Different

opinions have been expressed as to the legality of such charges, and among the courts that allow such fees there is a difference of opinion as to whether a charge should be made on account of each surety, or only one fee of 25 cents for each bond. *Vide Strong v. U. S.*, and *Rand v. U. S.*, *supra*; *Barber v. U. S.*, 35 Fed. Rep. 887; *Heyward v. U. S.*, 37 Fed. Rep. 764. It seems to be the practice to allow such fees in most districts. I accordingly assent to that view of the law. Such fees being allowed, it seems to me most reasonable to hold that it should be allowed for each acknowledgment by a surety, and should not be limited to 25 cents for each bond.

Fifth. A charge is made, in the sum of \$26.40, for entering returns of warrants and subpoenas in the commissioner's docket. With respect to this charge there is also a difference of opinion as to its propriety. *Strong v. U. S.*, *supra*, and *Rand v. U. S.*, 38 Fed. Rep. 666. In this district it has long been the practice of some commissioners to note the return of warrants and subpoenas in their dockets. The practice was very likely adopted in analogy with that of justices, who, by the laws of this state, are required to make such entries in dockets by them kept. For many reasons it seems desirable that a notation should be made in a commissioner's docket of the time warrants and subpoenas are returned. Authority for the allowance of such fees is to be found in subdivision 7 of section 847,¹ and subdivision 8 of section 828.² The charge made (\$26.40) is hereby allowed.

Sixth. A controversy next arises over several charges made by the commissioner for what he terms "certificates of attendance;" the whole amounting to \$10.05. The phrase used by the commissioner to indicate the character of the service referred to is misleading. He really means by the phrase "certificate of attendance" a short statement indorsed by him on the back of complaints, after cases were disposed of, showing what action he had taken. It has never been the practice in this district, so far as I am advised, for commissioners to return into court a full transcript of their proceedings, as appears to be the rule in some districts. *Hoyne v. U. S.*, 38 Fed. Rep. 545. In lieu of a transcript, the original papers are returned, with a short statement indorsed on the complaint, showing what action was taken by the committing magistrate or officer. This is necessary to render the proceeding intelligible, and the charge made for the same at the rate of 15 cents per folio is reasonable, and, in my opinion, ought to be allowed. *Hoyne v. U. S.*, *supra*. I accordingly allow the charge of \$10.05.

Seventh. I see no reason to question the legality of the various *per diem* fees claimed by the commissioner, amounting to \$35 in the aggregate, nor the legality of the fees claimed in the cases of Charles F. and Christian Lautenschlager, amounting to \$6.60. These items are accord-

¹ Rev. St. U. S. § 847, provides, (commissioners' fees:) "For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services."

² Rev. St. U. S. § 828, provides, (clerks' fees:) "For entering any return, rule, order, continuance, judgment, decree, * * * or making any certificate, return, or report, for each folio, fifteen cents."

ingly allowed. The *per diem* fees were disallowed, as it seems, because the comptroller was of the opinion that certain sessions held by the commissioner were unnecessary. An investigation of the facts, satisfies me that no more sessions were held than were reasonably necessary to dispose of the business pending before the commissioner in a judicial manner. In the Lautenschlager cases it seems that the commissioner's fees were disallowed because these cases might have been prosecuted jointly with another case of the same character. It does not appear to have been the commissioner's fault, however, that more complaints were filed than were really necessary. The district attorney appears to have directed the method of prosecution by several complaints, instead of one. As no more than legal fees are demanded, they must be allowed. *Barber v. U. S.*, 35 Fed. Rep. 888.

Eighth. The last item in the account necessary to be mentioned is a claim for \$126.80 for drawing affidavits qualifying 317 supervisors of election, and administering oaths to such persons; the sum claimed in each instance being 40 cents. The plaintiff was not the chief supervisor of elections for this congressional district, but appears to have rendered the services in question at the request of the chief supervisor, who was at the time disabled by sickness. If any statute clearly provided that the United States should pay the expenses of supervisors of election incurred in qualifying for the discharge of their duties after their appointment, I should have little hesitation in holding that the government was liable for the services in question. But I can find no such law. Section 2031,¹ to which my attention was called, does not seem to me to imply that the government will, and certainly it does not in terms declare that it shall, pay such expenses. When persons are appointed to office, I believe, it is usual for them to qualify at their own expense. If congress intended that such expenses of supervisors of election should be borne by the government, the intent ought to have been more clearly expressed. I am constrained to hold that the service in question was rendered for the supervisors, and not for the government. The item of \$126.80 is therefore disallowed. Deducting the amounts heretofore disallowed, aggregating \$165.30, from the sum sued for, (\$371.75,) the balance due is \$206.45, for which judgment will be entered.

¹Rev. St. U. S. § 2031, provides for the allowance of compensation to supervisors of elections.

UNITED STATES v. EWAN.

(Circuit Court, N. D. Florida. November 14, 1889.)

GRAND JURY—QUALIFICATIONS—INDICTMENT.

Although the law may require grand jurors to be registered electors, etc., the fact that one of the grand jurors was illegally registered is no ground for quashing an indictment, but is such a defect only as is contemplated by Rev. St. U. S. § 1025, which provides that no indictment shall be deemed insufficient by reason of any defect in matter of form which shall not tend to the prejudice of defendant.

At Law. Plea in abatement to indictment.

E. K. Foster, J. E. Hartridge, and C. M. Cooper, for defendant.

J. N. Stripling, U. S. Atty.

SWAYNE, J. The defendant filed a plea in abatement to the indictment herein, and alleges that it should be abated and quashed upon the ground, in substance, that William Pittman, one of the grand jurors who presented said indictment, is not, and was not when he was impaneled as a member of the grand jury, a duly-registered elector of the county of Duval, his place of residence. The plea admits that his name appears upon the registration list of Duval county; but it is contended that it is there illegally, in this: that it was placed there on the 29th day of September, 1887, and by an officer not entitled to register, and therefore he is not a legally qualified juror. To this plea the government has interposed a demurrer, and alleges that the plea does not state facts which in point of law show that the juror in question was incompetent and disqualified.

Section 800 of the Revised Statutes declares that "jurors to serve in the courts of the United States, in each state, respectively, shall have the same qualifications * * * as jurors of the highest court of law in such state * * * at the time." Act Aug. 1, 1868, Laws Fla., provides that "all persons who are qualified electors of this state shall be liable to be drawn as jurors, except as hereinafter provided," etc.; and Act June 7, 1887, § 9, provides that qualified electors can register only between certain dates in each year in which there shall be a general election. The grand juror William Pittman did not register in such a year. Is he a competent grand juror, or must the indictment against the prisoner, J. W. Ewan, be quashed for this reason? In the case of *U. S. v. Benson*, decided by FIELD, circuit justice, SAWYER, circuit judge, and HOFFMAN, district judge, in the district of California, reported in 31 Fed. Rep. 896, the facts upon which the decision was rendered are very similar to those in this case. In that case the plea in abatement set up that "the grand jury which found the indictment was an illegal and incompetent body, having no authority or jurisdiction to find or present it, or to find or present any indictment, for the reasons that some of the persons who composed the jury * * * were not at the time tax-payers in California, nor were they assessed for taxes on any property on the last assessment roll of the counties from which they were respectively summoned." The defendants in that case contended that the in-

dictment was illegal and void, and should be abated and quashed. To this plea the United States demurred. In the examination of that question it appeared that the Code of Civil Procedure of the state of California, § 198, declares "that a person is competent to act as juror if he be—*First*, a citizen of the United States, an elector of the county, * * * and a resident of the township at least three months before being selected and returned; *second*, in possession of his natural faculties, and not decrepit; *third*, possessed of sufficient knowledge of the language in which the proceedings of the courts are had; *fourth*, assessed, on the last assessment roll of his county, on property belonging to him." And section 199 of the same Code adds that "a person is not competent to act as a juror—*First*, who does not possess the qualifications prescribed by the preceding section; *second*, who has been convicted of a felony or misdemeanor involving moral turpitude." In deciding that case the court says that "the essential requisites of every juror are the possession of his natural faculties, and sufficient knowledge of the language in which the proceedings before him are had to obtain a clear understanding of what is done and said," and that "the provisions of the statute passed to bring offenders against the laws to trial are not to be so construed as to defeat their purpose. The various proceedings prescribed are the means designed, not merely to protect the accused, but also to protect the public, and are to be enforced, on the one hand, so as to secure to the accused a full and fair trial, and, on the other hand, so as not to prevent the punishment of crime." The last two paragraphs are as follows:

"In this case the objections to some of the grand jurors, that their names were not among the list of tax-payers on the last assessment roll of their respective counties, is technical only. There is no allegation in the plea that the jurors were not in all respects, as to ability and knowledge, fully qualified for the duties imposed upon them, or that the defendants were in any respect prejudiced by the absence of their names from the assessment roll. In these circumstances the objection must fall under the general rule of the federal courts, that omissions which do not impair any substantial right, or prejudice the defense, of the accused must be disregarded, unless otherwise required by positive statute. Section 1025, Rev. St., declares that 'no indictment found and presented by a grand jury, in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.'

"In *U. S. v. Tuska* it was held by Judge BLATCHFORD, then district judge, now a justice of the supreme court, that, where there is no averment in a plea in abatement of injury or prejudice to the defendant, irregularities in the finding of an indictment, consisting, among other things, of some of the grand jurors not possessing the proper property qualifications, became matters of mere form, to be disregarded under the above statute. 14 Blatchf. 5. Without accepting this conclusion in full, the spirit which it expresses undoubtedly governs the action of the federal courts, that omissions or defects in such cases which do not prejudice the accused shall not avail to set aside an indictment or other proceeding."

The demurrer to the plea in that case was sustained, and the defendant ordered to plead to the indictment. I have quoted thus extensively

from the above decision, both on account of the high authority of the court that delivered it, and the almost exact similarity of the facts involved. In that case the grand jurors were not on the last assessment roll. In this case a grand juror was on the registration list; but it is alleged his name was not there in strict accordance with the law regulating the same. There is no allegation in the plea in this case, nor does the argument of counsel intimate in the most remote manner, that the grand juror Pittman was not in his natural faculties, or possessed of sufficient knowledge of the language to obtain a clear understanding of all that was done or said, or that he was not a man of approved integrity, fair character, sound judgment, and intelligence. It was not denied that he was a citizen in every way entitled to register, and his name was on a registry list; the allegation simply being that it was not there legally. Surely, the court can appropriately adopt the language of the California case, that the "objection is technical only." But counsel for the prisoner contended that the reason why the California case was so decided was owing to the existence of section 995 of the Penal Code of that state, that provides that an indictment may be set aside on motion for certain reasons, among which there was no mention of not having been on the assessment roll, as mentioned in section 198 of the Civil Code. But in the state of Florida, by the act of criminal procedure of February 2, 1861, it is provided on what grounds only an indictment shall be quashed, and in that act there is no mention of an unregistered elector,—of his not being registered at the proper time. So that, if we read the two acts together in Florida, as was done in California, and as we must do to get the proper meaning of the law as it exists, it will be seen that the same conclusion must follow in this case as was arrived at in that. While this part of the criminal procedure act of Florida may not have been so construed by some of the courts of this state, the decision of the federal court must be the guide in this case. The law of California provides that a person is not competent to act as a juror whose name is not on the last assessment roll of his county. The law of Florida provides that a person is not a competent juror who is not registered between certain dates in a certain year. Who can point out the material difference between these two provisions? And, as it is evident the objection made to the grand juror does not impair any substantial right, or prejudice the defense, of the accused in any manner, it must fall under the provisions of section 1025, Rev. St., mentioned above. As this disposes of the matter without reference to the question of the legality of the registration, but upon what the court deems a broader and more comprehensive view, and one that must carry with it the force of its own merit, it will not be necessary to consider the other points that were urged by counsel on both sides at great length. The demurrer to the plea is sustained, and the defendant must plead to the indictment; and it is so ordered.

UNITED STATES v. STUBBLEFIELD.

SAME v. BISHOP.

(District Court, E. D. Missouri, E. D. November 8, 1889.)

INTOXICATING LIQUORS—WHAT CONSTITUTE—ILLEGAL SALES.

"Lemon Ginger" and "Empire Tonic Bitters" are sold by the bottle as medicinal preparations, and are believed to possess curative properties. They consist of about one-third alcohol, and the residue of distilled water and extracts from herbs, etc., and the quantity of alcohol is not greater than is necessary to extract and retain the virtues from the herbs, and is less than is contained in some ordinary tinctures. *Held*, that they are medicinal preparations, and dealers in them are not liquor dealers, within the meaning of Rev. St. U. S. § 3244, defining a liquor dealer as one who sells "distilled spirits or wines," though they are intoxicating, if used immoderately.

Indictments for Selling Liquors without License.

George D. Reynolds, Dist. Atty.

Lee & Ellis, for defendants.

THAYER, J. In these cases the question to be determined is whether persons who sell "Lemon Ginger," manufactured by the Collins Bros. Drug Company, and "Empire Tonic Bitters," prepared by the Donell Manufacturing Company, are retail liquor dealers, within the meaning of section 16 of the act of February 8, 1875, amendatory of the internal revenue laws. This, of course, involves the further question whether the compounds referred to are "distilled spirits or wines," as section 3244, Rev. St. U. S., defines a retail liquor dealer to be a person who sells "foreign or domestic distilled spirits or wines in less quantities than five gallons." From the testimony in the case, it appears that "Lemon Ginger" has been patented as a useful medicinal preparation, and that about one-third part of the same, by weight, consists of dilute alcohol. The residue is distilled water and lemon juice, mixed with extracts from six different herbs and roots. The percentage of alcohol by weight in the compound known as "Empire Tonic Bitters" is a trifle less than one-third, and the residue of weight is made up of distilled water and extracts from certain medicinal barks, leaves, roots, berries, etc. The two compounds, "Lemon Ginger" and "Empire Tonic Bitters," do not differ sufficiently in their composition or effects to justify any distinction between them in determining whether they ought to be classified as medicinal preparations or as distilled liquors. It is obvious that either preparation contains enough alcohol to produce intoxication, if that is the sole test to be applied. It appears from the testimony that both preparations are put up, advertised, and sold by the manufacturers as medicinal preparations, and that each possesses, or at least is believed to possess, curative properties, when used for certain disorders, and in the manner directed by the manufacturers. It further appears with respect to one of the preparations (and I presume that the same may be said of the other) that the quantity of alcohol employed is not greater than is necessary to ex-

tract the virtues of the medicinal herbs employed, and hold the same in solution, and that the quantity used is less than that contained in some ordinary tinctures. These compounds, so far as the evidence discloses, are sold by the bottle by retail dealers, and are not sold over the counter, like ordinary intoxicating beverages. On the facts stated I see no ground for dissenting from the ruling of the commissioner of internal revenue heretofore made, that these preparations, "Lemon Ginger" and "Empire Tonic Bitters," should be classed as medicinal preparations, and hence that dealers in the same are not wholesale or retail liquor dealers, within the meaning of the law. The fact that men with a strong appetite for drink may occasionally buy one of these preparations, and by an immoderate use of the same become drunk, is not an adequate reason for classifying them as distilled spirits. It is safe to assume that alcohol enters into the preparation of some other compounds, that no one would think of classifying as distilled spirits, in such quantity that a man might be made drunk by imbibing them too freely. The fact, therefore, that a mixture possesses so much alcohol that persons may become intoxicated by drinking such a quantity as may be drunk without imperiling life, cannot be accepted as the sole test by which to determine if the mixture should be classed as distilled spirits, and dealers therein as liquor dealers. If a preparation is not intended as a beverage, but is put up in good faith as a medical preparation, and is only advertised and sold as such, and there are reasonable grounds to believe that it possesses curative qualities, and no more spirits are used in the preparation than are reasonably necessary to extract and hold in solution the medicinal properties of the various drugs employed, such preparation is medicinal, and does not lose its character as such, although it is intoxicating when used to excess. The defendants in these cases will be discharged.

UNITED STATES v. BAIN.

(District Court, E. D. Wisconsin. November 25, 1889.)

STATUTES—REPEAL—SEAMEN—DESERTION—LAKE VESSELS.

Rev. St. U. S. § 4590, provides certain penalties for the desertion of a seaman who has been lawfully engaged. Section 5601 provides that all acts passed after December 1, 1873, are to have full effect as if passed after the enactment of this revision; and so far as they vary from, or conflict with, any of its provisions, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. Act U. S. June 9, 1874, (18 St. c. 280,) provides that none of the provisions of the act of June 7, 1872, (17 St. c. 322,) shall apply to vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade, touching at foreign ports or otherwise, etc. *Held*, that this act repeals so much of Rev. St. tit. 53, including section 4590, as is composed of the provisions of act June 7, 1872, so far as it applies to vessels on the Great Lakes.

Information for Desertion against a Seaman.

W. A. Walker, U. S. Dist. Atty.

J. W. Wegner, for defendant.

JENKINS, J. An information is lodged charging the defendant, a seaman lawfully engaged to service on board the schooner *S. L. Watson*, under shipping articles duly signed, on a voyage from Sandusky, Ohio, to Milwaukee, Wis., and thence, via Escanaba, Mich., to any discharging port on Lake Erie, with desertion at the port of Milwaukee. The information is presented under Rev. St. § 4596, and contains all proper averments to bring the matter within that section, if the provisions of title 53 of the Revised Statutes, entitled "Merchant Seamen," has application to the Great Lakes. A demurrer is interposed to the information presenting this precise question. This title of the revision is in the main composed of the provisions of the act of June 7, 1872, (17 St. c. 322,) known as the "Shipping Commissioners' Act." The penalties prescribed in Rev. St. § 4596, first appear in section 51 of that act. By act of June 9, 1874, (18 St. c. 260,) it was enacted that none of the provisions of the act of June 7, 1872, "shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade, touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage." The revision of the statutes was approved June 20, 1874, but took effect as of December 1, 1873. Section 5601 provides that acts subsequent to that date are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. It is clear, therefore, that the effect of the act of June 9, 1874, is to repeal all the provisions of title 53 (including the penal provisions of section 4596) of the revision, taken from the act of 1872, so far as they are applicable to vessels engaged as specified in the act of June 9, 1874. *U. S. v. Bain*, 5 Fed. Rep. 192; *U. S. v. King*, 23 Fed. Rep. 138; *U. S. v. Buckley*, 31 Fed. Rep. 804; *U. S. v. Mason*, 34 Fed. Rep. 129; *U. S. v. The Grace Lothrop*, 95 U. S. 532.

It is suggested that the exception includes all subsequent parts of the act. Such contention cannot be maintained. That construction would render altogether unnecessary and out of place the reference to seamen participating in the profits of a voyage, and would defeat the evident intention of congress to exempt that class from the operation of the shipping commissioners' act. The exception in the law has reference only to the coastwise trade between the Atlantic and Pacific coasts. The word "coastwise," as used in the statute, means along that part of the territory of the United States bordering upon and washed by the sea. It does not comprehend inland navigation. This is apparent upon the face of the shipping commissioners' act. It was intended to apply to ocean navigation solely. Shipping commissioners were to be appointed only in ports of ocean navigation. 17 St. c. 322, § 1; Rev. St. § 4501. Written agreements with seamen were to be made before proceeding on a voyage from a port in the United States to any foreign port, and from a port on the

Atlantic to a port on the Pacific, and *vice versa*, (section 12 of the act;) and by a proviso it was expressly declared that the section should not apply to masters of lake-going vessels that touch at foreign ports. This was inserted *ex industria*, lest that class of vessels might be supposed to be included in the phrase, "on a voyage from a port in the United States to any foreign port." In *U. S. v. The Grace Lothrop*, *supra*, the supreme court, speaking with respect to a vessel in the coastwise trade, declare that the act of 1874 is "an explicit declaration that congress never intended that the original act should apply to vessels engaged in any part of the coasting trade, except that between the Atlantic and Pacific coasts." It is quite as clear that congress never intended the act to apply to the lake-going trade. The act had reference to ocean navigation alone. Within a year after the passage of the act, congress abolished the necessity of shipping articles with respect to vessels engaged in trade between the United States and the British North American possessions, the West India islands, and the republic of Mexico. 17 St. c. 35, p. 410. It cannot be presumed that the law-making power designed to remove the restrictions as to vessels trading with neighboring foreign ports, to exempt vessels in the coastwise trade (except between Atlantic and Pacific ports,) but not vessels in the lake-going trade. The act was manifestly directed to extended ocean voyages. It is also to be observed that in the original act the terms "coastwise trade" and "lake-going trade" are used in contradistinction. The act of 1874 clearly expresses the intention of congress to restrict the shipping commissioners' act to ocean navigation, excluding all coastwise trade except that between Atlantic and Pacific ports. In *Burdett v. Williams*, 27 Fed. Rep. 113, 117, it was ruled that, since the act of 1874, none of the provisions of the act of 1872 apply to vessels in the trade between the United States and the British North American possessions, or in any case where seamen are entitled to participate in the results of a voyage. Like construction excludes vessels engaged in commerce on the Great Lakes. The demurrer is sustained, and the defendant discharged.

UNITED STATES v. BROWN.

(District Court, E. D. South Carolina. October 11, 1889.)

1. CRIMINAL LAW—CONFESSIONS—EVIDENCE.

A sworn confession, made long anterior to trial, and not preliminary thereto, is admissible in evidence.

2. SAME—DEFENDANT AS WITNESS—IMPEACHMENT.

Where a defendant in a criminal case becomes a witness for himself, under act Cong. March 16, 1878, making him a "competent" witness, his credibility may be impeached.

3. PENSION AGENTS—ILLEGAL FEES—REV. ST. U. S. § 5485.

It is a violation of Rev. St. U. S. § 5485, which forbids any agent or attorney or other person instrumental in prosecuting any claim for pension directly or indirectly to contract for, demand, receive, or retain any greater compensation for his services than \$25, to contract to render such services for more than \$25; to demand more than that sum for such services after rendering them without a contract; to

retain more than that sum out of the check sent to the pensioner; to receive more than that sum for such services in pursuance of any agreement, direct or indirect, express or implied, or of any legal or moral obligation; but it is not a violation of the section to receive more than \$25 for such services, wholly as a gratuity, and without demand.

4. SAME.

Any scheme or contrivance by which, under the guise of a loan, a mortgage, or a gift, or other dealing, the claim agent retains more than the legal fee, is a violation of the section.

On Indictment for Violation of Rev. St. U. S. § 5485, by Charging an Unlawful Fee for Securing a Pension.

Abial Lathrop, U. S. Dist. Atty.

S. J. Lee, for defendant.

During the trial the government placed a special pension examiner on the stand. He produced a statement made by the defendant to him, reduced to writing, and sworn to. Defendant objected, on the ground that a confession under oath cannot be admitted. 1 Greenl. Ev. § 225.

SMONTON, J. The rule laid down by Mr. Greenleaf, and sustained by his authorities, applies to a confession made before an examining magistrate preliminary to a trial; not to a case like this, in which the sworn statement was made long anterior to any prosecution, or to the issuing of any warrant in an investigation made by a special agent of the interior department. This rule is confined to examinations before the committing magistrate. See 1 Greenl. Ev. § 224. The statement offered in evidence is an extrajudicial admission, and must be treated as such.

The government having closed its case, the defendant was put upon the stand and examined. The district attorney sought to put in evidence impeaching his credibility. Defendant's attorney objects.

SMONTON, J. When a defendant in a criminal case exercises the privilege given him by the act approved 16th March, 1878, and goes on the stand as a witness in his own behalf, he subjects himself to all the exceptions which can properly be made against witnesses. The act makes him a competent, not a credible, witness. His credibility can be attacked, as in the case of other witnesses. This is the rule in South Carolina. *State v. Robertson*, 26 S. C. 117, 1 S. E. Rep. 443. I am satisfied with the logic of that decision.

All the testimony being in, the defendant's attorney requested the court to charge the jury that the provisions of section 5485, Rev. St., apply only while the relation of attorney and client or principal and agent exists between the pensioner and the person charged with receiving the money from her. If the money was received by defendant after the pensioner had the check in hand, and when the money was in her possession as her property, it is not a violation of this section.

The district attorney requested the court to charge the jury that if the money was received by the defendant at any time from the pensioner,

and was given by the pensioner either because of a contract, or as a mere gratuity, or from motives of gratitude, for his instrumentality in obtaining the pension, the receipt of the money is a violation of the section.

SIMONTON, J., (*charging jury*.) I will not adopt either of the requests to charge submitted to me. The section in question forbids any agent or attorney or other person instrumental in prosecuting any claim for a pension directly or indirectly to contract for, demand, receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension than such as is provided in the title pertaining to pensions,—in this case, \$25. If you find that the defendant made a contract with the pensioner under which he agreed to render his services in obtaining or securing the pension for more than \$25, he has violated the section. If there were no contract, and the defendant, having rendered the service, demanded from the pensioner when she received her check, or at any time after it, more than \$25 for his services or instrumentality in obtaining the pension, he has violated the section. If when she received her check the defendant went with her, and drew or assisted in drawing the money, and withheld or retained more than \$25 of it for his services or instrumentality in obtaining the pension, he has violated the section. If the pensioner, having come into the possession of her money, gave this defendant more than \$25 in consequence of some promise made by her to him, or pursuant to any contract made between her and him, or induced by any understanding or agreement, direct or indirect, express or implied, or by any legal or moral obligation whatsoever between them, either admitted by her or set up by him, and he so received the money, he has violated the section. If she gave him the money of her own free will, without any demand on his part, it not being withheld or retained by him against her wish, wholly as a gratuity, out of gratitude to him for a friendly service, not induced by the fact that a promise or understanding existed by which he should be compensated for his services; or by his setting up and insisting upon such a promise or understanding; or, in the absence of it, by his claiming some merit or desert on his part for such service; in other words, if the money was paid to him without any demand, request, urgency, or action on his part by her, of her own motion,—he has not violated the section.

It has been assumed that the defendant received from the pensioner more than \$25. Both sides admit this. The district attorney has requested the court to charge you that any scheme or contrivance by which, under the guise of a loan, a mortgage, or a gift, or other dealing, the claim agent retains more than the legal fee, is a violation of this section. I charge you in those words, concurring fully with Judge HAMMOND in the case of *U. S. v. Moyers*, 15 Fed. Rep. 411, which has been quoted.

One more point must be noticed. The indictment alleges that the pensioner, Nellie Deas, is the lawful widow of David Deas, a soldier, etc. It appears that Nellie Deas and David Deas were both slaves in 1867. That in that year they went through the ceremony of marriage before a clergyman, and lived as husband and wife until the death of David Deas,

in 1869. The defendant insists that this proves that no marriage existed, as slaves could not marry. Were it necessary, I would charge you that this testimony would establish a marriage. It is not necessary. On 19th December, 1865, the legislature of South Carolina declared that all colored persons who at that date were living together as husband and wife were husband and wife. 13 St. at Large, S. C. 269. If the pensioner and David Deas in 1865 were living as husband and wife, she is his lawful widow.

The jury found the defendant guilty.

SHIPMAN v. BEEBER *et al.*

(Circuit Court, N. D. New York. December 3, 1889.)

INFRINGEMENT OF PATENTS—PRIOR STATE OF THE ART—BUTTONS

Letters patent No. 357,237, February 8, 1887, to M. G. Shipman, was for an invention consisting of a fastening device for garments, leather, etc. The button member consisted of a stud, having a head, neck, and outwardly spreading base, and of a central stem, which may be integral with the stud, or a separate part. The stem was adapted to pass through the stud, and through the fabric on which the base of the stud rested, and to be clinched on the opposite side of the fabric, with or without a washer, thus fastening the button member of the combination firmly to the fabric. None of the drawings show a detached stem, but it is in all cases integral with the stud. An earlier patent to one Platt consisted in a tubular stud, with a flange at right angles to the base, and of an inner tubular member, having a flange, and called an "eyelet." The parts were united by placing the outer tube on one side of the fabric, with its flange resting thereon, and inserting the inner tube through the fabric into the outer tube, and compressing the parts together. Defendants used a contrivance similar to the Platt patent, except that the stem differed from the eyelet of the Platt patent slightly in form, and in proportion of its diameter to that of the stud. Held that, in view of the prior state of the art, defendants did not infringe the Shipman patent.

In Equity.

Witter & Kenyon, for complainant.

John R. Bennett, for defendants.

WALLACE J. The complainant alleges that the defendants infringe claims 4, 5, and 6 of letters patent No. 357,237, dated February 8, 1887, granted to Madison G. Shipman. The invention which is the subject of the patent relates to separable buttons, a fastening device composed of two organized members, respectively attached to the two parts of the article to be fastened together. One member represents the button-hole of the glove or garment to be fastened, and the other the button proper. In such a device it is necessary that each of the two members will admit of being fastened securely to the fabric of the glove, shoe, or garment, and will so co-operate with the other that the article can be readily buttoned and unbuttoned, and will be effectually held when buttoned. In view of the prior state of the art, the essential novelty of the inventions in controversy consists in a new organization of two of the parts of the

button member, which may be conveniently described as the "stud" and the "stem." Each of the three claims is for a combination. The button-hole member, which is an element of all the claims in controversy, consists of a hollow cap, provided with a hollow tube to receive the stud of the button member, and a spring inclosed within the cap, and entering the tube, which expands when the head of the stud enters or is withdrawn from the tube, and contracts inwardly upon the neck of the stud to lock it in place. The button member, which is also an element of all the claims, consists (1) of a stud, (termed in the specification a "bulb,") having a head, a neck, and an outwardly spreading base; and (2) of a central stem, which may be integral with the stud, or may be made as a separate part. By the express terms of the claims, the central stem must be "adapted to pass through the material from one side, and be clinched upon the side opposite to that from which it passed through, substantially as described." The drawings show a stem integral with the stud, or, when not integral, located within the stud, which has an end projecting below the base of the stud, capable of passing through the fabric upon which the button member is to be fastened, and of being clinched or upset against the fabric. The specification states that the lower end of the stem is clinched over the edge of the orifice in a washer, but that the washer may be dispensed with, and then the lower end of the stem is clinched "directly upon the fabric." Both the specification and the drawings denote that the stem is to be clinched against the fabric (or the washer) after the stem has been inserted in the stud, and on the side of the fabric opposite the stud. Of course, when it is made integral with the stud, it cannot be clinched in any other place. This is the method by which the fabric is firmly held between the clinched end of the stem and the base of the stud, and the stem and the stud are united with each other. Both the stud and the stem, or either one of them, may be made hollow or solid. The fourth claim is for a combination of the elements thus described. The fifth and sixth claims are for a narrower combination; the fifth being limited to a combination of the parts in which the stud is hollow, and the sixth to one in which both the stud and stem are hollow.

It is obvious that, unless the defendants infringe the fourth claim, they do not infringe any of the claims in controversy. Their separable button contains the button-hole member of that claim, in essentials, though not specifically. Their button member is adapted to be used with a button-hole member which differs in details of construction from that described in the specification; but it can be used, though perhaps not as efficiently, with the button-hole member of the claim. It has a stud, which has a head, neck, and an outwardly spreading base. It has also a tubular or hollow stem. The stem is surrounded by a flange at one end. The stud and stem are not integral, but are separate. They are united together by passing the stem through the fabric, and thence into the stud, until the flange of the stem holds the fabric against the base of the stud, when the parts are clinched together by compression. The stem is not adapted to be clinched against the fabric (or

a washer) on the side opposite the base of the stud, or at the fabric on the side opposite that at which it is inserted. It is adapted to be clinched to the stud at some distance beyond that place; that is, at or near the head of the stud. The difference between its adaptability to be clinched against the fabric and the adaptability of the stem of the patent to be clinched at any other place exhibits the structural differences between the two stems. These differences, slight as they may seem, are material, because they constitute the only differences between the combination of the claim and the combinations which were old in the prior state of the art. The method of uniting the parts of the button member, and holding the fabric between them, in the device of the defendants, more nearly resembles what is shown in the patent to Platt—an earlier patent than the complainant's—than it does that of the patent in suit. In the patent to Platt the stud is tubular, and has a flange formed at right angles to the shank or base. It has also an inner tubular member, which has a flange at right angles to its shank, which is called an "eyelet." This eyelet differs from the stem of the defendants' slightly in form, and otherwise only in the proportion which its diameter bears to the diameter of the stud. The parts are united together by placing the outer tube on one side of the leather, or other fabric, with its flange resting on the fabric, and inserting the inner tube through the fabric into the outer tube, and compressing the two parts together, "thus effectually riveting the eyelet to the stud." It may be that the Platt button member is not as well adapted to be fastened to fabrics differing in thickness as one made like that of the patent; but, if this is true, it is true also of the device of the defendants. On the other hand, it is obvious that both the button member of the Platt patent and that of the defendants dispense with the use of a washer next to the fabric; and, although it is said in the complainant's patent that the washer is only preferably used, it would seem plain that the upsetting of the end of the stem alone would be a crude and undesirable attachment; and that the use of a washer, or a substitute for a washer, like the flanges of the tube of Platt or the stem of the defendants, would be almost indispensable to an artistically finished button fastening.

The contention for the complainant, that the button member of the defendants has the stem of the patent, because that stem can be removed from the stud, and united it again by first passing it through the material, and that it is immaterial whether the two parts are riveted together close to the fabric, cannot be sanctioned. Such a method of uniting the two parts is not suggested by the patent. The drawings nowhere show a stem detached from the stud. In each illustration the parts are assembled together. The theory that they are capable of being detached and reunited in the way suggested is merely conjectural. It is antagonized by the language of the claims, which describes the characteristics of the stem. What is meant by this language is clear, when it is borne in mind that each claim includes a stem which is integral with the stud. Such a stem could only be clinched on the side of the fabric opposite the stud, and could only be passed from the stud through the material.

The case is not one in which the claims in controversy are to be given a more liberal construction than their language fairly requires. The separable button of the patent has never been made commercially, and the only evidence that it can be made commercially is found in the assumption of the expert and counsel for the complainant that the defendants are making it. In view of the prior state of the art as shown in the record, the only novelty of the invention of the claims resides in a new organization of the stem and stud relatively to each other in details of form and proportion, except in instances where the two parts are made integral, unless it resides in assembling the two parts together before they are applied to the fabric. Without passing upon the question of the patentable novelty of the combinations, the bill is dismissed because the defendants do not infringe.

WINNE v. BEDELL.

(Circuit Court, S. D. New York. November 8, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—BASKET-COVER FASTENINGS.

The claim of letters patent No. 221,203, issued November 4, 1879, for an improvement in basket-cover fastenings, was for a combination of (1) a box or basket; (2) a cover on the basket; and (3) a metallic fastener, at one end of which there is a hook attached to the hoop of the basket, at the opposite end a bend at an acute angle, provided with a sharp point, which is driven into the basket cover, and in the middle a rectangular bend. The specifications said that the fastener device could be used in a certain manner without the middle bend; but the original claim, being for the fastener, was rejected, and the claim was amended. *Held*, that sale of the fastener without the middle bend, alone, did not infringe the patent, and, as it was capable of innocent use, it was immaterial that it was also capable of being bent so as to infringe.

In Equity. Bill for infringement of patent.
William H. King, for complainant.
Arthur v. Briesch, for defendant.

COXE, J. This is an action of infringement, based upon letters patent No. 221,203, dated November 4, 1879, for an improvement in basket-cover fastenings. The specification says:

"The invention consists in the combination, with a box and its cover, of a metallic bar, bent to form at one end a close hook, bent again rectangularly near the middle, bent again near the other end at an acute angle, and provided with a sharp point for entering the top of the cover. * * * This device may also be used for the purpose of securing the covers of paper handboxes and other similar articles. When used for that purpose, the hook, B, is inserted in the top of the cover, the body of the device extending down the side of the box, into which the point, C, is inserted, and is retained in place by the hold produced by its angle. * * * I do not broadly claim a metallic bar or rod bent into shape for holding a basket cover on a basket, being aware that such is not broadly new; but what I do claim is:
 "In combination with a box and its cover, E, a metallic bar, A, bent at b

to form at one end the close hook, B, bent again rectangularly near the middle at α , and having near the other end a bend, c , forming an acute angle, and having a sharp point, C, forced through the cover, to complete a firm fastening."

The claim is therefore for a combination consisting of the following elements: *First*, a box or basket; *second*, a cover on the basket; *third*, a metallic fastener, at one end of which there is a hook attached to the hoop of the basket, at the opposite end a bend at an acute angle, provided with a sharp point, which is driven into the basket cover, and in the middle a rectangular bend. The following diagram will serve to illustrate the combination of the claim:

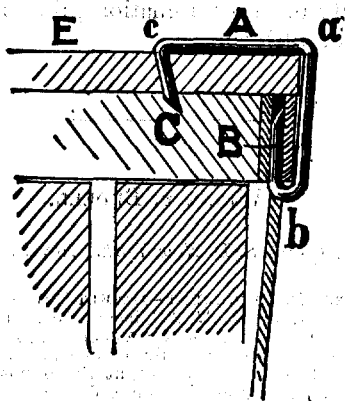
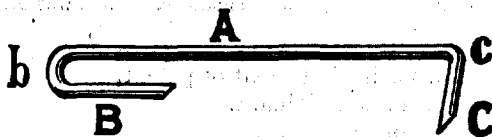


Fig. 1 of the drawings shows the fastening device without the rectangular bend.



Originally, the applicant sought to cover this device, but was rejected upon various references. It was not until he had abandoned the claim for the fastener, and had explicitly stated that "the claim is now no longer for the fastening bar *per se*, either before or after application," that the patent was issued in its present restricted form. The defendant sells "the fastening bar *per se*," as shown in Fig. 1. There is no evidence that he has at any time used the patented combination, or sold the fastener with the rectangular bend in the middle. In this connection, it should be remembered that the specification describes the use of the straight fastener for securing the covers of paper boxes.

The question, then, is this: Can the complainant, who has described a straight fastener, and a use to which it may be put, but has not claimed the straight fastener, either singly or in combination, maintain infringement against one who sells the fastener in this form only?

Manifestly not. The defendant has not adopted the combination of the claim. He sells but one element of it. It is urged that he should be held liable because his device "is capable of being bent" so as to infringe. But this argument would apply with equal force to an umbrella-slide holder, a bale-tie, or a hair-pin. The complainant cannot invoke the doctrine of *Wallace v. Holmes*, 9 Blatchf. 65, and analogous authorities, for the obvious reason that the defendant's fastener is susceptible of a perfectly legitimate use, which the complainant himself has taken pains to point out, *Snyder v. Bunnell*, 29 Fed. Rep. 47. To justify a decree for infringement, actual proof must be presented of the defendant's illegal acts. It will not do to substitute therefor suspicion and conjecture. As the complainant must fail upon this branch of the case, it is unnecessary to examine the other defenses presented. The bill is dismissed.

FALLS RIVET Co. *et al.* v. WOLFE *et al.*

(Circuit Court, W. D. Pennsylvania. November 13, 1889.)

1. PATENTS FOR INVENTIONS—FRICTION CLUTCHES—INFRINGEMENT.

Letters patent No. 308,872, for an improvement in friction clutches, granted to William D. Brock on December 9, 1884, construed, and *held* not to be infringed by friction clutches manufactured under and in accordance with letters patent No. 812,122, granted to Harry W. Hill on February 10, 1885.

2. SAME—CONSTRUCTION OF CLAIM.

Brock's first claim, as originally filed, was for "the combination, with a shaft, and a loose pulley adapted to run freely on said shaft, of a clutch rigidly secured to said shaft, having two inversely moving radial jaws, adapted to engage, one upon the periphery, and one against the interior, of the pulley flange, said jaws being connected, by suitable mechanism, with a laterally moving sleeve and shifting lever, whereby they may be simultaneously opened and closed as said lever is moved towards the right and left;" but, the examiner having ruled that the words "suitable mechanism" rendered the claim "vague and indefinite," Brock struck them out, and substituted therefor "lever J, link, I, and lever, F." *Held*, that the constituents thus introduced into the claim are material; that the claim should be construed strictly against the patentee, and in favor of the public; and that a mechanical connection between the clutch jaws and the shifting lever is an essential part of the combination.

3. SAME.

Brock and Hill were contemporary independent improvers of an old mechanism, the subject of many prior patents, and perfected by progressive steps, and each is entitled only to his own specific form of device.

In Equity.

Livingston Gifford, for complainants.

Watson & Thurston and *George H. Christy*, for respondents.

Before McKENNAN and ACHESON, JJ.

ACHESON, J. This suit is brought for the infringement of letters patent No. 308,872, for an improvement in friction clutches, granted to William D. Brock on December 9, 1884, upon an application filed April 18, 1884. The plaintiffs are the Falls Rivet Company, assignee, under certain reservations, of the patent, and Brock, the patentee. The de-

endants are selling agents of the Hill Clutch-Works, of which Harry W. Hill is the proprietor, and the alleged infringing clutches are manufactured at those works under letters patent No. 312,122, granted to said Hill on February 10, 1885, upon an application filed October 6, 1884. Both these patents relate to a well-known and extensively used class of devices, which are intended to produce frictional engagement, and thus to establish at pleasure a common state of motion between a pulley mounted on a rotatable shaft and another member of the mechanism also mounted thereon, one of the two being fast upon the shaft, and the other loose upon it. The proofs show that, for many years before Brock's application for a patent, friction clutches in a great diversity of forms were in common use, and that a very large number, probably more than 300, patents on such devices had been granted in the United States. Many of those patents are in evidence here. They disclose mechanisms greatly differing in details, consisting in levers, links, wedges, etc., to bring into operation the friction blocks or jaws through the longitudinal movements of a sliding sleeve on the shaft; and they also exhibit considerable variety in the form and mode of operation of the friction blocks or jaws, and in the arrangement of the frictional surfaces which are to be engaged. Some of the patents show flanges at right angles to the shaft, and clutch-jaws arranged to bear against the opposite sides of such a flange with a vise-like grip. In others the friction blocks or jaws are thrust radially outward against the inner surface of a cylindrical flange. Thus Brown's patent of 1864 shows such an inner radially moving jaw, seated by means of a dove-tailed tongue and groove on a fixed radial arm. Others of these patents show a jaw on the outside, and another on the inside, of the cylindrical pulley flange, and so actuated by suitable mechanism as to be brought, respectively, into engagement with the convex and concave sides of the flange, or to be released therefrom. The Margedant patent of 1875 shows a rocking plate, centrally pivoted to a bracket, and carrying two brake-jaws, arranged so as to bear, one on the inside, and the other on the outside, of the rim of a driving pulley. After describing the mechanism, the patent states:

"It will be understood by this that whenever the brake-jaw, F'', presses on the inside of the rim of the driving pulley, the brake-jaw, F', presses with the same force on the outside of the rim of the driving pulley."

The Havens patent of 1879 shows a rocking lever, to which, on opposite sides of its pivot, two friction jaws are connected, and so adapted as to bear, one on the outer, and the other on the inner, face of a cylindrical pulley flange; and the rocking lever is so mechanically connected with a sliding sleeve on the shaft that by the movements of the latter the two jaws are forced, respectively, inwardly and outwardly, to grip the interposed flange, or in opposite directions to release it. Here the jaws do not have a vise-like action, for, when gripping the flange, their bearing faces are not directly opposite to each other, unless it be at the edges of their inner ends. The Dawson patent, issued on May 27, 1884, upon an application filed December 21, 1883, shows two inversely moving jaws,

having, respectively, convex and concave bearing surfaces, engaging on directly opposite sides of the cylindrical flange with a vise-like grip. But here there is no rocker or other device connecting the two jaws, by means of which the force moving one jaw could be transmitted to the other jaw, and promote its movement in the opposite direction.

Such, in brief, was the state of the art when William D. Brock devised his friction clutch. His patent shows two inversely and radially moving jaws, lettered, respectively, L and K, connected with each other by a rocking lever, J, one of the jaws being adapted to bear upon the outer face of the cylindrical pulley flange, and the other to bear upon its inner face, and together exerting a vise-like action. The shanks of the jaws are supported on opposite sides of a fixed arm, G, projecting radially from a hub or sleeve, H, which is fast to the shaft. The sliding shanks of the jaws are pivotally connected with the rocking lever, and they are held against the opposite sides of the fixed arm, G, by bolts, M, M; but the patent states that dove-tailed tongue and grooved ways may be substituted. The movement of the jaws is effected by the vibration of the rocking lever, J, which is pivoted to the fixed arm, G, between the oppositely arranged sliding shanks of the jaws. The rocking lever is provided with circular enlargements, O and P, which operate in slots in the shanks of the jaws, and, by bearing against the ends of these slots, throw the jaws towards each other or apart as the rocking lever oscillates on its pivot. The rocking lever is provided with a lateral extension, the extremity of which is connected by a link, I, and by what is called the "adjustable lever, F," to a collar or sleeve, E, adapted to slide longitudinally on the shaft, and which is moved back and forth by an attached shifting lever, S, of ordinary construction. I is a freely swinging link, pivoted at one end to the rocking lever, J, and at the other end to the so-called "lever, F," which latter, when in action, is a rigid attachment to the sliding sleeve, moving with it as if it were an integral part. The "lever, F," is rigidly held and adjusted at any desired angle to the sleeve, E, by a "screw, b, and nuts, d, d." When it is desired to communicate motion from the revolving pulley to the shaft, the shifting lever, S, is moved to the right; and thereby motion is communicated from the sleeve, E, though the "lever, F," and link, I, to the rocking lever, J, whereby its long arm is thrown upward and its short arm downward, thereby moving the jaw, K, outward, while the jaw, L, is drawn inward, and the pulley flange is thus firmly grasped between them. To stop the motion of the shaft, the shifting lever, S, is moved towards the left; "whereby [says the specification] all the connecting mechanism between said lever, S, and said jaws is inversely moved, and said jaws are opened, as shown in Fig. 2, thus relieving the pulley from the grasp of said jaws."

The patent has three claims. The first claim is as follows:

"(1) The combination, with a shaft, and loose pulley adapted to run freely on said shaft, of a clutch rigidly secured to said shaft, having two inversely moving radial jaws, adapted to engage, one upon the periphery, and one against the interior, of the pulley flange, said jaws being connected by lever, J, link,

I, and lever, F, with a laterally moving sleeve and shifting lever, whereby they may be simultaneously opened and closed as said lever is moved towards the right and left, substantially as set forth."

The other claims need not be quoted at length. Each includes specifically every element which enters into the clutch mechanism, and the second claim is further limited by calling for the bolts, M, M, and the circular enlargements, O and P, while the third claim calls for the screw, b, and adjusting nuts, d, d.

In the Hill friction clutch, as described in his patent, and as manufactured by him and sold by the defendants, are to be found two inversely moving radial jaws, adapted to engage, one on the periphery, and the other against the interior, of a cylindrical pulley flange, the two jaws being coupled by a rocking lever, pivoted to a fixed radial arm, and their engagement with the flange being with a vise-like grip. Hill's rocking lever, however, does not have circular enlargements and corresponding slots in which to operate, but has two pivot pins, which respectively engage with the shanks of the jaws. Nor has his rocking lever any lateral extension in the line of the shaft, but a long arm, directed inwardly towards the shaft. Neither is it connected by any mechanism with the sliding sleeve. His operating mechanism is this: A link connects the sliding sleeve with the adjacent arm of a bell-crank lever, which is interposed between the link and the inwardly directed long arm of the rocking lever. In the forward end of the bell-crank lever there is a set-screw, adapted to bear against the pendent arm of the rocking lever, so as to push it inwardly to close the jaws. But the bell-crank lever is not coupled with, nor does it bear any pulling relation to, the rocking lever; and therefore when the sliding sleeve is retracted it merely takes the set-screw out of the way of the rocking lever, and the opening of the jaws is accomplished by other means. To this end, Hill's clutch is provided with a coiled spring, arranged so as to force the clutch jaws open as soon as the shifting lever moves back the sliding sleeve. Hill's specification states that the spring may be omitted, as the greater centrifugal force to which the outer jaw is subjected, and which tends to throw it away from the flange, is transmitted by means of the rocking lever to the inner jaw, so as to move it inwardly, and that the release of both jaws from engagement with the flange may thus be effected without other agency. But in practice the employment of the spring has been found to be indispensable, and the jaws are open by its action, the centrifugal force co-operating to effect their release from the flange. In this connection it is worthy of remark that Brock's specification makes no reference whatever to centrifugal force, although it is now claimed by the plaintiffs that the centrifugal counterbalancing of the clutch jaws is a most valuable and distinguishing characteristic of his invention.

In disposing of the case, the first question to be considered is what, if any, patentable novelty exists in Brock's construction. That all the elements he employs were old is not to be doubted. The plaintiffs assert that the gist of his invention is expressed substantially in the first six lines of his first claim, viz.:

"The combination, with a shaft, and a loose pulley adapted to run freely on said shaft, of a clutch rigidly secured to said shaft, having two inversely moving radial jaws, adapted to engage, one upon the periphery, and one against the interior, of the pulley flange."

The alleged new results are—*First*, a vise-like grip of the cylindrical pulley flange; and, *secondly*, a centrifugal counterbalancing of the jaws, promoting their easy release from the flange when the shifting lever is employed for that purpose. But it was old, as Brown's patent shows, to seat an inner friction jaw against a fixed radial arm; and certainly Brock was not the first to employ an outer jaw in conjunction with an inner one for frictional engagement with the cylindrical pulley flange. Nor was the vise-like grip in itself novel. That feature is to be seen in Dawson's patent. Neither was it new to couple an inner and an outer friction jaw by a rocking lever, so as to bring the two jaws simultaneously into engagement, one with the inside face, and the other with the outside face, of a cylindrical pulley flange. This arrangement of the jaws and mode of action are to be found in the Havens friction clutch. True, there the jaws do not press exactly against opposite sides of the same part of the flange, but otherwise there is a substantial agreement between the Havens clutch and the Brock clutch, as regards the matter under consideration. They both act upon the same principle, and in each the friction jaws so move as to bear against the opposite faces of an interposed cylindrical flange. Furthermore, it is obvious from the very nature of the construction that in the Havens clutch the excessive centrifugal force of the outer jaw operates through the rocker upon the inner jaw in the same way as it does in the Brock clutch, thereby contributing to the release of the jaws from their engagement with the flange. The plaintiffs' expert admits that to some extent this is the case. It seems to us, then, that the only new thing which Brock here did was to seat the stems or shanks of the two jaws—the outer one as well as the inner one—against a radial arm, so that both jaws should move radially in the same line, and thus engage the cylindrical flange with a vise-like grasp. Certainly this was no great advance upon what others had already achieved. And just here it is well to note the facts connected with the origin of the rival friction clutches involved in this suit. Brock completed his clutch in the spring of 1884, and Hill completed his clutch in the month of August of the same year. The former resided in Wisconsin; the latter in Alabama. They were contemporary independent improvers, each ignorant of what the other was doing. Yet each arranged the two friction jaws so that their shanks should slide on opposite sides of the same radial arm, and the jaws press against the opposite faces of the cylindrical flange with a vise-like action. The coincidence deepens the impression produced by a contemplation of the prior state of the art, that this arrangement of the parts required nothing but the exercise of ordinary mechanical skill.

But if it be conceded that the subject-matter of Brock's improvement is what the plaintiffs allege, and that it really involved invention, still, in our judgment, he has imposed such limitations upon his claims that

the charge of infringement here made is not sustainable. Immediately following the above quotation from the first claim are the words:

"Said jaws being connected by lever, J, link, I, and lever, F, with a laterally moving sleeve and shifting lever, whereby they may be simultaneously opened and closed as said lever is moved towards the right and left."

Now, by every sound rule of construction, some positive effect must be given to this language. The constituents here named are as much part of the combination as the inversely moving radial jaws themselves; and when we look into the body of the specification we find that they are essential to the described operation. The only method therein set forth for opening the jaws is by means of the shifting lever, S, and the described mechanism connecting it with the rocking lever; and no other agency to accomplish that result, or to aid in accomplishing it, is hinted at. We think, then, that it is an unavoidable conclusion that a mechanical connection between the clutch-jaws and the shifting lever is a material part of the combination. *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343; *McCormick v. Graham*, 129 U. S. 1, 9 Sup. Ct. Rep. 213. But Hill's clutch does not have such a connection, and, as we have already seen, the opening of the jaws in his machine is not effected by the shifting lever, but by distinctly different means. And here it is not to be overlooked that in the first claim, as originally filed, the language employed was, "said jaws being connected by suitable mechanism with a laterally moving sleeve," etc., and that, the examiner having ruled that the words "suitable mechanism" rendered the claim "vague and indefinite," Brock struck them out, substituting "lever, J, link, I, and lever, F." Now, this action requires that the claim shall be construed strictly against the patentee, and in favor of the public. *Fay v. Cordesman*, 109 U. S. 408, 420, 3 Sup. Ct. Rep. 236; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. Rep. 1021.

Finally, it is very clear that Brock's invention is not one of a primary character. He was a mere improver of an old device. This field of invention had been thoroughly worked over before Brock entered it. At the most he took but a single step forward. Treating him, then, as an inventor, the case, we think, fairly comes within the principle stated in *Railway Co. v. Sayles*, 97 U. S. 554, 556, 557; "but if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs."

Let a decree be drawn dismissing the bill of complaint, with costs.

CLEMENT MANUF'G CO. v. UPSON & HART CO. *et al.*

(Circuit Court, D. Connecticut. November 20, 1889.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—PARTIES.

Where a patentee grants to a complainant "the exclusive right, liberty, and privilege to make, use, and sell" a patented invention, "during the full unexpired term thereof, and of all reissues, renewals, and improvements," throughout the United States and the territories, the complainant to pay the royalties agreed upon in a separate agreement, and it does not appear whether such grant is an absolute or defeasible conveyance, the complainant must join the owner of the legal title in a suit to enjoin the infringement of the patent.

2. SAME—INTEREST OF COMPLAINANT—PLEADING.

In such suit, complainant's allegations that, by mesne assignments and grants, it became, prior to the suit, and now is, the party interested in said letters patent, "all of which, by said assignment and grants, now in court produced and shown, will more fully appear," sufficiently show complainant's interest, when coupled with the profert and exhibit.

In Equity. On bill for injunction.

Maynard & Beach, for complainant.

John P. Bartlett, for defendants.

SHIPMAN, J. This is a demurrer to the complainant's bill in equity for an injunction against the infringement of two patents. The bill alleges that the complainant, "by mesne assignments and grants," is the party interested in letters patent No. 241,471, dated May 17, 1881, to James Beecher, and makes profert of said assignments and grants. By the written instrument of conveyance, dated April 16, 1886, from the owner of the patent to the complainant, the former grants unto the latter "the exclusive right, liberty, and privilege to make, use, and sell the invention described in and protected by the letters patent of the United States above mentioned, during the full unexpired term thereof, and of all reissues, renewals, and improvements thereof, throughout the United States and the territories thereof; said Clement Manufacturing Company yielding and paying unto said E. Stein the royalties, and upon the terms and conditions, in a certain article of agreement made between the parties, dated the 16th day of April, 1886, specified and set forth." The defendant demurs upon the ground that the instrument is an exclusive license, and is neither an assignment of the patent, nor a grant of the owner's exclusive right thereof, and that therefore the owner should be a party plaintiff.

The fourteenth section of the statute of 1836 authorized the recovery of damages for infringement of patents by action on the case, to be brought in the name of the persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States. The terms which were used in this statute were defined as follows:

"An assignee is one who has had transferred to him, in writing, the whole interest of the original patent, or any undivided part of such whole interest, in every portion of the United States; and no one, unless he has had such an interest transferred to him, is an assignee. A grantee is one who has had

transferred to him, in writing, the exclusive right, under the patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout some specified part or portion of the United States. Such right must be an exclusive sectional right, excluding the patentee therefrom. A licensee is one who has had transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest." *Potter v. Holland*, 4 Blatchf. 211.

The fifty-ninth section of the statute of 1870, which corresponded with the fourteenth section of the act of 1836, authorized an action at law to be brought "in the name of the party interested, either as patentee, assignee, or grantee," and did not add "of the exclusive right within a specified portion of the United States;" while the thirty-sixth section authorized the patentee or his assigns "to grant and convey an exclusive right under his patent to the whole, or any specified part, of the United States." The language is substantially reproduced in sections 4898 and 4919 of the Revised Statutes.

The question in dispute is whether the complainant is a grantee, or simply an exclusive licensee; for it is not an assignee, strictly speaking, as that term has been defined. It has not the entire patent, or the undivided part thereof. If it is a grantee, it is substantially conceded that, in equity and at law, it is entitled to sue alone. The complainant insists that it has an exclusive right to the beneficial interest in the entire patent; the right to make, use, and sell the invention throughout all the territory of the United States, for the entire possible life of the patent; and that therefore the conveyance is more than a license. It is a grant of the owner's exclusive rights throughout the entire territory which the patent covers. There is very much force in the argument. The general language of the text-books and of the decisions is that neither the exclusive licensee nor the patentee can maintain a bill in equity against a third person for infringement without joining the other; but the great majority of the reported cases throw but little light on the question in the case. What is called "an exclusive license" is frequently an exclusive license to make a part of the invention which is covered by the patent; or is, in the language of Judge WALLACE in *Telegraph Co. v. Brooklyn*, 22 O. G. 1978, 14 Fed. Rep. 255, "a segregated right for a particular employment of the invention." This was the fact in *Hammond v. Hunt*, 4 Ban. & A. 111, a case which is quite relied upon by the plaintiff. The conveyance or contract which was the foundation of the defense in that case was an exclusive license, under the patent which had been granted, to make, use, and sell the specified mechanism which was described in the application for a new patent, which application was subsequently denied. Judge LOWELL points out the distinction between such a license and one which is equivalent to an assignment or grant where nothing is reserved to the patentee. It is plain that the language of the text-writers and of courts in regard to the necessity that an exclusive licensee must unite the owner as a co-complainant in a bill in equity is perfectly true when the exclusive license is for a particular employment of the invention. It does not so forcibly apply to such a

license as the one now under consideration. The conveyance in this case is of the exclusive right to make, use, and sell the patented invention; the complainant yielding and paying therefor the royalties, and upon the terms and conditions, specified in a separate agreement. The owner of the patent has the legal title,—a continuing right to receive royalties for the use of the patent; and whether its use is contingent upon the performance of the conditions, which are contained in the separate agreement, is not known. It is apparent that the owner is continually pecuniarily interested in infringements, if these infringements diminish sales, and therefore diminish royalties; and it does not appear whether the exclusive license is an absolute conveyance, or one which may be defeated, and whether the licensee may cease to enjoy the right. It is by no means clear that the owner has not retained a very considerable interest in the patent, and therefore I cannot say that the license amounts to either an assignment or a grant.

In *Nellis v. Manufacturing Co.*, 22 O. G. 1131, 13 Fed. Rep. 451, Judge McKENNAN held that the complainant, to whom and to whose legal representatives had been given the exclusive right to manufacture and sell the patented invention in the United States to the full end of the patented term, could alone maintain a bill in equity for an infringement. It appears, however, that by a subsequent agreement the assignees were relieved from liability to forfeiture, and were released from other liabilities assumed by them by an agreement of even date with the original conveyance, and that the effect of that agreement upon the right conveyed by the assignment was nullified. The court was of opinion that the entire interest of the assignee in the patent was intended to be vested in the assignee.

In illustration of the distinction between an absolute and a conditional conveyance is the case of *Manufacturing Co. v. Manufacturing Co.*, 27 Fed. Rep. 550, decided by Judge BLODGETT, in which he held that "where owners of patents had granted the entire interest in them for certain territory, but upon certain conditions which grantees were to perform, and, upon failure to perform, the title was to revert to grantors;" "that grantors' title was never fully divested, or at least, they had a possible reversionary interest, so that it was proper to join them as complainants in a suit for infringement of the patents within the territory covered by the grant."

But the precise question in this case came indirectly before the circuit court for this circuit in *Huber v. Sanitary Depot*, 34 Fed. Rep. 752, in which it was held that the sole owner of one patent, and exclusive licensee of another, may join his licensor as plaintiff in one bill for an injunction against the use of an apparatus infringing both patents, and that such a bill was not demurrable for misjoinder of parties. The facts in that case appear to have been the same as in this case. The complainant was the owner of one patent, and, "except for the payment of royalties, entitled to the whole beneficial interest in the other." Judge LACOMBE says: "As exclusive licensee, however, he is required to join the owner of the legal title." It is true that this question was not prob-

ably a subject of contention between the counsel. The contention was whether one or two bills must be brought, and the fact that the licensor and the exclusive licensee must be joined was not a subject of dispute. But this bill cannot be sustained without disregarding the opinion of the court for this circuit upon the question of law which is raised by the demurrer.

The defendant also demurs because the allegations of the bill in regard to title in either patent are not sufficient. The allegations are that, by mesne assignments and grants, it became, prior to the bringing of this suit, and now is, the party interested in said letters patent; "all of which, by said assignment and grants, now in court produced and shown, will more fully appear." The objection is that the bill does not show how the complainant is interested, whether as assignee, grantee, or whether it is solely interested, or the extent of the interest. The allegations, coupled with the proffer and exhibit of the "assignments and grants," which show the nature and character of the interest, are sufficiently definite. The demurrer, so far forth as it relates to the parties who must unite in a suit upon the Beecher patent, is sustained. Leave is given to amend.

CONSOLIDATED ROLLER-MILL Co. v. RICHMOND CITY MILL-WORKS.

(Circuit Court, D. Indiana. November 9, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

A provisional injunction will not be granted, against the infringement of a patent whose validity is dependent upon the result of an appeal in a former suit for its infringement, where it appears that defendant has been carrying on its business in good faith, and in ignorance of the alleged infringement, and that a stoppage would be an irreparable injury, while plaintiff has an adequate remedy in damages.

In Equity. On motion for provisional injunction.

Rodney Mason, for complainants.

Parkinson & Parkinson, for defendant.

GRESHAM, J. The above complainants brought suit on four patents, in the eastern district of Michigan, against William A. Coombs, as the user of a roller-mill, made by the defendant in this suit, for the manufacture of flour. The answer attacked the validity of all the patents, and denied infringement. The complainants abandoned one of the patents at the hearing. The court held two of them invalid, and sustained the second, third, fourth, and fifth claims of the other, the Gray patent, which consisted "in a peculiar construction and arrangement of devices for adjusting the rolls vertically, as well as horizontally, whereby any unevenness in the wear of the rolls, or in their journals or bearings, may be compensated for, and the grinding or crushing surfaces kept exactly in line," and also "in the special devices for separating the rolls when not in action, and in other details." The usual decree was entered

against the defendant, and the case was sent to a master. The answer in the suit here sets up substantially the same defenses that were relied on in the Michigan case, which was defended by an association of five mill furnishers, of which the defendant, the Richmond City Mill-Works, was one. The motion for a provisional injunction is based in part upon the decree in the Michigan case on the theory that there was privity between the defendant there and the defendant here. Prior to the commencement of the Michigan suit, Allis, the then owner of the Gray patent, sued Freeman for its infringement in the western district of Wisconsin,¹ and after a hearing the court (Judge BURN) held the patent invalid, and dismissed the bill for want of equity. The complainant appealed, and then assigned the patent to the parties, or some of them, who became complainants in the Michigan suit, and they dismissed the appeal. Why this was done we do not know. In Gray's first application for a patent he claimed broadly the means for adjusting the roller bearings, irrespective of the particular location of the supporting pivots, which were adjustable, and irrespective of other details of construction. The application was rejected by the patent-office. Gray submitted to the decision, and filed another application, with claims limited to special devices for his adjustments, and the application, with the claims thus limited, was allowed. Judge BROWN, who heard the Michigan case, did not hold Gray to the limitations imposed upon him by the patent-office, but construed his claims broadly, and somewhat as if the patent were a pioneer. Indeed, he interpreted the claims as if no limitations had been introduced into them by amendment to meet the requirements of the patent-office. Certain foreign patents, properly or improperly, caused the patent-office to reject Gray's original application. He submitted to the decision as stated above, and amended his claims by limiting them to the "special devices" by which he made his adjustments, and if he is held to these limitations, and his claims are not expanded by construction, this suit must fail, and the appeal from the Michigan decree will be reversed. It is not necessary, however, for the court, at this time, to express an opinion as to the correctness of the rulings of the learned judge who entered the decree in the Michigan case, or of the effect of that decree upon the defendant in this suit. The defendant is a manufacturer, and the complainants are not, and if the supreme court should hold the Gray patent invalid, and reverse the decree in the Michigan suit, this defendant might, and probably would, suffer irreparable injury, while, if the decree of the Michigan court is affirmed, the complainants can recover full damages and profits for the use of their patented improvements. The defendant owns and operates an extensive establishment, and has a large capital invested in the manufacture of roller-mills. It cannot be said upon the proofs before the court that the defendant has not been carrying on its business in good faith, and in the belief that it was not trespassing upon the rights of others, and a sudden stoppage of its business might be ruinous to it. The chances are more than

¹No opinion filed.

even that if the court should now issue a provisional injunction as prayed for it would result in serious injury to the defendant without benefit to the complainants. The motion for a provisional injunction will be denied; when the defendant files an undertaking, with security, to be approved by the clerk of the court, for the payment of any decree that may be rendered in favor of the complainants on final hearing.

CELLULOID MANUF'G Co. v. CELLONITE MANUF'G Co.

(Circuit Court, S. D. New York. November 6, 1889.)

1. PATENTS FOR INVENTIONS—PROFITS FROM USE—FINDINGS OF MASTER.

In an action to recover profits arising from the use of a patent solvent, the master in chancery found that defendants used the solvent for treating pyroxyline, and during the same period treated it with other solvents, but, owing to a defect in the pyroxyline, its treatment with the various solvents resulted in a product which could not be sold at a profit; but that, if defendants had not used the solvent in question, they would have used others; and that, by reason of the patent solvent being cheaper, defendants saved a sum which complainant was entitled to recover as a profit. *Held*, that the conclusion of the master was correct.

2. EQUITY—REPORT OF MASTER—FINDINGS OF FACT—WAIVER.

The reason for the rule requiring objections to the findings of a master in chancery to be first made to him on the draft of his report does not fully obtain where the objection is to the principal finding of fact, as he probably would not have changed his conclusion; but it is no hardship to require of the dissatisfied party that he so state his objections, or be deemed to have waived them.

3. SAME—CONCLUSIONS OF LAW.

Where the master is correct in his findings of fact, but errs as to conclusions of law, the rule requiring exceptions to his report is not applicable.

In Equity. On exceptions to master's report.

J. E. Hindon Hyde, for complainant.

John R. Bennett, for defendant.

WALLACE, J. The exceptions filed by the defendant to the report of the master, to whom it was referred to take an account of damages and profits, impugn every important finding of the master upon matters of fact, and also his conclusion of law upon the facts. The testimony taken before the master has been examined sufficiently to ascertain that it justifies his findings of fact. In the view most favorable to the defendant, the master has only found against the defendant upon facts as to which there is a fair conflict of testimony. His findings, therefore, should not be disturbed. *Mason v. Crosby*, 3 Woodb. & M. 258. Although the testimony bearing upon the exceptions has been thus examined, it is not to be understood that the court is of the opinion that the defendant is entitled to have these exceptions considered. In his draft report the master made the same findings, and no objections to them were interposed by the defendant. According to the correct practice, no exceptions to a report can be considered which were not taken before the master in the form of objections to his draft of the report. The reason for

this rule of practice is that the master might have allowed the objections, and corrected his report, if errors had been pointed out to him; thus saving the parties unnecessary expense, and the court unnecessary trouble. 2 Daniell, Ch. Pr. (2d Amer. Ed.) 1483; *Church v. Jaques*, 3 Johns. Ch. 81; *Byington v. Wood*, 1 Paige, 145; *Copeland v. Crane*, 9 Pick, 73; *Story v. Livingston*, 13 Pet. 359; *Gaines v. New Orleans*, 1 Woods, 104; *Gordon v. Lewis*, 2 Sum. 143; *Nail Factory v. Corning*, 6 Blatchf. 328. So far as the cases of *Hatch v. Railroad Co.*, 9 Fed Rep. 856, and *Jennings v. Dolan*, 29 Fed. Rep. 861, relax this rule of practice, they are inconsistent with the practice in this circuit, as recognized in the case of *Nail Factory v. Corning*. When the correctness of the principal finding of the master—a finding upon the ultimate question of fact referred to him—is controverted, it is hardly to be supposed that an objection to the draft report would have induced him to change his conclusion, and consequently the reason for the rule does not fully obtain; but it is no hardship to the dissatisfied party to require him to state his objections, and, unless the precedents are to be disregarded, he must be deemed to waive any objection which he does not state. If, owing to accident, surprise, or any other sufficient excuse, the objections have not been properly taken before the master, the court may, upon an application showing the facts, recommit the report to the master, and allow the dissatisfied party to make and argue the objections before him, or may permit the exceptions to be filed as though the objections had been properly taken.

The practice thus referred to does not preclude the defendant from being heard upon a question of the correctness of the legal conclusion reached by the master. Where the master, by his report, states the facts correctly, but errs as to the legal conclusion, the party against whom he errs is not required to except to the report, but may bring the question to the attention of the court upon further directions; or, if the report is made pursuant to an interlocutory decree, when the cause comes on to be disposed of by a final decree. 2 Daniell, Ch. Pr. 149. The cause remains under the control of the court until disposed of by a final decree, and until then it can revise the interlocutory decree, or any proceeding in the cause; and it is its duty to correct any error of the master affecting the merits, as well as any error of its own, properly brought to its knowledge. *Wooster v. Handy*, 22 Blatchf. 308, 21 Fed. Rep. 51; *Perkins v. Fourniquet*, 6 How. 206; *Fourniquet v. Perkins*, 16 How. 82. There is nothing inconsistent with these well-settled rules of chancery practice in equity rule 83.

The defendant insists that the master has erred in his conclusion of law that the defendant made gains, profits, and advantage by its use of the patented solvent in the treatment of pyroxyline. The master finds that for a period of several months in the year 1887 the defendant used the patented solvent in the treatment of pyroxyline; that during the same period, and simultaneously, defendant used other solvents for treating pyroxyline; that, owing to a defect in the pyroxyline, its treatment with the various solvents was unsuccessful, and the resulting product was imperfect, and could not be sold at a profit; that the product of the

pyroxyline treated with the patented solvent was of the same quality as that treated with the other solvents; that, if the defendant had not used the patented solvent, he would have used the other solvents in lieu of it for the treatment of the pyroxyline; that, by reason of the less cost of the patented solvent than the other solvents, the defendant saved the sum which he finds the complainant is entitled to recover as profits. From these findings it is apparent that, to the extent the defendant used the patented solvent, the use of the other solvents was superseded in its experiments and operations in treating pyroxyline. The case is therefore one where, by the use of the patented invention, the defendant has been saved a greater loss than it otherwise would have sustained. To this extent it has derived an advantage by the use of the patent. *Railroad Co. v. Turrill*, 94 U. S. 695. It follows that the conclusion of the master is correct. If the master erred by an improper rejection of testimony offered by the defendant at the hearing before him, his error was one to be at once corrected by a motion to the court for an order to compel him to receive the evidence, and is not the subject of an exception to his report. *Schwarz v. Sears*, Walk. (Mich.) 19; *Ward v. Jewett*, Id. 45; *Nail Factory v. Corning*, 6 Blatchf. 333.

SCHWEBEL v. BOTHE.

(District Court, E. D. Missouri, E. D. November 8, 1889.)

PATENTS FOR INVENTIONS—MARKING UNPATENTED ARTICLES.

The fact that a person has marked the words "Patent applied for" on an unpatented article does not render him liable under Rev. St. U. S. § 4901, which provides that any person who marks upon an unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, etc.

At Law. On demurrer to petition.

This was a *qui tam* action, brought under the third paragraph of section 4901 of the Revised Statutes of the United States, and the charge complained of was that the defendant marked certain wagon stake pockets with the words "patent applied for." The petition contained 201 counts, a penalty of \$100 being demanded on each count. The clause in question of section 4901 of the Revised Statutes prohibits persons from affixing to any unpatented article "the word 'patent,' or any other word importing that the same is patented, for the purpose of deceiving the public." The defendant demurred to the petition.

W. B. Homer, for plaintiff.

George H. Knight, for defendant.

THAYER, J., (orally.) The statute, being of a *quasi* criminal character, must be strictly construed, so as not to impose a penalty, unless the act complained of is within the language of the statute, and also clearly

within the prohibition intended to be imposed by the law-maker. It is evident, I think, that the use of the word "patent" on any article is not an offense unless it is so used as to import that the article is protected by letters patent. Standing alone, the word "patent" would no doubt imply that an article to which it was affixed was patented; but used in connection with other words it might not have that signification. The inhibition against the use of the word "patent" is, in my judgment, aimed at the use of the word in such manner as to import that an article is then and there protected by letters patent. If not so used as to convey to the public that idea, no offense is committed. Suppose a manufacturer should brand or stencil on an article the words following: "A patent was heretofore obtained on this machine, but it has expired." Would it be pretended that the use of the word "patent" in that connection was an offense for which a penalty might be imposed? I think not. Now the words employed in the case at bar, "Patent applied for," did not signify that the article was then and there protected by letters patent. It conveyed no such representation to the public. In point of fact, patents are applied for on many articles that are never granted. Perhaps as many applications for patents are denied as are granted. I am persuaded that the case does not fall within the statute, and the demurrer is accordingly sustained.

WORTHINGTON v. BATTY.

(Circuit Court, S. D. New York. November 23, 1889.)

COPYRIGHT—INFRINGEMENT—PRELIMINARY INJUNCTION.

Plaintiff contracted with an authoress to copyright and publish her work, to use his best efforts to secure a speedy sale, and to pay her 12 cents per copy sold. She agreed to furnish the manuscript, and agreed not to cause to be published anything which might injure the sale of the book. Plaintiff sought to restrain the publication of the same work, emanating from her since, in a newspaper. She was not made a party to the suit, and it appeared that the sale of the book had quite or nearly ceased, and that plaintiff had not continued his efforts to sell. *Held*, that the preliminary injunction would be refused.

In Equity.

Simpson, Thatcher & Barnum, for plaintiff.

Townsend, Dyett & Einstein, for defendant.

WHEELER, J. This is a motion for a preliminary injunction to restrain infringement of the plaintiff's copyright of a book written by Mrs. Fanny Stenhouse. The book was copyrighted under an agreement between them that she should furnish the manuscript of the work, which he should copyright and publish, and use his "very best exertions and facilities to secure the speedy sale of," and pay her 12 cents on each copy sold; and that she would not cause to be published, in her name or otherwise, anything which might injure or interfere with the sale of the book. The publication sought to be restrained is of the same work, em-

anating from her since, in a newspaper. She has an interest in the copy-right, but is not made a party to the suit, either by being joined as a plaintiff in protecting it, or as a defendant for inequitably violating her agreement not to injure or interfere with the sale of the book. The proofs brought forward on the hearing of the motion tend to show that the plaintiff has not continued the efforts required by the agreement for the sale of the book, and that sales have quite or nearly ceased. Damages from any further apprehended publication by the defendant would be comparatively slight. Whether the plaintiff is so carrying out the agreement on his part as to entitle him to equitable relief without joining the author, or against publication coming from her, is so doubtful in the present aspects of the case as to make preliminary restraint of what will be of such slight injury appear to be unwarrantable, in the exercise of the discretion involved in granting or refusing such motions. Motion denied.

THE KATIE.

LAWTON v. COMER *et al.*

(District Court, S. D. Georgia, E. D. November 12, 1889.)

1. SHIPPING—LIMITED LIABILITY ACT—CONSTITUTIONAL LAW—INTERNAL COMMERCE.

The act of June 19, 1886, extending the benefits of limited liability legislation to vessels engaged in inland navigation, having been assailed for alleged unconstitutionality, *held*, that the act is valid, in view of the power of congress to regulate commerce, because the law amended, excepted from its operation inland navigation only, and not internal commerce, as insisted.

2. SAME.

The amendment extended the operation of the law, not to internal commerce, but to inland navigation. So much for the direct purpose of the act.

3. SAME.

If internal commerce is affected, it is incidentally merely. The purpose of the legislature being legitimate, and warranted by the constitution, it is wholly immaterial to the consideration of the validity of its action that somewhere it has a casual or contingent effect upon the domain of state legislation.

4. SAME.

Even though the subjects of this extended limitation of liability, or the territory in which it is effective, are partially within the region of state control, yet, where the subjects are separable, and are partly under the national control, the act will be sustained by the courts wherever the power of congress extends, and as to all those objects to which it attaches; and this rule is easily applicable in this case.

5. SAME—APPLICATION TO SAVANNAH RIVER.

As to the Savannah river, it is a public navigable stream. The voyages of the Katie and her cargo are interstate in character, and the jurisdiction of congress is undoubted.

6. SAME—CONGRESSIONAL POWERS—ADMIRALTY.

The act is warranted also by the admiralty clause of the constitution, and the power of congress to modify by statute the application of admiralty doctrines.

7. SAME.

The entire purpose of the limited liability enactments was to encourage investments in shipping, and they may be extended wherever the admiralty courts of the United States have jurisdiction.

(Syllabus by the Court.)

In Admiralty.

Chisolm & Erwin, for libellant.

Denmark, Adams & Adams, for respondents.

SPEER, J. This is a libel brought under the provisions of section 4 of the act of congress of June 19, 1886, (24 St. at Large, 80.) Its purpose is to limit the liability of the owner of the steamer *Katie* for losses to her cargo occasioned by fire. The libellant (the owner) alleges that he is not liable at all for the damage which occurred to the cargo, but, if liable, to limit the liability, he prays to be accorded the benefit of the act referred to. The allegations of the libel are that the *Katie* was on her trip when the fire occurred. At that time, and for 20 years prior thereto, she had been engaged in transporting freight and passengers from and to the ports of Savannah and Augusta, and intermediate landings on the Savannah river in the states of South Carolina and Georgia. She belonged to a line of carriers issuing through bills of lading to and from localities in Georgia, and to and from ports and places in the other states of the Union, and to and from foreign ports. The libel contains the usual averments that the damage was done without the privity or knowledge of the owner. It is admitted in the pleadings that a large portion of the cargo was laden at different points on the Georgia side of the river, and was consigned to merchants in Savannah, and that other portions, consigned in like manner, were received from the South Carolina landings.

The various owners of the cargo, as respondents, have interposed a demurrer and motion to dismiss the libel, upon the ground that the fourth section of the act of congress of June 19, 1886, is, as they insist, unconstitutional and void; and since the owners of vessels used in rivers or inland navigation were expressly excluded from the right to limit their liability under previous acts of congress (sections 4283-4289, Rev. St.) it follows, they contend, that no relief can be granted under the allegations and prayers of the libel. The gist of the contention of proctors for respondents may be stated as follows: (1) They insist that section 4 of act of June 19, 1886, extending the right to limit liability to the owners of "all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges, and lighters," was intended to affect, and *ex vi termini* does affect, vessels used in the purely internal commerce of a state; that this purpose of the act is expressed in unequivocal words. (2) Even though it be conceded, they urge, that congress might have provided a measure of relief for owners of a vessel whose interstate traffic relations were corresponding to those of the *Katie*, without encroaching upon the domain of internal commerce, the court, they insist, may not restrict the application of this act so as to give it partial effect simply because the facts here are appropriate to national control, the statute itself in plain and unambiguous terms, exceeding they contend the limitations of the commerce clause of the constitution. This clause, they maintain, so far from authorizing, actually prohibits legislation by congress, which will affect the internal commerce between citizens of the same state, and since the terms of the act in question comprehend alike constitutional and unconstitutional topics, the entire section of the amended statute must, they argue, be held

inoperate and void; citing *U. S. v. Reese*, 92 U. S. 220; *Trade-Mark Cases*, 100 U. S. 82; *Virginia Coupon Cases*, 114 U. S. 304, 5 Sup. Ct. Rep. 903; *Leloup v. Port of Mobile*, 127 U. S. 647, 8 Sup. Ct. Rep. 1380; *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988; *Allen v. Louisiana*, 103 U. S. 80; *State Tonnage Tax Cases*, 12 Wall. 219. (3) While respondents concede the power of congress to provide, by inspection, license regulations, etc., for the safety of vessels engaged in internal traffic, they insist there is a distinction between inspection and other laws intended to control the character of machinery, equipment, and the like in vessels plying upon the navigable waters of the United States, and laws intended to enlarge or to limit the contract rights and liabilities of persons concerned with the same vessels; that the legislation, for the one purpose, may be warranted by the commerce clause of the constitution, but for the purpose of affecting the rights of persons contracting with vessels engaged exclusively in the internal traffic of a state the enactments of congress are nugatory; citing *The Daniel Ball*, 10 Wall. 557; *Ex parte Boyer*, 109 U. S. 631, 3 Sup. Ct. Rep. 434; *Hatch v. Iron Bridge Co.*, 6 Fed. Rep. 329; *Yale Lock Manufg Co. v. James*, 20 Fed. Rep. 903; *Sands v. Improvement Co.*, 123 U. S. 295, 8 Sup. Ct. Rep. 113. (4) They further insist that the legislation embodied in the act of March 3, 1851, and in sections 4283-4289 of the Revised Statutes, was construed by the supreme court of the United States, and by other federal courts, to be authorized by the commerce clause of the constitution; citing *Moore v. Transportation Co.*, 24 How. 37; *Lord v. Steam-Ship Co.*, 102 U. S. 541; *The Genesee Chief*, 12 How. 443; *The Bright Star*, 1 Woolw. 274; *The Mamie*, 5 Fed. Rep. 819; *The War Eagle*, 6 Biss. 366. They argue that the enactments are otherwise without constitutional warrant or validity. (5) They assert that the provision of the constitution, "the judicial power shall extend to all cases of admiralty and maritime jurisdiction," has relation merely to the law of the forum, and gives no authority to congress to regulate the property rights and liabilities of parties litigant. Moreover, even though it be conceded they say that the admiralty clause confers upon congress the power to legislate as to all topics which are properly within the admiralty jurisdiction, nevertheless the act of June 19, 1886, is broader even than that extensive domain, for it applies to all inland waters, while the admiralty jurisdiction is limited to those waters which, by themselves, or their connections with others, form a continuous channel for commerce among the states or with foreign countries; citing *The Daniel Ball*, 10 Wall. 557; *The Genesee Chief*, 12 How. 443; *Allen v. Newberry*, 21 How. 244; *The Hine*, 4 Wall. 569; *The Belfast*, 7 Wall. 624; *The St. Lawrence*, 1 Black, 527.

Proctors for respondents instance rivers and inland waters in the states which are not included in the navigable waters of the United States; and they cite *Veazie v. Moor*, 14 How. 568; *The Montello*, 11 Wall. 411; *Sands v. Improvement Co.*, 123 U. S. 295, 8 Sup. Ct. Rep. 113. By all of this reasoning they reach with great apparent confidence the conclusion that the act of June 19, 1886, has no foundation upon the admiralty clause, and none upon the commerce clause, of the constitu-

tion, and must therefore be wholly disregarded, and as a consequence, that the libel must be dismissed.

It is not difficult it would seem, for the observing mind, trained in the philosophy and history of our law, to appreciate the interesting considerations of legal thought suggested by the pending inquiry and the gigantic magnitude of the values which its ultimate adjudication may affect. Should the propositions of the respondents be deemed finally controlling, this would afford the twenty-first instance when an act of congress was decisively adjudged unconstitutional. When it is considered that this record of legislative conscientiousness and judicial conservatism embraces a period of ninety-nine years, the inchoate and formative period of a vast and novel experiment in the science of government; the exciting exigencies of foreign wars, the corroding inflammation of civil strife; the expansion of three millions of primitive people, employed mainly in the simple and unproductive occupations of frontiersmen, to sixty millions whose ventures in the production of national wealth are as diverse in character as they are intrepid in enterprise and affluent in results; when also, the mighty volume of decided cases, involving the application or interpretation of the constitution, is considered,—it must be granted that the national legislation is with substantial uniformity stable and valid, and that the occasions when it may be held by the courts invalid are rarely afforded. It is equally obvious that the courts will decline to adjudge a statute to be in conflict with the constitution, unless the reasons therefor are of that convincing and imperative character which at once clear the mind of doubt and constrain the inevitable decision.

The attempted impeachment of the fourth section of the act of June 19, 1886, extending the privilege of limited responsibility to "all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges, and lighters," is evolved mainly from this premise of respondents' proctors:

"It seems to us clear that section 4 of the act (save in the use of the words 'sea-going vessels') directly collides with the constitution, and that its expressed purpose was to do the very thing which congress is prevented from doing. The law, as it stood, excepted from the operation the owners of vessels engaged in internal commerce. The design of the act of 1886 was so to change the excepting clause as to apply the law to such owners and commerce. Take the law as it was in connection with this fourth section, and it will then appear that the purpose was to do an unconstitutional thing; that is to say, the very legislation proposed was unconstitutional if our contention be correct as to the power of congress."

In this connection it may be well to state that elsewhere in the copious and valuable brief from which the quotation is taken an important axiom of constitutional interpretation is frankly set forth, viz., "that a court ought not to declare a law unconstitutional unless the fatal infirmity is made clearly to appear,—to appear, beyond any reasonable doubt." With this cardinal rule in mind, let us attempt to ascertain if there is not at least a reasonable doubt as to the existence of error or misapprehension in the propositions of the proctor, above set forth. Is it true that

congress has "expressed the purpose" by this amendment to take control of the internal commerce of the states? Did the law, before the amendment, except from its operation the owners of vessels engaged in internal commerce? Does the amendment assailed apply the law to such owners and commerce? Is it true that the "purpose of congress was to do an unconstitutional thing?" It does not appear that the law of limited liability before the 19th of June, 1886, excepted from its operation the owners of vessels engaged in internal commerce. The language of the exception was applicable to the owners of craft of certain description plying upon certain waters. It is wholly silent as to the character or kind of commerce for which the vessels or the water routes were utilized. This is plainly apparent from the language of the proviso before the amendment was adopted:

"This act shall not apply to the owner or owners of any canal-boat, barge, or lighter, or to any vessels of any description whatsoever, used in rivers or inland navigation."

It should not be difficult to understand that this is widely variant from the proposition of respondents. The excepting clause, if their construction had been adopted, would probably have read:

"This act shall not apply to the owners of any vessel, etc., used in purely internal commerce."

There is, or may be, a vast distinction in the lading, or contracts of a vessel used in inland navigation, and one used for internal commerce. A vessel may be used for internal commerce and never traverse inland waters, or may ply the waters of a lake embosomed in the central territory of a state, and be wholly engaged in interstate commerce. Then it is not true that the law, before the amendment, excepted from its operation the owners of vessels engaged in internal commerce, but simply those whose vessels were used in rivers or inland navigation. Again, does the amendment to the limited responsibility law, assailed by the respondents, apply to the "owners of vessels engaged in internal commerce?" In the opinion of the court, very clearly not. It has no syllable with reference to internal commerce. It "shall apply also to all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges, and lighters." Congress, in the amendment as in the excepting clause of the act of 1851, *supra*, dealt entirely with classes of vessels navigating inland waters and lakes, and gave no attention to cargoes or shipping contracts. It did not deal with commerce, but with shipping. As we have before seen, there is no essential identity of topic in a vessel and the character of the commerce in which it is engaged. By a parity of reasoning it follows that congress has not, by this extension of the limited responsibility privilege, expressed the purpose to take control of internal commerce, nor, so far as it has been made to appear, was it its purpose to do an unconstitutional thing. These conclusions seem to be clearly inferable from the plain and unambiguous words of the clauses which constituted the old law and the remedial statute which, as we will presently see, is but an encouragement to important classes of ship-

ping in which the wealth of the country is largely invested. But if the language of the sections quoted was equivocal, there would even then be no difficulty in tracing to its constitutional source the current of this legislation, which has revived the drooping but vital growth of the country's maritime interests. It is well to remember that it is an elementary principle of construction, not only that the scope of a legislative enactment may be modified by the purpose expressed in the title, but that the intention of the legislature is often gathered from a view of the whole, and every part, of continuous legislation on the same general topic. 1 Kent, Comm. 461, 462. Upon consideration of the several enactments on the subject of limiting responsibility of the owners of shipping, it is not possible to discover any purpose of the national legislation to encroach upon the conceded rights of the states as to internal commerce. It may be, and is, no doubt, true that much of this legislation does incidentally affect rights growing out of internal commerce. That, however, is a necessary result, flowing from the variety and extent of the influence, exerted by every act of congress of general operation, howsoever undoubted its constitutionality. An illustration of this may be found in the laws relating to internal taxation. Who may say these do not affect internal commerce? and yet the power of congress is conceded. In the amplitude and diversity of the occupations and enterprises of our countrymen many results flow from congressional action which, if designed as a result of direct legislation, would be held unwarranted. It is enough to say of a law that its purpose, object, and main results are legitimate, and the law of limited responsibility has been often so adjudged. *Norwich Co. v. Wright*, 13 Wall. 109-128. The act of March 3, 1851, was entitled "An act to limit the liability of ship-owners, and for other purposes." Its provisions applicable to the questions at bar, embodied in sections 4283-4289, Rev. St., are as follows:

"The liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Section 4283, Rev. St. "The provisions of [this title, the seven preceding sections,] relating to the limitation of the liability of the owners of vessels, shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Section 4289, Rev. St.

The legislation upon this subject, next succeeding the act of 1851, is found in the act of June 26, 1884, (23 St. at Large, 53.) This, it is important to observe, is entitled "An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade, and for other purposes." The eighteenth section of this act is as follows:

"That the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the

vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel, on account of the same, shall not exceed the value of such vessel and freight pending: provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action, nor shall the same apply to wages due to persons employed by said ship-owners."

We thus perceive that the title indicates what the body of the act makes clear, viz., that it was intended to encourage, and therefore to foster, the American merchant marine and the American foreign carrying trade. Its chief modification of the existing law was an enlargement of the privileges of exemption. It will be readily observed that it was the consistent legislative purpose to broaden the privileges of the owners of American craft upon the high seas. The enactments it seems were found advantageous also, as they were followed very soon afterwards by the act of June 19, 1886, (24 St. at Large, 79,) which is entitled "An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes." The fourth section of this act extends previous enactments relating to limitations of liability to "all sea-going vessels," and here the respondents insist the national legislature exhausted its jurisdiction.

But it was not deemed enough to accord these privileges to sea-going vessels. A vast and rapidly augmenting fleet of American shipping, embracing every type of vessel, from the clumsy sailing craft of the last century, to the latest achievements in naval architecture, whose twin screws and triple expansion engines drive them with incredible swiftness over the teeming waters of the Great Lakes, were wisely esteemed by congress to merit the aid and encouragement of the legislation which had been so effective with sea-going shipping. Nor was this all. It had been found that the vital necessity for cheap transportation for the natural and manufactured productions of the country, often denied in greater or less measure, by railway combinations, had been accomplished by a return to the slower, but cheaper methods of water carriage. Rivers, canals, and inland lakes, by themselves or their connections, in many instances afford the most important channels for the ebbing and flowing tide of interstate and foreign commerce. In the case of *The Daniel Ball*, 10 Wall. 557, where the recovery of a penalty under the act of congress for failure to obtain a license to transport merchandise and passengers upon the bays, lakes, rivers, or other navigable waters of the United States was resisted upon the ground that the steamer navigating the Grand river, in the state of Michigan, was not engaged in interstate commerce, and for this reason it was insisted congress had no control over her, the supreme court make very pertinent declarations. They decided that the Grand river was a navigable stream. They hold that rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water, and they constitute navigable waters of the United States, with-

in the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continuous highway, over which commerce is, or may be, carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water." 10 Wall. 563. This test was applied to Grand river, and the conclusion was reached that it was a navigable stream, and the court adds:

"And by its junction with the lake it forms a continued highway for commerce, both with other states and with foreign countries, and is thus brought under the direct control of congress."

The court continues:

"That power [the power to regulate commerce] authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and, for that purpose, such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. 'The power to regulate commerce,' this court said in *Gilman v. Philadelphia*, 3 Wall. 724, 'comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of congress.' But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the state of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand river is a navigable water of the United States; and this brings us to the consideration of the second question presented. There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to congress is limited to commerce 'among the several states,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states. In this case it is admitted that the steamer was engaged in shipping, and transporting down Grand river, goods destined and marked for other states than Michigan, and in receiving, and transporting up the river, goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan, and destined to places within that state, she was engaged in commerce between the states; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation,

it is subject to the regulation of congress. It is said that, if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of congress over interstate commerce when carried on by land transportation. And we answer, further, that we are unable to draw any clear and distinct line between the authority of congress to regulate an agency employed in commerce between the states when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

See, also, *The Montello*, 11 Wall. 411, 20 Wall. 430; *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. Rep. 434. In the case last cited the waterway upon which the collision occurred was actually the property of the state of Illinois, and was wholly artificial, and was wholly within its territorial boundaries. The court says, through Mr. Justice BLATCHFORD:

"Within the principles laid down by this court in the cases of *The Daniel Ball*, 10 Wall. 557, and *The Montello*, 20 Wall. 430, which extended the salutary views of admiralty jurisdiction applied in *The Genesee Chief*, 12 How. 443, *The Hine v. Trevor*, 4 Wall. 555, and *The Eagle*, 8 Wall. 15, we have no doubt of the jurisdiction of the district court in this case." "Navigable water, situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different states, carried on by vessels such as those in question here, is public water of the United States."

It is true that this case considers and decides a question of admiralty jurisdiction; but the canal, although wholly artificial, and wholly within the body of the state, is declared public water, for the reason that it is a conduit for interstate commerce. In concluding the opinion, Mr. Justice BLATCHFORD observes:

"This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a state, and from which vessels cannot so pass as to carry on commerce between places in such state and places in another state or in a foreign country, and no opinion is intended to be intimated as to jurisdiction in such a case."

The case was decided in January, 1884. In December, 1870, in the case of *The Montello*,—a proceeding to recover a penalty under a statute operative upon the "bays, lakes, rivers, or other navigable waters of the United States,"—Mr. Justice FIELD, for the court, declares that the stream "can only be deemed a navigable water of the United States when it forms by itself, or by its connection with other waters, such a highway." "If, however," the learned justice continues, "the river is not of itself a highway for commerce with other states or foreign countries, or does not form such a highway by its connection with other waters, and

is only navigable between different places within the state, then it is not a navigable water of the United States, but only a navigable water of the state, and the acts of congress * * * for the enrollment and license of vessels have no application. Those acts only require such enrollment and license for vessels employed upon the navigable waters of the United States." It will be observed that this was the construction of a penal statute, and its application under the admiralty power. But, for the regulation of interstate commerce, as we shall presently see, congress has enacted legislation with reference to the commerce upon water routes, whether they form by connection with other waters or with railways, a highway for continuous carriage or shipment of passengers or property. The power of congress for this purpose is, we believe, generally conceded. If, therefore, the navigable waters of a state wholly within the state, and with no exterior water connection, are yet utilized under "common control, management, or arrangement," in connection with railroads, for "continuous carriage,"—in other words, for interstate commerce,—for the purposes of such commerce,—they would become public waters of the United States, and subject to congressional control under the commerce clause (paragraph 3, § 8, art. 1) of the constitution, if not under the admiralty clause. See act of February 4, 1887, entitled "An act to regulate commerce," (24 Stat. at Large, 379.)

But if it be true, as contended, that the terms of the act of June 19, 1886, are so broad that they affect the navigable waters of a state upon which there are vessels wholly engaged in internal commerce, must the act be held a nullity for that reason? From the fact that the indefatigable proctors for respondents have referred to the Kissimee, in Florida, and the Jordan, in Utah, to illustrate their argument, it is perhaps fairly inferable that such streams and lakes are very rare. It is probable, also, that the commerce which they convey is comparatively unimportant. Now, is it not the duty of the court to sustain the act under consideration if it appears that its application to the navigable inland waters of the United States, and to the great body of commerce, is valid and appropriate, even though it may affect, upon occasion, commerce wholly within a state? Concede that its language is susceptible of the meaning suggested by the respondents, it is nevertheless clearly warranted, and operative, as to all the important inland navigation of the country and the Great Lakes, and as to a mighty volume of commercial transactions. It has long been settled that statutes, constitutional in part only, will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are separable. *Packet Co. v. Keokuk*, 95 U. S. 80. A case of controlling authority upon the proposition that the statute may be valid as to one class of commerce, even though invalid as to another, is *Ratterman v. Telegraph Co.*, 127 U. S. 411-428, 8 Sup. Ct. Rep. 1127. There a single tax was assessed by the state of Ohio upon the receipts of the telegraph company. These were derived as well from interstate as from internal commerce. The items of the income account were of course capable of separation, but they were returned and assessed in gross, and without separation or apportionment.

A bill was presented to the judge of the circuit court of the United States, sitting in chancery, by the telegraph company, with averments that the tax was illegal and void, and in conflict with the constitution of the United States, for the alleged reason that the state was seeking by the act to impose a tax upon gross receipts principally accumulated from interstate telegraphic messages. The prayers were that the defendant, to-wit, the treasurer, may be compelled to accept that portion of the tax lawfully due the state and country, and that he may be enjoined from levying or collecting the balance of the assessment. To the bill a general demurrer was filed. The circuit court, after argument, upon an agreed submission of facts, which was in the main but a statement of the separate amounts received from business within the state, and from business between points in Ohio and in other states, held that the tax by the state, so far as apportioned to receipts derived from interstate communication, was unconstitutional and void, but, as apportioned to messages within the state, it was valid. The case reached the supreme court by a certificate of difference of opinion between the circuit and the district judge; and Mr. Justice MILLER, for the court, presenting the unanimous opinion with the characteristic vigor and clearness of his judicial deliverances, has with precision, and we think with conclusiveness, defined the rule for our guidance. After stating the question certified, and observing that the agreement of parties had avoided the point that the tax was not separable, the learned justice decisively states:

"Nor do we believe, if there were allegations, either in the bill or answer, setting up that part of the tax was from interstate commerce, and part from commerce wholly within the state, that there would have been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams by means of the appointment of a referee or master to inquire into that fact, and make report to the court. Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that, so far as it was only upon commerce wholly within the state, it was valid."

How apposite is this language to the facts before the court! Here the books and bills of lading of the steamer would show every fact essential to the apportionment of the cargo into classes of internal and interstate traffic and freight. But even more pertinent is the next succeeding remark of the learned justice: "This precise question was adjudged in the *Case of State Freight Tax*, 15 Wall. 282." There a statutory tax of Pennsylvania of two cents for one class, three cents for another, and five cents for another, imposed upon every ton of freight transported by any railroad or canal of that state, was resisted by the Reading Railroad Company on the ground that it was levied on interstate commerce. The returns of the railroad company to the accounting officers stated separately the amount of freight carried wholly within the state, and the amount brought into or carried out of the state. The court held "that the tax upon the former class * * * was valid under the law of Pennsylvania, by which it was imposed; but that the

latter classes, being commerce among the states, were not subject to such taxation." These cases are very satisfactory.

It is also true that apportionment and separation of subjects under control of the state, and without such control, will apply to the transportation routes, as well as to the freight transported or messages forwarded. In the case of *Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961, where a tax by that state, estimated against the company upon the length of its lines within the state, as proportioned to their length elsewhere, it was held that since lines along post routes and across navigable waters of the United States were not subject to taxation; and since, in the state, 233,455 miles of the defendant's lines were thus exempted, there remained only 49,850 miles not exempt; and upon this the company offered to pay the proportion of the tax assessed against it according to mileage by the state authorities. The remaining assessment was enjoined. "We refer to this now," continues this valuable opinion, "only for the purpose of showing how easily the question of taxation which is forbidden by the constitution may be separated from that which is permissible in this class of cases." If the subjects of taxation are so readily classified to mark the separate domain of federal and state taxing power, how entirely justifiable will be the same process when necessary to maintain the validity of national legislation! This, as we have seen, is the unquestionable duty of the court. *Vide*, also, *Tiernan v. Rinker*, 102 U. S. 123; *Steam-Ship Co. v. Pennsylvania*, 1 Int. St. Com. R. 311; *Telegraph Co. v. Pennsylvania*, 128 U. S. 39, 9 Sup. Ct. Rep. 6. A case very interesting and very instructive as to this important topic is *Steam-Ship Co. v. Pennsylvania*, 122 U. S. 326-345, 7 Sup. Ct. Rep. 1118. The opinion of the court, rendered by Mr. Justice BRADLEY, comprehends an attractive analysis of the more pertinent decisions upon this rule, with copious references to many others.

It will be observed that we have heretofore considered the argument submitted by respondents' proctors as if a portion of the cargo of the Katie was shipped to be transported wholly within the state. It is true, however, as we shall presently see, that all of it is properly to be regarded as interstate in its character. It is true, also, that the Katie was engaged, in the strictest sense, in interstate and foreign commerce, and that the Savannah river between Augusta and Savannah is, as clearly, as the Mississippi between St. Louis and New Orleans, a navigable river of the United States. We extract the following from the valuable and elaborate brief of Mr. Robert Erwin, the proctor for libellant:

"The state of Georgia is bounded on the east by a line running from the sea, or the mouth of the river Savannah, along the stream thereof, to the fork or confluence made by the rivers Keowee and Tugalo. Code Ga. § 15. It is proper to state, however, that there has been much discussion as to whether the state of Georgia extends only to the thread of the stream or to the Carolina shore. However that may be, the second article adopted by the convention of Beaufort, which settled the boundary between Georgia and South Carolina, provided that the navigable portion of the Savannah river should be henceforth equally free to the citizens of both states, and exempt from all duties, tolls, hindrance, interruption, and molestation whatsoever attempted

to be enforced by one state on the citizens of another. See *Hotchkiss*, St. Law Ga. 916. And as the steam-boat *Katie*, on every trip, touched at landings on both shores of the river,—that is, in South Carolina and in Georgia,—there can be no doubt that she was engaged in interstate commerce.”

In *Cotton Exchange v. Railroad Co.*, 2 Int. Com. R. 375-388, we find it announced that commerce between points in the same state, but which passes through another state, is regarded and treated as interstate commerce. Mr. Commissioner Morrison, stating the conclusion of the commission, on page 386, uses the language following:

“While passing through Mississippi, after passing from Louisiana, this commerce is interstate, and subject alone to interstate regulations. It is not subject at any place between Shreveport and New Orleans to regulation by both the state and the congress. It passes by continuous carriage from Louisiana to and through the state of Mississippi. It is not transportation ‘wholly within the state.’ It is subject to regulation by the provision of the act to regulate commerce, and the commission has jurisdiction to reserve the rates, where the parties interested in them are before it.”

This report is strongly advisory, and the statement quoted seems otherwise altogether justifiable. Then the *Katie* was in all respects engaged in interstate commerce. See, also, *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826; *The Daniel Ball*, *supra*.

To summarize our conclusions upon this important and interesting topic, we are of opinion that the act of June 19, 1886, is valid, in view of the power of congress to regulate commerce: (1) Because the law, amended, excepted from its operation inland navigation only, and not internal commerce, as insisted. (2) The amendment extended the operation of the law, not to internal commerce, but to inland navigation. So much for the direct purpose of the act. (3) If internal commerce is affected, it is incidentally, merely; and the purpose of the legislature being legitimate, and warranted by the constitution, it is wholly immaterial to the consideration of its validity that somewhere it has a casual or contingent effect upon the domain of state legislation. (4) Even though the subjects of this extended liability, or the territory in which it is effective, are partially within the region of state control, yet, where they are separable, and are partly under the national control, the act will be sustained by the courts wherever the power of congress extends, and as to all those objects to which it attaches; and this rule is easily applicable to the facts. (5) As to the Savannah river, it is a public navigable stream. The voyages of the *Katie* and her cargo are interstate in character, and the jurisdiction of congress is undoubted.

It will be seen that the question presented as to the constitutionality of the clause extending the benefit and privilege of limited responsibility to the owners of vessels engaged in navigating the inland public waters of the United States has been heretofore considered solely with relation to the commercial power of congress. But the commerce clause of the constitution is not the only title to the validity and effectiveness of the enactments. It is equally clear that the amendment is warranted by section 2, art. 3, of the constitution, which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

Since this demurrer was argued, the supreme court of the United States, in *Butler v. Steam-Ship Co.*, 130 U. S. 527-558, 9 Sup. Ct. Rep. 612, has settled with distinctness the following principles applicable to this discussion: The law of limited liability was enacted by congress as part of the maritime law of the United States, and is co-extensive in its operation with the whole territorial domain of that law. (2) While the general maritime law, with slight modifications, is accepted as law in this country, it is subject, under the constitution, to such modifications as congress may see fit to adopt. (3) The limited liability act applies to the case of a disaster happening within the technical limits of a county in a state, and to a case in which the liability itself arises from a law of the state. The case resulted from the well-known disaster to the City of Columbus near Gay Head, at the western extremity of Martha's Vineyard; and it was insisted by respondents to the libel to limit liability, filed by the steam-ship company, that the doctrine had no application to cases of personal injury and death, and none in the technical limits of a county in a state, nor to a cause of action created by state law. All of these propositions were negatived by the court. The case seems to have been argued with great care and elaboration; and the opinion, rendered by Mr. Justice BRADLEY, is most valuable. The learned justice declares that the purpose of the limited liability law is,—we may observe, not to affect internal commerce,—but for the encouragement of ship-building, and the employment of ships in commerce. He refers to the various attempts which have been made to narrow the operation of the statute. He cites the leading cases in which the beneficent object of the law has been set forth: *Norwich Co. v. Wright*, 13 Wall. 104; *Steam-Ship Co. v. Manufacturing Co.*, 109 U. S. 578, 3 Sup. Ct. Rep. 379, 617. "The law of limited liability," says the learned justice, "as we have frequently had occasion to assert, was enacted by congress as a part of the maritime law of this country, and therefore it is co-extensive in its operation with the whole territorial domain of that law." *Norwich Co. v. Wright*, 13 Wall. 104-127; *The Lottawanna*, 21 Wall. 558-577; *The Scotland*, 105 U. S. 24, 29-31; *Steam-Ship Co. v. Manufacturing Co.*, 109 U. S. 578-593, 3 Sup. Ct. Rep. 379, 617. In *The Lottawanna* we said:

"It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed." Page 577.

Again, on page 575, speaking of the maritime jurisdiction referred to in the constitution, and the system of law to be administered thereby, it was said:

"The constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *The Scotland* this language was used:

"But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in maritime cases." Page 31.

Again, in the same case, (page 29,) we said:

"But whilst the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawanna*, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is nevertheless statute law."

And in *Steam-Ship Co. v. Manufacturing Co.* it was said:

"The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and, if this were not so, the subject-matter itself is one that belongs to the department of maritime law." 109 U. S. 593, 3 Sup. Ct. Rep. 389.

These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly 20 years past, and they leave us in no doubt that while the general maritime law, with modifications, is accepted as law in this country, it is subject to such amendments as congress may see fit to adopt. One of the modifications of the maritime law as received here was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime Code. We cannot doubt its power to do this.

At this point it is material to observe that the exception to the act of 1851 denying the statute operation to inland waters was added in the senate. It seems to have been suggested by an act of parliament in the reign of Geo. III. which provided that these privileges "should not extend to the owners of any lighter, barge, boat, or vessel, of any burden or description whatsoever, used wholly on rivers or inland navigation, or vessel not duly registered according to law. Opinion of Judge DRUMMOND in *The War Eagle*, 6 Biss. 364. Surely parliament was not concerned with questions of interstate or internal commerce. To use the language of Mr. Justice BRADLEY above quoted, it was a modification of the maritime law. We have rectified that. In fact, our statute adopted the maritime law, as contradistinguished from the English statutes, with that exception, where they were followed. But in England as in this country the scope of this great privilege had been gradually but steadily extended. It was partially adopted by the act of 7 Geo. II. in 1734. It was enlarged by 26 Geo. III., 1786, and again by 53 Geo. III., 1813. In 1841, France took advanced action in behalf of the ship-owner. The act of 1851 was framed in the light thrown upon the subject by all of this European legislation, and by the writings of Grotius, (*War and Peace*, bk. 2, c. 11, § 13,) Valin, (*liber* 2, tit. 8,) Pardessus, (2 *Droit Com.* pt. 3, tit. 2, c. 3,

§ 2,) and many others,—renowned writers on maritime law. Who can doubt its wisdom or its beneficence, when considered in the light of such experience and such authority? Its philosophy is eminently practical, and is well explained by Mr. Justice BRADLEY, in *Norwich Co. v. Wright*, 13 Wall. 121:

"The great object of the law was to encourage ship-building, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of sea-faring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions, by which they are exempt from personal liability or from liability except to a limited extent! The public interests require the investment of capital in ship-building quite as much as in any of these enterprises."

Having rectified by the act of 1851 its omission to obtain the benefit of this law for the ship-owners who are our countrymen, congress, finding that it was injudicious to exclude therefrom the interests engaged in inland navigation, rectified that mistaken exclusion by the act of June 19, 1886, now under consideration. Who may successfully dispute the wisdom of this legislation? Who may deny its absolute and vital importance to the shipping interests of the country upon those northern oceans of living water,—traversed by vast fleets of steamers and sailing vessels, annually discharging into the coffers of national and individual treasure, an opulence of wealth beyond the dreams of avarice? Is it possible to question the benefit of this law, to the traffic upon those mighty streams which, with their tributaries, vitalize the continent as the arteries the human body, or upon the innumerable water-courses of lesser volume, but the value of which the nation is beginning to appreciate, and for the improvement of which the public makes annual and liberal expenditures in order to advance the commerce, which is declared in argument here, to be wholly without national control?

After consideration in detail of the reasons urged against the validity of the act,—consideration had with the carefulness and attention demanded, not alone by the great moment of the inquiry, but also by the zeal and earnestness with which the supposed encroachment upon the rights of the state has been combatted,—we are thoroughly satisfied that the legislation is proper, as well to the commercial power of congress as to the admiralty jurisdiction of the courts, as modified by the statutes. It has afforded an additional illustration of the fortunate truth that the constitution of our country is never an obstacle to the practical and patriotic assertion of national control over subjects of national concern; but considered in sympathy with the broad and patriotic, yet cautious and conservative purposes of its framers, it furnishes an undoubted warrant

for all legislation appropriate to our diverse system, and in consonance with the expansion and progress of the country on the paths of civilization as they widen and extend. The demurrer will be overruled.

CHIESA v. CONOVER *et al.*¹

(District Court, S. D. Alabama. March 29, 1889.)

SHIPPING—BREACH OF CHARTER-PARTY—PERSONAL LIABILITY OF MASTER.

The master in charge at time of seizure cannot be made liable *in personam* for breach of the charter made by his predecessor, even though he has, without consideration, promised to execute it.

In Admiralty. On exceptions to libel by defendant A. Conover.

Pillans, Torrey & Hanaw, for exceptions.

G. L. & H. T. Smith, for libelants.

TOULMIN, J. As I understand it, the libel in this case is to recover damages for an alleged breach of a charter-party made by the master of the bark Augustine Kobbe for the owners thereof. The libel alleges that the charter-party was not performed by the master under the instructions of the owners. It appears from the libel that the master who executed the charter-party is not a party defendant, but that A. Conover, who subsequently became master, is a party defendant, and it is sought to make him liable jointly with the owners for the alleged damages. The only connection he seems to have had with the charter-party, so far as the allegations of the libel show, is that he promised the libellant to perform the charter-party. He cannot be made liable for a breach of the charter-party made by the former master, for he was not a party to it; and, if it is sought to make him liable for a breach of his subsequent promise as for a breach of a verbal charter-party, it seems to me it must be done in a separate suit. If A. Conover cannot be made liable for the breach of the charter-party made by the former master, and this suit is to recover damages for such breach, then the libel makes no case against A. Conover, and the exceptions by him that the libel shows no cause of action against him is well taken, and should be sustained. If the effort is to make him liable for a breach of his verbal promise, then no recovery can be had against him in this suit, because there is no consideration shown for such promise. But, as I have said, I understand from the allegations of the libel that its purpose is to recover damages for a breach of the original charter-party, to which contract A. Conover was not a party, and hence cannot be made liable on it. The exceptions to the libel are sustained.

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

SCHULTZ v. THE PIETRO G.

(Circuit Court, S. D. New York. November 7, 1889.)

1. SHIPPING—BILL OF LADING—SHORTAGE.

The clause, "I do not know the weight," inserted by the master in a bill of lading given for "about 200 tons," casts on the consignee the burden of proving that he did not receive all that was delivered to the ship under the bill, though less than 200 tons was received by him, and, failing to prove this, he cannot recover.

2. SAME—DUTY OF CARRIER.

Where two lots were delivered to a ship under different bills of lading, each containing the clause, and no evidence was given to show how much was originally delivered under each bill of lading to the ship, the consignee of one lot cannot recover without showing that less was delivered to him than was delivered to the ship under his bill of lading, although he shows that the consignee of the other lot received the whole quantity mentioned in his bill of lading.

In Admiralty. Libel for shortage. On appeal from district court.
38 Fed. Rep. 148.

Wing, Shoudy & Putnam, for Schultz.

Ulo, Ruebsamen & Hubbe, for the Pietro G.

WALLACE, J. Two lots of scrap-iron were received by the bark at Antwerp for transportation to New York, and bills of lading, one for each lot, were given by the master,—one reciting the receipt by the ship of about 500 tons of iron; the other reciting the receipt of about 200 tons of iron; each bill of lading having the qualifying clause written therein by the master, "I do not know the weight." The libelants, by indorsement of the bill of lading for the 200 tons, became the owners of that lot of the iron, and bring this suit, alleging that the ship "has not delivered the said iron to libelants, nor any part thereof, except 164 tons." They have given no evidence of the quantity of the iron actually received by the ship at Antwerp. The ship delivered 500 tons of the iron on board to the consignees under the other bill of lading, and subsequently delivered 164 tons to the libelants; and what was thus delivered was the whole quantity received on board at Antwerp. There is no evidence in the case that less was delivered to the libelants than was received on board the ship as the lot mentioned in their bill of lading, or that any more was delivered by the ship to the other consignees than was received by the ship as the lot covered by their bill of lading. There is no evidence to show which of the two lots was first received on board the ship, or that the lot first discharged was not the lot last received on board, or that what was delivered to libelants was not the lot that belonged to them. The libelants do not claim in their libel that the iron which was delivered to them was not the lot which belonged to them, but aver that the quantity delivered was less than they were entitled to. The clause inserted in the bills of lading by the master, stating that he did not know the weight, qualified the effect of the recital as an admission of the number of tons of iron received on board the ship. It was equivalent to a statement by the master that he had not so verified the truth of the recital of the quantity received on board as to be willing to abide v.40f.no.8—32

by it. Such a clause neutralizes the force of the recital as evidence, and shifts the burden of proof from the ship to the owner in a case like the present, and requires him to show that he did not receive all of his property that was actually received by the ship. *Eaton v. Newmark*, 37 Fed. Rep. 375; *Matthiessen v. Gusi*, 29 Fed. Rep. 794. When a discrepancy is discovered before an acceptance by the owner, and acceptance is refused on that ground, and the carrier put to an action for the freight, it would be incumbent upon the latter to prove affirmatively a tender of delivery of all the cargo actually received for the owner; but this is not such a case. It appears in evidence that the two lots of iron were not kept distinct on board the ship. Consequently, if there were any evidence in the case to show that the libelants did not receive all they were entitled to, the ship would not be exonerated by proving that what was delivered to both consignees was all the iron actually received on board. But in the absence of such evidence, or of any evidence to show that a larger quantity was delivered to the other consignees than belonged to them, the libelants cannot recover. It was the duty of the master to keep the two lots distinct. If he had done this, the libelants would have had no reason to suppose that they did not receive all the iron that belonged to them, and this suit probably would not have been brought; but the libelants cannot recover upon any theory of a breach of duty in this respect on the master's part, because they do not show that they sustained any loss in consequence of his conduct. The libel by the master in the suit brought by him for demurrage against the present libelants alleges delivery to them of all the iron received for them; and the statements of the libel cannot be regarded as an admission that 200 tons were actually received on board the ship. The libel is dismissed, without costs of the district court, but with costs of this court.

CUMMING *et al.* v. THE BARRACOUTA.

(Circuit Court, S. D. New York. November 9, 1889.)

SHIPPING—CARRIAGE OF GOODS—NEGLIGENCE—BURDEN OF PROOF.

In a suit for the loss of the contents of certain casks and kegs during transportation on a vessel, the defense was that the loss arose from leakage, for which by the terms of the bill of lading the carrier was exempt from liability. It appeared that on the arrival at the port of discharge the cargo was transferred to lighters in the employ of the vessel for delivery to the owners. When delivered by the lighters all the casks were in bad order, some having their staves broken at the bilge, and others their hoops started and gone, and their contents, which were liquid, also gone. The hoops of the kegs were started and some of them gone, and the staves were broken. None of the lightermen were called as witnesses by the vessel, but witnesses for the vessel testified that when the casks and kegs were delivered to the lighters some of the casks were empty, apparently from leakage. Held, that inasmuch as the appearance of the casks and kegs when delivered to the owners was as consistent with the theory of the loss of their contents by breakage as with the theory of the loss by leakage, the burden of proof was upon the vessel to show clearly that the loss arose from the excepted cause; that, having failed to call the lightermen as witnesses, or give any evidence showing that the cargo was delivered by the lighters in the condition in which it was when received by them, the vessel was not exonerated by a satisfactory vindication.

In Admiralty. Libel for injury to cargo. On appeal from district court. 39 Fed. Rep. 288.

Arnold & Green, for appellants.

Wing, Shoudy & Putnam, for appellee.

WALLACE, J. In December, 1877, the libelants, through their agents at New York, shipped at that port upon the steamship *Barracouta*, in good order, for transportation to Trinidad, Spain, 14 casks of stannous chloride, containing 9,060 pounds, and 20 kegs of salts, containing 705 pounds. The steamer sailed December 17th, and, after encountering very severe weather on her voyage, reached Trinidad, December 29th, where her cargo was transferred to lighters employed by the steamer, and by them taken to the government warehouse on the dock. After the cargo was landed at the warehouse, all the casks were found to be in more or less bad order. The staves of two were broken at the bilge, and were entirely empty. The others had their hoops started, and two of them had their heads bulged; and all were leaking, and more or less deficient in contents. Of the kegs, several were deficient in their contents, and in bad order; the hoops being started, and some of them gone, and the staves broken. The value of the missing contents was \$1,082. The libelants have brought this suit to recover for their loss. The defense is that the loss arose from leakage; for which, by the terms of the bill of lading, the steamer is exempt. The case made by the libelants is met by the testimony for the steamer that, when the cargo was taken out to be transferred to the lighters, two of the casks were found to be empty, and the others indicated that their contents had leaked through the seams; but the steamer's witnesses also testify that none of the casks or kegs presented any appearance of external injury, neither the heads, staves, nor hoops being displaced. The steamer's cooper was not called as a witness, and it does not appear that any cooperage was done to the casks. The theory for the steamer is that the liquid chloride could not be safely transported in casks; that there is danger from expansion when it is shipped in wood if it is exposed to heat; and that the leakage arose from this cause, or because the casks were not sufficiently strong. The testimony shows that the article is usually shipped in carboys, but it is also sometimes shipped, both by sea and rail, in strong casks. In the present case the casks were selected by the manufacturer of the chloride, who was accustomed to ship it in casks, as especially strong and good ones for the purpose. None of the lightermen were called as witnesses for the steamer to corroborate the testimony of her own men respecting the condition of the casks and kegs when they were transferred to the lighters.

When goods in the custody of a common carrier are lost or damaged, the presumption is that the loss was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he is not responsible. The *onus*, therefore, is upon the steamer to show that the present loss arose from leakage; and, if the evidence is as consistent with the conclusion that the loss arose from negligence, the libelants

are entitled to recover. The lighters were employed by the steamer; and, as she is responsible for the acts of the lightermen, it is immaterial, if there was negligence, whether it took place while the goods were in charge of the lighters, or directly in charge of the steamer. The condition of the casks when they were landed in the warehouse was such as to denote that they had been roughly handled during the transit, or injured by external violence of some kind. Their appearance indicated a loss of the contents by breakage, rather than by leakage. Unless their condition was caused by external violence, it can only be accounted for by some chemical action of the contents, so powerful as to burst the heads, and break and displace the staves and hoops, because it is shown by the testimony for the steamer that they were not injured by the rough weather of the voyage. But the kegs containing salts were in nearly as bad a plight as the casks, and there is no room for any such theory as to them, or for the supposition that the loss of their contents arose from leakage. If the testimony of the officers of the steamer is true, and the staves and hoops of the casks and kegs were intact when the cargo was taken out of the hold and transferred to the lighters, the condition in which they were when landed is attributable to the carelessness of the lightermen. The circumstance that no cooerage was done to the casks, although the steamer customarily did it to cargo in need of it, is consistent with the truth of this testimony. Yet it seems hardly probable that the two empty barrels, from which they say the contents had escaped, were injured by the lightermen more seriously, the staves being broken at the bilge, than the full barrels, which, with their contents, weighed nearly 650 pounds. On the other hand, if their testimony in this behalf is untrue, their testimony as to the appearances of leakage is not entitled to credit. The steamer has not examined any of the lightermen as witnesses, or produced any testimony with a view of showing that the casks and kegs were delivered from the lighters in the same condition in which they were received by them. It was within the power of the steamer to produce this testimony, and the failure to produce it suggests either that the lightermen would not corroborate the testimony of the witnesses for the steamer, to the effect that the casks and kegs, when they left the steamer, were not broken, or that the lightermen cannot satisfactorily explain how the casks and kegs came to be landed in their damaged condition, if they were not in that condition when received by them. It is not shown satisfactorily that the loss is attributable to any insufficiency of the casks. The case is one in which the evidence of careless handling of the casks and kegs, somewhere during the transit, is such as to put upon the steamer the burden of full proof in exoneration of negligence. Full proof has not been given; and the question how the loss occurred, or, if any arose from leakage, how much, is left in doubt. If it cannot be ascertained how much of the loss sustained by the libelants arose from leakage, and how much from the breaking of the casks and kegs by improper handling, the ship must bear the whole loss. In cases like this, where goods which have been transported by the carrier in fit packages or receptacles are delivered to the owner in a damaged condition, the packages broken,

and the contents partly missing, although the latter may justly assume, in the absence of information showing injury by *vis major* that his property has been carelessly dealt with, he cannot ordinarily prove the particulars of the carelessness, because these are only known to the carrier or his servants. It is right, therefore, under such circumstances, that the carrier should be required to vindicate himself thoroughly; and if he fails to produce his own servants or employees, whose testimony might clear up any doubtful points, he cannot complain if every presumption is taken against him. The libelants were led to believe, from the statements of the lightermen, that the casks and kegs were in the same condition when received on the lighters that they were in when delivered at the warehouse. They assumed, therefore, that their loss was probably caused by the improper stowage of their goods, and framed their libel principally upon this theory; but the averments in the libel are sufficient to entitle them to recover for negligence in any other respect.

A decree is ordered for the libelants for the sum of \$1,082, with interest, and with costs of the district court and of this court.

BRADLEY FERTILIZER CO. v. THE EDWIN I. MORRISON *et al.*¹

(Circuit Court, S. D. New York. October 24, 1889.)

SHIPPING—DAMAGE TO CARGO—EVIDENCE.

On libel for damages to a cargo, it appeared that while the vessel was passing through a heavy gale, during which she shipped great quantities of water, and which injured her greatly by loosening timbers, etc., which were found floating in her waist, it was discovered that a brass plate which covered a hole in the water-way, used for bilge-pumps, and which was sunk flush with the top of the water-way, was gone. The plate had a movable cap, projecting about three-eighths of an inch above its surface, with edges beveled to one-eighth of an inch. It was in plain view, and appeared to be in good order at the commencement of the voyage, but was not tested except by inspection, which was found to be such as might be expected of a reasonably prudent master or owner. The plate had been screwed on, and the screw-holes were not smooth, black, or rusty. The surrounding wood was sound and white, and the screw-holes were ragged, showing that clear wood had come away. Such a plate is not unusual in vessels, and is considered a permanent fixture, and is not liable to deterioration by lapse of time. The vessel had been in use about 11 years. There was no direct evidence as to how the plate was lost. *Held*, that its loss was caused by an accident, resulting from a danger of the sea, which could not reasonably have been anticipated.

In Admiralty. Libel for damages. On appeal from district court.
27 Fed. Rep. 136.

FINDINGS OF FACT.

(1) The schooner Edwin I. Morrison, owned by the claimants, was chartered December 19, 1883, by written charter-party, to the libellant for a voyage from Weymouth, Mass., to Savannah, Ga., to carry a complete cargo of guano in bags and (or) bulk for a price agreed upon.

¹ Reversing 27 Fed. Rep. 136.

(2) By the charter-party, it was agreed on the part of the vessel that she "should be tight, staunch, strong, and every way fitted for such a voyage," and "the dangers of the sea (were) mutually excepted."

(3) Under this charter, there was loaded on board said schooner, by the libellant, a cargo of guano, superphosphate, and other fertilizers, viz., 343.1680-2240 tons in bulk, and 410 35-61 tons in bags, besides 3,925 empty bags and sacks. Six bills of lading were given therefor, which acknowledged the receipt of said cargo in good order and condition, and agreed to deliver the same in like good order and condition at Savannah; the dangers of the seas only excepted. The bulk cargo was stowed between-decks, and the remainder in the lower hold.

(4) The cargo was what is known as a "dead cargo," and a hard one for a vessel to carry in severe weather.

(5) The vessel was not overloaded. She was accustomed to, and able to carry, that amount of cargo of the same character at that season.

(6) The vessel was built in 1873, had three masts, was about 155 feet long over all, carrying spanker, mainsail, foresail, forestay sail, jib, flying jib, outer jib, foretop sail, maintop sail, and mizzen-top sail. She was properly manned and equipped. Her officers and crew consisted of a master, first mate, second mate, steward, and four sailors. On this voyage she had two passengers on board, viz., the master's wife and a lady friend.

(7) On the port side of the vessel, in the water-way, and close to the bulwark, there was a hole about three inches in diameter, made when she was built, for the purpose of introducing a hose-pipe into her bilges to free her of any water accumulated there. The water-way (of yellow pine) was about three and a half inches above the deck. The hole was a short distance in front of the poop, and ran down through the water-way, between the ceiling and the skin of the ship. The hole was covered by a brass plate about four inches square, countersunk into the timber, flush with the top of the water-way, and fastened by four brass screws. In the brass plate was a removable cap, also of brass, intended to be unscrewed from the plate, when the hole was to be used, but it had not in fact been used for four or five years, (if, indeed, at all,) and was painted over whenever the water-way was painted. The removable cap projected about three-eighths of an inch above the surface of the plate, the edges being beveled so as to leave not more than an eighth of an inch of perpendicular surface. There was a similar plate and cap on the starboard side of the vessel, but somewhat further aft, and upon the poop deck.

(8) Such bilge-pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Verdigris sometimes forms around brass screws, thus weakening the hold of the wood, but water-ways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of 12 years. If the plates and caps which are generally used to cover such holes are not kept tight and secure, the holes become danger-

ous; but that mode of covering was generally deemed secure by sea-faring men, and seldom, if ever, have any accidents arisen from their use.

(9) The bilge-pump hole heretofore described as located in the water-way was opposite a port in the bulwarks of the vessel. The opening of the port was about a foot square, beginning about two inches from the bulk-head of the poop deck. The poop deck was about four and a half feet above the main deck, and extended from just abaft the mainmast to the stern.

(10) Said bilge-pump plate was in plain view, upon a casual inspection, at the time of making the charter and loading the vessel. The vessel was loaded several times before this voyage by the libelants.

(11) Before the vessel sailed, the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that time made of them consisted of such inspection as could be given by the eye; and to such an inspection they were from time to time subjected. They were not tested either by unscrewing the cap or the plate, or by tapping the plate with a hammer. Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any) in the bilge-pump plate. Immediately after the loss of the port bilge plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound.

(12) The examination which was made of the cap and plate, as set forth in the eleventh finding, (viz., by a survey, without the use of special tests, unless there is some appearance of defect,) is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage.

(13) The voyage began on the 5th day of January, 1884, and the vessel actually got to sea on the 7th, when she encountered a strong north-west gale. The light sails were furled, and the mainsail and foresail double reefed. The gale caused her to labor heavily, and ship large quantities of water, some of which entered the cabin, and reached the cargo. The vessel was driven out of her course and into the Gulf Stream. The gale moderated somewhat the latter part of the day, but the vessel still continued to roll heavily, and shipped plenty of water. The pumps were attended to, and the vessel was found to be making considerable water. The next day the gale continued, with a very heavy sea running, until about 4 P. M., when it moderated, and at 6 P. M. top-sails were set. The latter part of the day there was a strong breeze, and two reefs were made in the spanker. The vessel made little water this day. The next day (the 9th) began with a strong south-east breeze, which freshened to a strong gale. Two reefs were made in main and fore sails. At 4 P. M. the spanker and jib were furled. The middle part of the day there was a very sharp gale, and heavy sea running. The vessel labored heavily, and shipped great quantities of water. The pumps were carefully attended to, and she was found to be making considerable water. The latter part of the day the wind was still increasing, and the foresail and fore-stay sail were furled. It was then blowing a "living" gale from the west-

ward. The weather through the night continued to be extremely severe. There was "a terrific gale of wind." Planks were carried away from the bulwarks of the starboard side of vessel; also one of the ports. The water-way on starboard side was started off. The covers of the chain locker and a spar were found loose in the morning, floating in the waist of the vessel on both sides. Coal washed about decks; also buckets and bucket racks; also pieces of bulwark. The forecastle door and galley door were washed off, but were not lost. The men could not stand at pump on main deck, because it was continually swept by these seas; and it was with difficulty that they were able to work at the pump on the poop deck, which was about four and a half feet higher than the main deck, on account of the sea breaking over. Before midnight the vessel was hove-to under a storm try-sail, two-reefed foresail, and fore stay sail, on the port tack. The vessel was shipping water through the cabin windows, doors, and down the booby hatch. The cabin was situated in the after part of the poop deck. The top of the cabin-house was about three and a half feet above the deck. They commenced to take water in the cabin while eating supper, and all through the night it forced its way in. This was unusual, and indicated very bad weather and a rough sea. Everything in the cabin was drenched, excepting the berths, by water washing around the cabin with motion of vessel. Water reached the cargo during the night through the cabin, a strained water-way, and otherwise. The pumps were tried every two hours; and by 4 o'clock Thursday morning it was discovered, by the pumps bringing up guano with the water, that the cargo was wet. The master of the vessel did not go to bed during the night, but was mostly on deck. Previous to 4:30 o'clock in the morning they were able to get a suck on the pumps, indicating that there was no water then in the well, but after that were unable to do so. At this time the weather was very bad; a very bad sea flooding the decks continually, and washing everything movable about. About 5 o'clock they sounded, and founded 18 inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps. This gave the vessel a list to port. The only outlets on the port side for the seas that came aboard were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at 9 o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as she was supposed to be sinking. The lashings of the boat on the poop deck were cut, and the women on board came up from the cabin to take the boat. Between 10 and 11 o'clock they wore ship, and the vessel slowly righted up, the booms swinging from the port to the starboard side, bringing the port side out of the water. The vessel was then working heavily in the sea, losing steerage-way, and settling fast. When the vessel righted up and rolled her lee side out of water, the second mate, who, with others, fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge-pump

plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole, and sung out to the captain, "Look here!" Being greatly excited, and not looking for such a thing, he hardly realized what the trouble was. The captain came, and said, "My God, this is the bilge-pump!" It was found that the whole bilge-pump plate, with the screws, was gone.

(14) The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come, part of the clear wood was itself hauled, the splinters hanging around the edges of the holes; the holes thus presenting a ragged look. The screw-holes were not smooth, nor black, nor rusty. The wood of this particular water-way, in the vicinity of the plate, did not look rotten; and when, after arrival at Savannah, the temporary plugging referred to in the seventeenth finding was removed, and the hole plugged and covered with sheet-lead, the timber into which the plug was driven, and on which the lead was nailed, was found solid; and since that time the covering has not been further repaired, nor the timber changed in any way.

(15) No marks of violence other than the splintering of the wood about the screw-holes was visible upon the water-way, or upon the adjacent bulwarks or stanchions.

(16) As no one witnessed the removal of the bilge-pump plate, direct evidence of the cause of this mishap is not obtainable. It is, however, to be inferred, from the facts proved, that it was knocked out by something striking violently against it, subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 A. M. and 5:30 A. M.

(17) The hole was at once plugged up, covered with canvas, and sheet-lead nailed over the canvas.

(18) At this time the wind had abated somewhat. The vessel's wheel was tied hard up, and the sails trimmed so that she would lie to, and the crew went to work pumping again, and gained on the water. By 11 or 12 o'clock that night they succeeded in getting her free of water so far as the pumps could do so, and the journey was continued.

(19) Afterwards it was found that the mainmast had been loosened by the working of the vessel, and that the coating was broken; also that a scupper on the starboard side was broken.

(20) The weather continued severe during almost the entire voyage, and the injury to cargo was increased thereby.

(21) The vessel arrived in Savannah, January 27th.

(22) Upon the arrival, she delivered her cargo, some of it in a damaged condition. The extent of the damage was \$9,175.40.

(23) At the time of the contract, and lading of cargo, and commencement of voyage, the vessel was tight, stanch, and strong, and in every way fitted for the contemplated voyage.

(24) There was no latent defect in the vessel which contributed to the injury of the cargo.

(25) There was no fault or negligence in the navigation of the vessel or care of the cargo.

(26) The whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter-party and bills of lading.

CONCLUSIONS OF LAW.

First. The damage is to be attributed to the dangers of the seas, and not to the fault of the vessel.

Second. The decree of the district court is reversed, and the libel dismissed, with costs of both courts.

George A. Black, for libelant.

Wilcox, Adams & Macklin, for the Edwin I. Morrison.

LACOMBE, J., (*after stating findings and conclusions as above.*) The grounds of decision in this case are perhaps sufficiently indicated in the findings. That the vessel was not unseaworthy by reason of overloading (a fault not charged in the libel) seems to have been the conclusion finally reached by the district court upon the rehearing. Such a conclusion is accordant with the testimony. Her behavior with seven feet of water in her well, and a cargo of wet guano in her hold, and the manner in which, after the leak was plugged, she recovered her buoyancy, should be conclusive on this point. So, too, on the rehearing, the district court found, as her witnesses testify, that before the plate was knocked off the vessel had encountered dangers of the sea, by reason of which there was eighteen inches of water in her well, and her cargo was damaged to a considerable extent. It is indeed hard to conceive by what casualty the plate could have been removed, while the water-way in which it was fastened was still on the weather side, and the evidence shows that they did not wear ship, thus developing the list to port, until after the eighteen inches of water had been found in her well.

It only remains to determine what caused the loss of the plate. There is no direct evidence on this point; only inferences to be drawn from known facts. That it was knocked out of sound wood by a blow from some floating article, which left no marks of violence upon the bulwarks or stanchions because it was swept overboard through the open port, is certainly not impossible. That the wood was rotten, or the fastenings defective, seems disproved by the condition in which the holes were found. The vessel was not originally unseaworthy because she had bilge-pump holes covered as these were. The presumption of continuing seaworthiness in respect to this part of the ship is not rebutted by the single fact that no special test was made as to their condition, in view of the testimony (especially that taken in this court) as to what is the usual examination given to such structures. They are considered as permanent fixtures; are located in the upper works, where they are almost constantly in view; and are not liable to deterioration from the lapse of time. Moreover, the evidence as to the condition of the water-way, and as to the torn and ragged appearance of the holes, indicates that they were reasonably fit to resist the ordinary shocks and action of the sea, and were displaced by an accident of an extraordinary nature,

and the application of a degree of force which a reasonably skillful and prudent owner would not have anticipated or guarded against. There is no question of latent defect, the inference to be drawn from the testimony being that there was no defect, patent or latent; that the fastenings were sufficient, and were knocked out by a blow such as could not reasonably have been anticipated, and which was caused by a danger of the sea.

ON APPLICATION TO AMEND FINDINGS.

(December 18, 1889.)

LACOMBE, J. Upon the two principal amendments to the findings asked for by the libelant, namely: (1) To insert the word "apparently" in the twenty-third finding; and (2) to prefix to the twenty-fourth finding the words, "It is to be inferred from the facts found in the 16th finding,"—his motion must be denied. The libelant claims that there was in fact some defect or weakness in the plate and cap, and the screws which secured them; that in consequence they washed out, and allowed the water to enter the vessel. Whether such defect or weakness existed or not is a question of fact, which it is the duty of the circuit court to decide. Such decision must be presented, as a finding of fact, to the appellate court. The conclusion reached upon all the testimony was that there was no such defect. No doubt that conclusion was reached as an inference from the facts in proof. No one distinctly testified: "I made an elaborate examination of the cap, plate, and screws before the vessel sailed. They were then in sound condition, and I saw them knocked out by floating stuff washing across the vessel's deck, and out through the open port." Nevertheless, the testimony, taken as a whole, indicates that this was in fact what happened. If this court should amend the twenty-third and twenty-fourth findings in the manner suggested, the supreme court might reverse on the express ground that, because there was no distinct finding of fact to that effect, it must be inferred that the claimant did not convince the circuit court, as a matter of fact, that the vessel was tight, and that there was no latent defect in the plate, cap, or fastenings. But that is the very conclusion to which an examination and comparison of all the testimony adduced by both sides has led this court; and therefore compliance with the act of 1875 seems to require the statement of such conclusion as a finding of fact.

LARRINAGA *et al.* v. TWO THOUSAND BAGS OF SUGAR.

(Circuit Court, E. D. Louisiana. November 16, 1889.)

ADMIRALTY JURISDICTION—SEVERING CAUSE OF ACTION.

On libel against cargo for freight and other charges, where claimants admit that the freight is due, but deny liability for the other charges, the cause of action may be severed, and judgment rendered for libelants for the freight charges, though such separation destroys the right of appeal to the supreme court of the United States, by reducing the amount in controversy below its jurisdiction.

In Admiralty. Libel for freight and expenses. On appeal from district court.

James McConnell, for libelants.

O. H. Sansum, for claimant.

PARDEE, J. The libelants brought a libel in the district court against 2,000 bags of sugar, part of the cargo to this port of the ship *Emiliano*, for unpaid freight and for charges on the cargo. The libel alleged a charter-party, full compliance with the stipulations thereof, and the freight, as per charter-party, was \$4,906.61, and the costs for trucking across the levee, watching, etc., amounted to \$947.53; that the entire cargo had been delivered, except the aforesaid 2,000 bags; and that they were ready to be delivered, but were withheld, because the consignees, while willing to pay the aforesaid freight, refused to pay the said charges. The libel demanded judgment for the said sum of \$4,906.61 freight, together with the said sum of \$947.53 costs and charges. The answer of claimant substantially admits the delivery of the merchandise, and that the amount of freight thereon claimed was due and unpaid; but contested the right of the libelants to hold the merchandise for the aforesaid costs and charges, which claimant denied were due and owing. Upon these pleadings in the district court the libelants moved for a decree for the amount of the freight, on the ground that it was not in contestation, and that the claimant admitted its liability to pay the same. On the hearing the court granted the motion, and gave a decree against the claimant and its surety for the amount of the freight, as being admitted by the respondents to be due on the shipment, and not in contestation; but reserving the claim set forth in the libel, and not admitted by the respondents in their answer, to be thereafter passed upon and determined by the court, and also reserving all questions as to interest and costs until there should be a decree as to the contested items of libelants. From this decree the claimant appealed to this court. The case has been heard and submitted. The only contest the claimant and appellant make in this court is that the district court had no right to sever the cause of action; that the whole amount demanded in the libel was for a sum within the appellate jurisdiction of the United States supreme court; and that such separation takes away the right of appeal.

At the request of the libelants the court finds the following facts: (1) That the allegations set forth in the libel are true, being sustained by the evidence offered so far as it relates to the claim for freight, to-wit, the sum of \$4,906.61, which the pleadings on their face and the evidence offered show to be due and owing by the claimant and appellant herein to the libelants set forth in the libel. (2) That the said freight money, to-wit, \$4,906.61, is due to libelants on the said cargo of sugar received by the claimant and consignee herein, and about which there is no contest or dispute made in the pleadings, nor shown in the evidence offered. (3) The only contest herein, both in fact as shown by the evidence, and also as shown by the pleadings, is exclusively in regard to the items set forth in the libel, aggregating \$947.53, as charges for mov-

ing the cargo across the wharf from along-side of the ship to *terra firma*, and for watching and caring for the same, which items are not now in contest before this court, but are still pending in the district court.

The following decree will be entered in the case: This cause came on to be heard upon the transcript of appeal and evidence, and was argued; whereupon it is ordered, adjudged, and decreed that the libelants, Felix R. de Larrinaga, Pedro de Larrinaga, Jose R. de Unitia, and Ramon de Mendozana, composing the commercial firm of Olano, Larrinaga & Co., do have and recover from the claimant, the Louisiana Sugar Refinery Company, and John S. Wallis, surety on the release bond herein, *in solido*, the sum of \$4,906.61, together with the costs of this court on this appeal, and for which execution may issue after 10 days from the filing hereof.

COOPER *et al.* v. THE SARATOGA.

(Circuit Court, S. D. New York. November 14, 1889.)

ADMIRALTY—APPEAL—REVIEW.

A finding of the district court, on libel for damages by collision, that both vessels were in fault, will not be disturbed on appeal, when no new proofs are taken, and the evidence was conflicting, and the finding turned on the credibility of witnesses who were examined in the presence of the district judge, though the testimony seems to warrant another conclusion.

In Admiralty. Libel for damages. On appeal from district court, 37 Fed. Rep. 119.

Hyland & Zabriskie, for claimant.

Wing, Shoudy & Putnam, for libelants.

WALLACE, J. The libelants are the owners and crew of the schooner *L. Holbrook*, and sue for the loss of the vessel and the effects of the crew by a collision with the steamboat *Saratoga*, which took place in the Hudson River just opposite Catskill point on the night of August 15, 1888, about half-past 11 o'clock. The night was cloudy, and betokened rain. The moon was about setting, and had sunk behind the hills which lie on the west of the river, and, although the stars were visible at times through the rifts in the clouds, when the collision took place the night was exceptionally dark. Where the collision took place the trend of the river is north and south for some little distance, and the channel is narrow, the width being 600 or 700 feet. The vessels collided near the middle of the channel, but somewhat to the westward. The tide was ebb, and the wind was very light from the south-east. The *Saratoga* was a large steamer, making regular trips between the cities of Troy and New York, and running upon schedule time. She was bound down the river, making her usual speed, going about 14 miles an hour through the water, and had 225 passengers and a large cargo of freight. Her course was to the westward of the mid-channel. Two pilots were

at the wheel in the pilot-house on the front of the hurricane deck, and a lookout was stationed forward on the promenade deck. The schooner, carrying a cargo of 90,000 bricks, was also bound down the river. Her master was at the wheel, and one of her crew was on the deck, but not acting as a lookout. The rest of the crew were below. While she was on the easterly side of the river, on her port tack, making to the west side, the schooner observed some of the lights of the steamer apparently a mile or more away. She ran out her port tack until she got as near as practicable to the west shore of the river, on a course so far to the southward that her lights were not visible to the steamer. She then came about, and headed on her starboard tack for the east side of the river, going at a speed of a mile or a little better an hour, and sagging with the tide down the river. After she came about the master saw the red light of the steamer, according to his statement, about half a mile away; and shortly after he saw both lights, and, as danger of collision then became apparent, he shouted to the steamer, and gave an alarm to his own men, who were below. The steamer did not see the schooner, but, hearing the alarm, stopped her engines, and after she discovered the schooner reversed her engines. She struck the schooner on the port side, near the main rigging, and the schooner sank almost immediately. The pilots in the wheel-house and the lookout of the steamer all testify that although they heard the alarm on board the schooner, and tried to discover her, they could not do so until she was right under the steamboat's bow. When the alarm was given the vessels were so near together that the seaman on the schooner, who was standing by the starboard rigging, upon hearing the master's alarm had only time to jump from the top of the cargo to the forward deck, and run around to the port side, and back again to the starboard side, before the vessels struck. By the decree of the district court both vessels were held to be in fault, and the damages of the libelants were divided. The district judge was of the opinion that the schooner was in fault because she did not show any signal, neither a flash-light nor the globe lamp which she had at hand, to the approaching steamer, although her own colored lights were obscured from the observation of the steamer during all the time she was on her port tack and was coming about upon her starboard tack. He was of the opinion that the steamer was in fault because she ought to have seen the schooner, notwithstanding the circumstances, at a distance of at least 500 feet, and that her failure to do so was to be attributed to inattention on the part of the lookout. Both parties have appealed.

The only serious questions in the case are those of fact. Even if the schooner was not under a statutory obligation to exhibit a flash-light,—as to which it is not necessary to express an opinion,—upon the state of facts found by the district judge it was her duty to employ active vigilance to avoid collision, and in this behalf to give some indication of her presence to the steamer. *The Oder*, 13 Fed. Rep. 272; *The Victoria*, 3 W. Rob. 49; *The Anglo-Indian* and *The Earl Spencer*, 33 Law T. (N. S.) 233, 235; *The Thomas Martin*, 3 Blatchf. 517. The steamer was also in fault, if, as was found by the district judge, she ought to have seen the

schooner at least 500 feet away, although the lights of the latter were obscured, and failed to do so because her lookout was inattentive at the critical time. The case is not one in which it can be seen that the fault of either vessel was not contributory to the collision. As the witnesses were examined in the presence of the district judge, and no new proofs have been taken by the parties in this court, his conclusions of fact ought not to be disturbed by this court if they turn upon a question of the credibility of the witnesses for the respective parties. It seems improbable that if the red light of the schooner had been visible to the steamer at any time after she had come about on her starboard tack it would not have been observed by one of the pilots or the lookout, or that they would have failed to see her even with her lights obscured, if she had been visible at a distance of 500 feet. It seems improbable that the pilots, situated as they were, where their opportunities for observation were favorable, and exercising the vigilance to be expected when in charge of a steamer carrying a large number of passengers and a cargo of valuable freight, would not have seen the schooner if she had been plainly visible; or that, if their inattention had been otherwise momentarily occupied, they would perjure themselves as to the fact when there was a lookout at his proper place, upon whose vigilance they had a right to rely, and when blame could not reasonably be imputed to them. But the district judge discredited their testimony, as well as the testimony of the lookout, as to the impracticability of seeing the schooner a sufficient distance away to avoid collision because of the darkness of the night. He had an opportunity to observe the bearing and appearance of these witnesses, and to judge whether they appeared to be candid and truthful or not. This court has no such opportunity, and any impression derived from reading their testimony should give way, where the proofs present a fair conflict of fact, to the judgment of the district judge based upon the personal observation of the witnesses. The decree of the district court is affirmed. Neither party is entitled to the costs of the appeal, both having appealed.

SHAW v. FOLSOM.

(Circuit Court, S. D. New York. November 11, 1889.)

ADMIRALTY—APPEAL—REVIEW.

On an appeal from the district court in an admiralty cause, the circuit court will not award increased damages to the appellee, though the allowance made by the district court was too small. The case of *The Hesper*, 123 U. S. 256, 7 Sup. Ct. Rep. 1177, commented upon.

In Admiralty. Libel for damages. On appeal from district court.
38 Fed. Rep. 356.

H. G. Ward, for appellant.

H. Putnam, for appellee.

WALLACE, J. I find that the facts in this case are that the master of the brig called the attention of the charterer's agent, while the ship was being loaded, to the clause in the charter-party by the terms of which the cargo to be furnished to the charterer was not to exceed 850 tons; informed him that, if more cargo was put on board, the ship could not cross the bar in Charleston harbor; stated that he believed the full amount had been put on board, but, yielding to and relying on the statements of the agent to the contrary, permitted 91½ tons more than the agreed quantity to be laden on board. It was in the power of the agent to ascertain much more definitely the quantity put on board than the master could, because he knew how much the carts and lighters would carry, while the ship lay in the open roadstead, some distance from shore, and the sea was so rough that the master could not determine with accuracy the draught of the brig. Upon these facts, the decree of the district court was, in my opinion, more favorable to the appellant than it should have been, and the libelant should have recovered the whole expenses of the delay of his ship at the bar in Charleston harbor, as well as the stipulated demurrage per day. As the libelant has not appealed, he cannot claim greater damages in this court than were allowed by the district court. *Airey v. Merrill*, 2 Curt. 8; *Allen v. Hitch*, Id. 147; *The Alonzo*, 2 Cliff. 548. This court cannot decree increased damages without first reversing the decree of the district court; and this it cannot do on the prayer of the appellee. *The Peytona*, 2 Curt. 21, 27. See, also, *The Roarer*, 1 Blatchf. 1. The libelant cites the case of *The Hesper*, 122 U. S. 256, 7 Sup. Ct. Rep. 1177, and insists that the appeal of the charterer opens the whole case, and authorizes the court to decree in his favor beyond the sum awarded by the district court. I do not understand that the supreme court, in that case, intended to overthrow the long-established rule, repeatedly declared by it, that the party to an admiralty cause, or to an equity cause, who does not appeal, can only be heard in support of the decree of the court below. *Chittenden v. Brewster*, 2 Wall. 191; *Stratton v. Jarvis*, 8 Pet. 4; *The William Bagaley*, 5 Wall. 412; *The Quickstep*, 9 Wall. 665; *The Stephen Morgan*, 94 U. S. 599. That case was a suit for salvage; and while it decides that an award to a salvor who appeals may be reduced, although the adverse party does not appeal, it decides nothing more; and it is not to be supposed that the court would overrule its previous decisions without saying so, or without referring to them. As an authority upon the general question, see *The City of Antwerp*, 37 Law J. Adm. 25, decided on appeal to the privy council in 1868.

CLARK v. REEDER.

(Circuit Court, D. West Virginia. November, 1889.)

1. RESCISSION OF CONTRACTS.

On bill to rescind a contract for the purchase of lands by plaintiff, on the ground of fraud and false representations, it appeared that part of the lands was covered by a patent older than that under which defendant, who was the vendor, claimed, and was claimed adversely to defendant; but defendant agreed to convey with special warranty only, and plaintiff agreed to pay for all lands within the exterior boundaries fixed by a certain survey, except such as were shown by a survey, had at the expense of the vendee, to be held "by adverse title and possession," constituting a better title than defendant's. The bill did not allege that those in possession, claiming adversely to defendant, had a better title than defendant. Plaintiff's attorney, to whom the question of title was by the contract to be submitted, knew of the prior patent, but not of the extent of the interference, and certified that such patent could not, in any event, affect defendant's title, except to a small extent. Both he and defendant's agent supposed that the interlock covered only a small portion of the lands, and plaintiff made the first payment on that supposition, though not prevented from making full investigation. No survey was had by the vendee to ascertain the extent of the interlock. *Held*, that the interlock constituted no ground for rescission, though greater than supposed.

2. SAME.

On cross-bill by defendant, praying for a sale of the lands to pay the purchase money, defendant is entitled to a decree for a sale of the lands for the amount of the price, less the amount paid, and less, also, the value, at the agreed price per acre, of the lands to which others may be shown to have a better right than defendant, with interest.

3. SAME—PRINCIPAL AND AGENT—RATIFICATION.

A contract for the sale of lands was executed by W., "as agent" of the owner, and, being presented to the latter, he approved it, and subsequently received from the vendee the cash payment specified in the contract, without disclaiming, on either occasion, W.'s assumption of agency. *Held*, in a suit brought by the vendee for a rescission of the contract upon the ground of fraud and false representations upon the part of W., that the vendor, having taken the benefit of its provisions, could not dispute W.'s agency, and was as much bound by his fraud or false representations in the making of the contract as if W. had been authorized to make the sale as agent.

In Equity.

This is a suit in equity for the rescission of a contract for the purchase of real estate, upon the ground both of mutual mistake and fraud in respect to the quantity of the lands sold. The contract in question was as follows:

"Agreement made this 29th day of February, 1884, by and between C. C. Watts, of Charleston, W. Va., acting under an agreement in writing between himself and Charles Reeder, of Baltimore, Md., dated the 3d day of February, 1884, and as the agent of said Reeder, of the first part, and H. M. Bell, of Staunton, Va., acting as the agent of E. W. Clark, of Philadelphia, Pa., of the second part, witnesseth: That the party of the first part, acting as aforesaid, has this day sold to the party of the second part, acting as aforesaid, a certain tract and parcel of land lying and being in the counties of Boone, Logan, Wyoming, and Raleigh, in the state of West Virginia, containing 50,096 acres, be the same more or less, which tract of land was granted by the commonwealth of Virginia to Edward Dillon, by patent bearing date on the 16th day of April, 1796, and is now claimed and owned by the said Charles Reeder by a regular chain of conveyance, the first being a tax-deed for said land executed by the clerk of Wyoming county, dated the 22d day of December, 1857, executed in pursuance of a sale thereof for taxes delinquent thereon, in the name of the heirs of the said Edward Dillon, and the last to the said Reeder from C. C. Cox, dated the 27th day of August, 1870; and for a partic-

ular description of said tract of land reference is had to said patent, upon the following terms and conditions, to-wit: *First.* Said sale of said land is a sale by the acre, and not in gross. *Second.* The party of the second part is to pay for the said land at the rate of one dollar and seventy cents per acre, as follows: Thirty-five thousand dollars to be paid on the day on which James H. Ferguson, a practicing attorney of Charleston, W. Va., shall certify the title of said Reeder to said land to be good and valid, which certificate is to be made within 30 days from this date; twenty-five thousand dollars of which sum is to be paid to the said Reeder, and the residue to said Watts. The balance of the said purchase money is to be paid to said Reeder on the 1st day of June, 1884, or as soon thereafter as the necessary surveying can be done, to ascertain the quantity of land within the bounds of the said patent to which the said Reeder can make good title. It is understood that the party of the second part is satisfied with the survey already made by Wm. T. Sarver of the exterior bounds of said tract of land, and that the surveying to be done is only such as may become necessary to ascertain what lands within said boundary are held by a better title than that of the said Reeder, by reason of adverse title and possession, all of which surveying is to be done at the expense of the said party of the second part. *Third.* When the last of the purchase money is paid, the said Reeder is to convey said land, with covenants of special warranty, to the said E. W. Clark, or to such person or persons as he may direct. *Fourth.* The balance of said purchase money, after the date of the certificate of said Ferguson, is to bear interest until paid. *Fifth.* In addition to the said one 70-100 dollars per acre, the party of the second part is to pay said Reeder one thousand dollars, as provided for in his contract with said Watts. *Sixth.* This contract is subject to the approval of said Reeder, and is to take effect from the date of such approval; but the same shall then be void if the certificate of said Ferguson is not made within the time specified.

"Witness the following signatures the day and year aforesaid.

"C. C. WATTS.

"H. M. BELL, Ag't for E. W. Clark."

"Approved March 4, 1884. C. REEDER."

The payment of the \$35,000 specified in this contract was shown by the following receipt:

"\$35,000. Received March 25th, 1884, of H. M. Bell, agent for E. W. Clark, two drafts on said E. W. Clark, 35 S. 3d St., Philadelphia, dated this day, and payable at sight, one for ten thousand (\$10,000) dollars, payable to order of C. C. Watts, and the other for twenty-five thousand (\$25,000) dollars, payable to order of Charles Reeder, which said drafts, when paid, will be in full payment of the hand payment provided for in within contract.

[Signed]

"C. C. WATTS, Agent for Charles Reeder."

The defendant, Reeder, resisted the claim for rescission, and by cross-bill asked the specific enforcement of the contract. The cause was argued before Mr. Justice HARLAN and Judge JACKSON, district judge, sitting on the circuit, the former holding the court in conformity with the written request of the chief justice, as provided for in section 617 of the Revised Statutes.

James H. Ferguson and Lloyd W. Williams, for plaintiff, Clark.

John E. Kenna, C. C. Watts, and W. A. Quarrier, for defendant, Reeder.

HARLAN, Justice. 1. The contract of February 29, 1884, was for the sale by Reeder to Clark of a body of land in this state containing 50,096

acres, more or less, and embraced by a patent from the commonwealth of Virginia to Edward Dillon, issued April 16, 1796; which land, the contract recites, is claimed and owned by Reeder by a regular chain of conveyances, the first being a tax-deed to Ward and Lawson, dated December 22, 1857, and the last a deed from C. C. Cox, dated August 27, 1870.

2. The sale was by the acre, and not in gross;—\$1.70 per acre.

3. Reeder was to convey by special warranty, but he did not expect to be paid for any land a better right to which, by adverse title and possession, was shown to be in some one else. This is made plain by various clauses in the contract, namely: (a) The land is described as "claimed and owned" by Reeder. (b) The cash payment of \$35,000 was to be made on the day on which Mr. Ferguson certified the title of Reeder "to be good and valid." (c) The balance of the purchase money was to be paid when the quantity of lands, within the exterior bounds of the Dillon patent, to which Reeder could make "good title" was ascertained by a survey. (d) The surveying was to ascertain only whether any lands within the exterior boundaries, as established by the Sarver survey, were, "by reason of adverse title and possession," held by "a better title" than that of Reeder.

4. If Mr. Ferguson did not give the required certificate within the time specified, then the contract, by its terms, became void. If he gave it within the time prescribed, the balance of the purchase money, when such balance was ascertained, became payable, with interest, from the date of such certificate, until paid.

I am of opinion that the rights of the parties must be determined upon the theory that, at the date of the contract, Watts had authority, as agent for Reeder, to negotiate for the sale of the lands; though any sale or agreement to sell that he would make was to be subject to the approval of his principal. It is true that at the signing of the contract Watts did not, in fact, have authority, as agent for Reeder, to enter into an agreement for the sale of the lands. He had only an optional right for himself, for a limited period, and upon certain conditions, to buy the lands. But, in making the contract of February 29, 1884, he assumed to act, not only for himself, under his written agreement with Reeder, but as the agent of the latter. And it was so stated in the contract. When, therefore, Reeder approved the contract in question, without qualification, he must be held, as between himself and Clark, to have assented to Watts' assumption of agency. It does not appear that he was informed of what passed between Watts and Bell at or before the contract was signed by them; but he was at liberty to inquire as to such matters, or, when approving the contract, to disclaim the agency of Watts, as well as responsibility for what the latter may have said to Bell or others in respect to the lands. His unqualified approval of the contract was equivalent, so far as the question of agency was concerned, to original authority to Watts to make a sale of the lands, subject to his approval as to terms. If, when the contract of February 29, 1884, was signed, Watts was guilty of any fraud, or made any false representations, that would en-

title Clark to a rescission, if Watts had been, in fact, an agent to sell, then, Reeder, in taking the benefit of the contract, which, on its face, recites Watts' agency, cannot escape responsibility for such fraud or representations upon the ground that Watts was not agent, or because he did not have personal knowledge of what passed between Watts and Bell.

The original bill seeks relief upon the ground of mutual mistake. The last amended and supplemental bill, it was said in argument, proceeds upon the ground of fraud or false representations by Watts, whereby Reeder succeeded in obtaining a contract which Clark would not have made had he known at the outset, or before any money was paid, what the record now discloses. But, upon careful examination of that supplemental bill, it is very doubtful whether it contains any direct, positive averment of fraud or false representations by Watts. The clauses in it that come nearest to an averment of that character are those alleging that, *if* the interference of the Rutter-Etting patent had been known or suspected by Clark, or his agent or attorney, the contract in question would not have been entered into; and—

"*If* the existence of the said Rutter and Etting survey, and the fact that it interfered with and overlapped the said Dillon survey, had in any way come to the knowledge of the said Reeder and Watts, or either of them, before or at the date of the execution of said contract, or *if* they, or either of them, even suspected such interference, their said failure to make the same known to your orator, or to his said agent or counsel, before the execution of said contract, was a fraud upon your orator in law and in fact, no matter whether they, or either of them, so intended it or not."

The supplemental bill seems to have been drawn with the view of finding out whether a fraud had been committed, and does not directly charge fraud, or such representations as would entitle the plaintiff to a rescission.

In the view, however, which I take of the case, it may be assumed that the plaintiff's pleadings sufficiently charge fraud; and it may also be conceded, that, if it were satisfactorily proven that Watts made representations in respect to the interlock of the Rutter-Etting survey and the Dillon survey that were false, and of a material character, the plaintiff would be entitled to a rescission. I am, however, of opinion that the evidence upon that issue does not justify a decree rescinding the contract. The testimony of Mr. Ferguson and Gen. Watts is painfully conflicting, as is often the result where witnesses occupy the position, also, of lawyers in the same case. I have read and reread their depositions, and, while there are ugly conflicts between them as to material matters, I take pleasure in saying that I do not believe that either gentleman has made any statement that he did not at the time believe to be true. Looking at all the evidence, I am of opinion that the charge of fraud—assuming fraud to be sufficiently averred—is not sustained by such evidence as will justify the court in basing a decree upon that charge, or in determining the rights of the parties upon any basis except that furnished by the written documents, and such uncontradicted facts as are competent in connection with those documents.

Undoubtedly the Rutter-Etting patent is older than the Dillon patent. It is equally clear that the former covers most of the Dillon survey, though the extent of the interlock is not made certain by the evidence. But the interlock, however serious, does not, of itself, or by itself, entitle the plaintiff to a decree setting aside the contract. Every foot of the Dillon survey might be covered by the Rutter-Etting patent, and yet Reeder's title, under the Dillon patent and survey, to the lands in question may be better in law than any other. The parties agreed to take the exterior boundaries of the Dillon survey, as established by Sarver, and Clark was given the right, by a survey at his own expense, to ascertain what lands within those boundaries were held by a better title than Reeder's, "by reason of adverse title *and possession*." Now it is perfectly consistent with the allegations of plaintiff's pleadings that no single acre in the Dillon survey is held by a better right than Reeder's, "by reason of adverse title *and possession*." If Reeder, and those claiming under him, are in possession with a better right in law than any one not in possession, but simply claiming under the Rutter-Etting patent, then it is immaterial, under the contract, that the Rutter-Etting patent is older than the Dillon patent. I repeat there is no distinct averment in the plaintiff's pleadings that he will lose any of the land "by reason of adverse title and possession" in others. He avers that there are lands within the Dillon survey which are claimed adversely to Reeder, but he does not allege that the claimants are in possession, under the Rutter-Etting survey, and have the "better" title.

As to the evidence in respect to lands within the Dillon survey that are covered by the Rutter-Etting patent, it falls far short of establishing what is claimed for it by the plaintiff's counsel. Mr. Ferguson, in his brief, insists that the "purchasers" at the sale by the commissioner, under the forfeiture of the Rutter-Etting survey by Virginia, "or others holding under them, are to a great extent in possession of these lands, claiming them as their own." On the other hand, Mr. Quarrier, in his brief, insisted that there is no proof in the cause showing, or tending to show, that the Rutter-Etting title is better than the Dillon title, or that the plaintiff has been, or ever will be, injured by reason of the Rutter-Etting title. Mr. Kenna asserts in his brief that there is neither allegation "nor a scintilla of proof" that the title certified by Mr. Ferguson is not good against the world.

I have examined the proof, and to my surprise, and contrary to the impression I got at the oral argument, it does not appear that any very large part of these lands, outside of what is held by junior patentees in possession, is held by a better title than Reeder's, "by reason of adverse title and possession." The utmost shown is that most of the Dillon survey is within the lines of the Rutter-Etting survey. But, as already said, this might be true, and yet Reeder's right be the better in law. Can it be a sufficient ground to set aside the contract for the plaintiff to show that a large part of the lands in question is within the lines of a patent older than the one under which Reeder claims, and that it is claimed adversely to Reeder; especially when Reeder only agreed to convey with

special warranty, and when the plaintiff agreed to pay for all the lands covered by the Sarver survey, except such as were *shown by a survey had at his expense* to be held "by adverse title and possession," constituting a better title than Reeder's? I think not.

There are other weighty considerations in this connection. Whatever fact may be in doubt under the evidence, it appears beyond all question that before Mr. Ferguson, the attorney of the plaintiff, to whom, by the contract, the question of title was submitted, certified Reeder's title to be good, he became aware of the fact, if it was previously unknown to him, that the Rutter-Etting patent was older than the Dillon patent, and covered part of the lands in question. I am satisfied that no one connected with this business knew the full extent of the interlock; but Mr. Ferguson knew that no one's judgment or guess on that subject, without an actual survey, was of any value. If Mr. Watts believed, and so said to him at the time of the investigation of the title, that the Rutter-Etting patent covered less than 10,000 acres of land, it is impossible to suppose that Mr. Ferguson, with all his experience as a lawyer, especially in connection with land titles, relied upon any such expression of belief, or any such statement. This is shown by his certificate. He says:

"The only title which can be found older than the Dillon patent is a grant from the commonwealth of Virginia to Rutter and Etting, dated the 9th day of January, 1796. There is, from the best information I can obtain, a small portion of the Rutter-Etting survey embraced within the Dillon survey. But the Rutter and Etting survey was forfeited long prior to 1837, in the state of Virginia, for the non-payment of taxes thereon, and for the non-entry thereof on the land books of the proper county, and was sold by the commissioner of delinquent and forfeited lands some forty or more years ago. At the time of that sale the taxes on the Dillon survey had always been paid, and for that reason the title to the whole thereof became good and valid, so far as the Rutter and Etting survey is concerned."

After referring to junior claimants of the land, and saying that it was impossible to tell what number of acres they can make good title to, he proceeds:

"But I can say, with almost a perfect certainty, that in view of the possession of the said tract by said Reeder, and those under whom he claims, for nearly 25 years, the number of acres to which these junior claimants can make title will be but small, comparatively.

"I do therefore certify that in my opinion the title of Charles Reeder to the said Dillon survey is good and valid, except to such parts of said tract as may be affected by the claims of the occupants aforesaid, which may or may not be superior to the title of said Reeder."

The basis of the present suit is that the interlock between the Rutter-Etting survey and the Dillon survey is much greater than any one supposed. But evidently Mr. Ferguson did not care, at the time he gave his certificate, how great this interlock was; for he certifies, in effect, that whether it was large or small the title under the Dillon survey, as to the whole of that survey, was good against the Rutter-Etting patent, and that Reeder's title was valid against the older patent, and as to all

the lands except that held by junior occupants. Was he mistaken as to the law of the case as thus presented? If so, neither Reeder nor Watts was responsible therefor. Would a survey have shown the extent of the conflict between the older patent and the Dillon patent? Certainly. But Mr. Ferguson did not deem such survey necessary, believing, for the reason stated in his certificate, that the Rutter-Etting patent did not affect the title under the Dillon survey. It will not do to say that there was not time for such a survey within the 30 days fixed for giving his certificate. His client was not bound to accept a certificate disclosing upon its face a conflict between the Rutter-Etting patent and the Dillon patent, but not disclosing the extent of that conflict; but he was at liberty to accept and act upon a certificate by his attorney, to the effect that such conflict did not affect the value of Reeder's title.

It is suggested that Mr. Clark would have lost the benefit of the contract if Mr. Ferguson had insisted upon a survey to ascertain the extent of the interlock between the Rutter-Etting patent and the Dillon patent before giving his certificate. Surely that is no reason why the court should interfere and annul the contract. If Mr. Clark, by his agent, Mr. Bell, chose to make the cash payment of \$35,000 with knowledge that an older patent covered a part of the lands in question, and relying upon the opinion of his attorney that Reeder's title was valid so far as the old patent was concerned, and without reference to the extent of the interlock, he is in no position to have the contract canceled because of such interlock, especially in view of the fact that he agreed to take a deed with special warranty only.

This view is not at all affected by the fact stated by Mr. Bell (who is an attorney, was the agent of Mr. Clark, and was interested in this purchase) that the first information he had as to the Rutter-Etting survey interfering with the Dillon survey was on the 25th of March, 1884, when Watts delivered to him Mr. Ferguson's opinion as to title; that Watts concurred with Mr. Ferguson that the interlock was only as to a small portion of those lands; and that the result of their conversation on the subject was that he, (Bell,) being satisfied as to title, gave to Watts the drafts upon Clark for the amount of the cash payment. At most this only shows that Ferguson and Watts concurred in the view that the interlock between the two patents was only as to a relatively small portion of the land. But that was not a false representation, that entitled the plaintiff to a rescission of the contract. Ferguson, representing Clark, made his investigation of title independently of the question as to the extent of the conflict between the two patents of 1796. Nothing was done to prevent him from making the fullest investigation. If, in order to enable Clark to get the benefit of what was supposed at the time to be a beneficial contract, he chose, instead of making or requiring such investigation, to make the question of title rest upon his belief and opinion as to the validity of the Dillon title as against the older patent, by reason of the facts stated in his certificate, and if Mr. Clark's agent, Mr. Bell, with the contract before him, accepted the certificate as prepared, and made the cash payment, then the

interlock between the Rutter-Etting survey and the Dillon survey constitutes no ground for annulling the contract.

I am of opinion that the prayer for a rescission of the contract ought not to be granted.

The next question to be considered is whether Reeder is entitled to the relief asked in his cross-bill; namely, a decree for the sale of the lands in question to raise such sum as may be due him as the balance of the purchase money. If the views already expressed are sound, a decree in favor of the defendant, Reeder, on his cross-bill, will necessarily follow. The amount apparently due him from the plaintiff is \$85,163.20, (50,096 acres at \$1.70 per acre,) less \$35,000 already paid, and less also the value of such lands (at the rate of \$1.70 per acre) as may be shown to be within the exterior boundaries of the Dillon survey, fixed by Sarver, and to which there is shown to be a better title than Reeder's "by reason of adverse title and possession." The lands thus to be excluded from the computation of the balance of the purchase money, and excepted from any decree of sale, include not only such as are in possession of junior patentees, holding by a better right than Reeder, but such lands as are within *both* the Dillon and Rutter-Etting surveys, and are in the possession of others having title under the Rutter-Etting patent, and who, by reason of such title *and possession*, have a better right than Reeder. For the balance remaining, with interest thereon from the date of Mr. Ferguson's certificate, Reeder will be entitled to a decree for the sale of the lands.

In view of the uncertainty which has prevailed as to whether the quantity of lands to be excluded from the computation as to the balance due Reeder would be ascertained by institution of actions of ejectment or in some other mode, it would not be just to proceed to a final decree upon the evidence now before the court. The case should go to a competent master, under whose directions a survey should be had, at Clark's election, as well as at his expense, to ascertain who, if any persons, are in possession of lands within the Dillon survey, as run by Sarver, claiming by title adverse to that of Reeder, and whether such claim by adverse title and possession gives a better right than Reeder has to the lands, or any of them, embraced in the contract of sale. In the event a survey be had, the parties should be given a reasonable time to make additional proof upon the above point, and upon such proof, and the evidence now in the record, so far as competent, the report of the master should be based.

JACKSON, J. I concur in the conclusions of Justice HARLAN.

WILLIAMS *et al.* v. WILLIAMS.

(Circuit Court, D. Kansas. November 25, 1889.)

GIFTS—INTER VIVOS—HUSBAND AND WIFE.

Plaintiff, living in England, separated from her husband. The latter came to America, married defendant, who did not know of his former marriage, and died, leaving children by both wives. Some time before his death he transferred his property, without consideration, to defendant, and, though he continued to have the use of it for his support, it did not appear that he could dispose of it without defendant's consent. Plaintiff never lived in the state in which the husband lived in this country, so that the husband's conveyances to defendant did not require plaintiff's signature. Defendant worked to help accumulate the property, and nursed the husband for several years, while he was disabled. *Held*, that plaintiff and her children had no claim on the property thus transferred to defendant.

In Equity.

Gillett, Fowler & Saddler, for complainants.

Frank H. Hay and Johnson, Martin & Keeler, for defendant.

FOSTER, J. This action is brought by Anne Williams, widow, jointly with eight of her children, heirs at law of William Williams, all subjects of Great Britain, and residents of Wales, against Catherine Williams, of Osage county, Kan., widow of said William Williams, under an illegal marriage, to recover the estate left by said William Williams, deceased, alleged to be worth about \$8,000. Anne Williams and William Williams were married in Wales in 1846. At the date of this marriage, Anne had, in her own right, in possession and expectancy, quite an estate. By the law of England, the husband at marriage became entitled to her personal property, and did receive quite a sum of money from her estate. There was an antenuptial contract entered into between the parties, by which Anne reserved an hundred pounds, the income of which was to be and remain her separate property. Among other things, it was provided in said contract, in case Anne should survive her husband having living issue, the estate was to be divided between Anne and her children in such proportions as William might, by will, designate. The parties lived together until 1871, when they separated, and in 1873 William came to America, bringing with him about £800. In 1875, Williams and the defendant, Catherine, were married in Kansas, and have two children living, issue of such marriage. Williams died in 1887, leaving quite an estate, among which is the farm in Osage county on which the defendant and her children now reside. The testimony as to whether Catherine, at the time of her marriage with Williams, was aware of his having a wife living in the old country, is somewhat conflicting; but I think the weight of the testimony and circumstances tend to show that she did not have such knowledge prior to the marriage, but first became aware of it after the birth of her first child. At the time of the marriage, Catherine had about \$500 of her own money, which went into the hands of her husband. These parties lived together, as man and wife, for 12 years. They were industrious and thrifty. The defendant worked as well as her husband to accumu-

late property, and she nursed and attended him for several years, while disabled from a sore on his leg. During the time of their marriage, Williams from time to time transferred and turned over to Catherine all the real and personal property, so that at the time of his death it was all in her name. The farm was deeded to her in 1885, the live-stock transferred in 1886, and the other personal property, from time to time, for several years prior to Williams' death. With the exception of the \$500 of her own money and her personal services in the accumulation of the property, there was no other valuable consideration for the transfer, and it was avowed by the parties that the object of the transfer was to save the property to Catherine and her children, and keep it from the wife and children in Wales. So the transfer rests mainly as a gift from Williams to Catherine. Under this state of facts, the question arises, which party has the best right and title to the estate? The antenuptial agreement cuts no particular figure in the case, as Williams made no will, and, the estate being in Kansas, it is governed by the laws of this state, so far as descent and distribution are concerned; and as the complainant, Anne Williams, never resided in Kansas, her signature was not necessary to a conveyance of the husband's real estate.

The main question, in its broadest sense, is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be that if such gift is *bona fide*, and accompanied by delivery, the widow cannot reach the property after the donor's death. *Withers v. Weaver*, 10 Pa. St. 391; *Deeouche v. Savetier*, 3 Johns. Ch. 190; *Holmes v. Holmes*, 3 Paige, 863; *Ford v. Ford*, 4 Ala. 145; *Stone v. Stone*, 18 Mo. 390. Neither the wife nor children have any tangible interest in the property of the husband or father during his life-time, except so far as he is liable for their support, and hence he can sell it or give it away without let or hindrance from them. Of course, the sale or gift must be absolute and *bona fide*, and not colorable only. And if the sale or gift would bind the grantor it would bind his heirs. *Caruthers v. Weaver*, 7 Kan. 110. It is claimed by the complainants that these transfers from Williams to Catherine were not absolute, but that the grantor and donor still used, enjoyed, and controlled the property. This conclusion is reached more from the fact that the parties assumed and held the relation of husband and wife to each other, rather than from any direct testimony to that effect. True it is, he continued to live on the farm as before, and quite likely looked after the business, but it does not appear that he had the power to dispose of any of the property without Catherine's consent. Besides this, there was a high moral obligation imposed upon Williams to provide for and support this woman and children, to say nothing of the valuable consideration of money and labor she had contributed to the common fund. If there remains any property owned by Williams at his death, the complainants are entitled to a decree for it; if not, the bill must be dismissed.

affirmed on appeal. See also *Caruthers v. Weaver*, 7 Kan. 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

LOCKETT *et al.* v. RUMBOUGH *et al.*

(Circuit Court, W. D. North Carolina, November, 1889.)

GARNISHMENT—EQUITY—INTERPLEADER.

In attachment and garnishment proceedings, it appeared that the garnishee had funds in his hands, received from defendant, in which the garnishee claimed no individual interest, and which he offered to pay to the party adjudged entitled thereto. Defendant's wife interpleaded, and claimed that the garnishee received the fund under an express trust for her benefit. Plaintiffs claimed a lien by the attachment proceedings on the fund, and alleged that defendant's attempted disposition of it for his wife's benefit was in fraud of creditors. It was not alleged that the garnishee knew of such fraud. *Held*, that the cause would be transferred to equity, to determine the rights of the contesting claimants, and relieve the garnishee.

At Law. Attachment proceedings.

Moore & Merrick, P. A. Cummings, and F. A. Sondley, for plaintiffs.
Joseph Adams and T. H. Cobb, for defendants.

DICK, J. This case is one of a number of similar actions brought by creditors of the Warm Springs Company, and the order herein made extends to all the cases now pending in this court. These several actions were brought against the defendants for debts incurred by the Warm Springs Company, and judgments have been rendered for the amounts of such indebtedness. In the course of proceedings the plaintiffs obtained warrants of attachment against the property of Joseph Pettyjohn, upon affidavits alleging that he had assigned and disposed of his property with intent to defraud his creditors. These warrants of attachment were duly served on the respondent M. E. Carter, and he was summoned as garnishee to appear at court and answer upon oath as to what effects he had in his possession belonging to the defendant Pettyjohn. The garnishee, in his answer, set forth the amount of money which he had received from Pettyjohn, and the facts and circumstances which attended the transaction, and expressed his readiness to dispose of the money in his hands under the order of the court; and prayed for indemnity and protection against any personal liability, in law or equity, to any of the rival claimants. Upon proper application Mrs. Louisa B. Pettyjohn and her trustee, A. S. Pannell, were allowed to interplead, and by affidavits set up their claim to the money attached, in the manner and upon the conditions provided by the laws of the state. Counter-affidavits were filed by the plaintiffs, and issues of fact were framed for a trial by jury.

Among other things, the pleadings show the following statements and allegations in relation to the fund in controversy: The defendants Joseph Pettyjohn and his wife, Louisa B. Pettyjohn, purchased a one-third interest in the property of the Warm Springs Company, and executed a mortgage to secure the payment of a balance of purchase money, and expressly stipulated that their interest in any insurance upon the hotel should be paid in discharge of such indebtedness. The hotel was destroyed by fire, and Pettyjohn declined to sign the proof of loss on account of some difficulty which he had with Rumbough and Rollins, and

the insurance companies refused to pay unless such proof was signed by him. A compromise was made by the partners, and Rumbough and Rollins agreed to settle all disputes and difficulties, and pay to Pettyjohn the sum of \$2,500 upon his executing a deed of quitclaim to all interest in the Warm Springs Company. The insurance was adjusted and settled under this compromise, and Pettyjohn executed a power of attorney to M. E. Carter, to receive the agreed sum of \$2,500, and pay the money to A. S. Pannell, trustee of the estate of Mrs. Louisa B. Pettyjohn, claiming that the insurance money paid on the hotel property belonged to his said wife.

At this term of the court the issues of fact which had been prepared came on for trial, and a jury was duly impanelled. Upon hearing the pleadings and the argument of counsel, I was of the opinion that the case involved equitable elements that could not be adequately adjusted and determined in an action at law in this court. An order was made to withdraw a juror, and to suspend the further proceedings in the action at law until all equitable questions and rights were adjusted and determined in a suit in equity. A further order was made directing the garnishee, M. E. Carter, to hold the fund in his hands subject to the order of the court, and to file a bill of interpleader on the equity side of this court, making all the claimants of the fund parties defendant, and praying the relief asked in his answer to the garnishment.

I have filed this written opinion in order to set forth the reasons which induced me to adopt the mode of procedure which I have ordered in this case. The pleadings show that the garnishee, M. E. Carter, has in his hands funds which are claimed under separate and distinct titles by the contending parties in these proceedings. He claims no individual interest in the fund, and there is no allegation or suggestion that he had knowledge of, or in any manner participated in, the fraud alleged against the defendant Pettyjohn; and he has offered to bring the money into court, or to hold the same, and pay it over to the parties who may be adjudged to be entitled. The plaintiffs claim a legal lien on the fund acquired by their proceedings in attachment against the property of the defendant Pettyjohn, and they aver that they are able to show that he is insolvent, and that his attempted disposition of the same for the benefit of his wife is fraudulent, as it was done with the intent to hinder and delay his creditors. The interpleader Louisa B. Pettyjohn insists that the fund in controversy came into the hands of the garnishee under the power of attorney of Joseph Pettyjohn, and was the insurance money due upon her separate interest in the hotel; and that the garnishee received the money under an express trust that he would pay over the same to her trustee, A. S. Pannell, for her sole and separate benefit.

The claim of the plaintiffs is legal; that of the interpleaders is equitable. In such a case there can be no interpleader properly awarded and determined at law in this court, where equitable titles and rights can only be heard and disposed of under its jurisdiction in chancery.

The principles of law and equity which I have briefly announced are fully sustained by 2 Story, Eq. Jur. § 813, and by many decisions of

the United States supreme court. The course which I have adopted will enable the court of equity to fully hear and determine the rights of the contesting claimants, and to afford the garnishee the relief to which he may be entitled under his bill of interpleader

ROBINSON *et al.* v. BROOKS *et al.*

(Circuit Court, W. D. Missouri, C. D. November 19, 1889.)

SALE—DELIVERY—REASONABLE TIME.

Plaintiffs received from defendants an order to ship them a machine, to be used in threshing, "at once, or as soon as possible," for which defendants were to pay upon its arrival, and were notified that the threshing season had already begun. The machine at that time was at a point but 28 miles from its destination, a letter from plaintiffs to the railroad agent at that point should have reached him in two days, and there was a daily freight train between the two points. One week after they received the order, plaintiffs were notified that the machine had not reached defendants, and that the season was nearly over. The order from plaintiffs to the railroad agent at the place where the machine was, to ship it to defendants, reached him the next day, but defendants did not receive the machine until four days after that. *Held*, that plaintiffs failed to comply with their contract in regard to the time of shipment, their delay being unreasonable.

At Law.

Cosgrove & Johnson, for plaintiff.

Daffin & Williams, for defendants.

PHILIPS, J. This is an action to recover the purchase price of a threshing-machine. The facts are substantially as follows: The plaintiffs are manufacturers at Richmond, Ind., under the firm name of Robinson & Co., of traction-engines with designated equipments for threshing out grain. In June, 1886, the defendant John Mackler was the local agent of plaintiffs in and about Cooper county, Mo., for the sale of said machines. In the forepart of that month he obtained from one D. P. Weathers an order on plaintiffs for the machine in controversy. The machine was shipped about the 21st of that month from Richmond, Ind., to said Weathers, but the plaintiffs were named as consignees. On the 28th day of June, Mackler wrote plaintiffs from Pilot Grove, Cooper county, Mo., informing them that Weathers had failed to comply with his contract and take the machine, and proposed to store it for plaintiffs if they would advance the freight charges thereon, which the vendee by his contract was to pay. It does not appear from the evidence whether the machine was then at Sedalia; for Mackler himself, as appears from his letter, did not know where it was. Mackler also suggested in this letter of the 28th of June that he thought within ten days he could find another buyer for the machine. On receipt of this letter, plaintiffs notified Mackler that they expected Weathers to comply with his contract, and take the machine. On the 30th day of June, Mackler wrote plaintiffs that he had happily solved the difficulty by finding another purchaser

of this machine, and inclosed an order therefor. This order was signed by the defendants, Joseph D. Brooks, M. J. Judd, and John Mackler. Mackler stated that he had taken one-third interest, and the other defendants two-thirds. This order was drawn up by Mackler on one of the printed blank forms furnished him as such agent by plaintiffs. It ran as follows: "We hereby order from you the following, [then follows a minute description of a ten-horse-power traction-engine, etc.,] to be second-hand, in good order, and to fill the bill, same as new as to working quality; * * * to be delivered on board cars at your factory, for shipment by the route you think best and cheapest, at once, or soon as possible, on or about July 1st, 1886, to be in care of John Mackler, at Pilot Grove, or as soon thereafter as possible,"—for which defendants were to pay, on arrival, \$1,235, and the freight. The letter of Mackler accompanying this order stated that the machine ordered was the one shipped to Weathers at Sedalia; and the letter contained this concluding clause: "If it [the machine] is laid off on the road, hunt it up at once, as we are ready to thresh now." This letter reached plaintiffs on the 2d day of July; whereat they left order with the railroad agent at Richmond, through whom they shipped the machine, to have it forwarded at once to Mackler, at Pilot Grove, Mo. On the same day they telegraphed Mackler what they had done, and also wrote him that they had telegraphed to Sedalia to have machine forwarded, and expressing the hope that it would reach him in good condition. "If not, notify us, and it will be made so." Plaintiffs supposed that the machine had been forwarded as telegraphed until the 9th day of July, when they received letter from Mackler, dated July 7th, informing them that the machine had not reached Pilot Grove on the 6th inst., and that the other parties, Brooks and Judd, would refuse to take it because it was too late, and asking what he should do, etc. On receipt of this letter, plaintiffs immediately telegraphed Mackler that defendants must comply with the contract, and take the machine. They telegraphed to the agent at Sedalia and St. Louis of the railroad having the machine in charge to have it forwarded at once to Pilot Grove. The machine did not reach Pilot Grove, distant from Sedalia about 28 miles, until the 14th of the month. Defendants declined to receive the machine, and it was afterwards sold by the railroad company for the freight. This action is to recover the purchase money or the contract price. The defendants make two defenses: *First*, that the delay in shipping the machine was unreasonable; and, *second*, that the machine, as it reached Pilot Grove, was incomplete, in that the smoke-stack of the engine was missing, etc., without which the machine could not be operated.

1. The important matter presented on the foregoing facts is, was the delay in forwarding the machine from Sedalia to Pilot Grove such as to discharge defendants from the obligation to accept it when it did arrive? This turns upon the construction or effect to be given to the terms of the contract, "at once, or as soon as possible." These words, in the administration of justice, cannot have an arbitrary, stereotyped definition. They must possess so much flexibility as to be read and applied in the

light of the surrounding circumstances. In *Palmer v. Insurance Co.*, 44 Wis. 208, the court, in speaking of the term, "as soon as possible," as employed in a policy of insurance, say it "must mean that the particular account of the loss should be made as soon as it could be, under the circumstances, or within a reasonable time, or as soon as practicable." 2 Benj. Sales, §§ 1027, 1028, refers to *Attwood v. Emery*, 1 C. B. (N. S.) 110, where the agreement of the vendor, a manufacturer, to deliver as soon as possible, was construed to mean, "as soon as the vendors could, with reference to their ability to furnish the article ordered, consistent with the execution of prior orders in hand." Reference then is made to the later case of *Engineering Co. v. McHaffie*, L. R. 4 Q. B. Div. 670, as expressive of the better rule, where it is held that these words "mean within a reasonable time, with an undertaking to do it in the shortest practicable time. * * * By the words as soon as possible," said COTTON, L. J., "the defendant must be taken to have meant that they would make the gun as quickly as it could be made in the largest establishment, with the best appliances." The delay in that case arose from the act of an incompetent workman, and the vendor was held for breach of contract. When the order in question was forwarded to plaintiffs, on the 30th day of June, the machine, presumably, was already on car at the station at Sedalia, Mo., within 28 miles of Pilot Grove. Plaintiffs were advised of the importance to the purchasers of the greatest expedition in forwarding it. They must have known, as manufacturers engaged in the business of selling such machines for the harvest in Missouri, that the season for threshing begins here about the last days of June, or the first of July; in addition to which, the letter of June 30th, accompanying the order for the machine, urged immediate attention, as the threshing was ready. Knowing, as plaintiffs did, that such machines were bought for use in the beginning and flush of the threshing season, this fact indicated to them that time was of the very essence of the contract, and that the terms "at once, or as soon as possible," meant at the earliest moment of time practicable to meet the purchasers' object in making the order. Plaintiffs received this order on the 2d day of July. A letter from them to the railroad agent at Sedalia would, in the ordinary course of mail, have reached him on the 4th of July. There was a daily freight train between Sedalia and Pilot Grove. The machine could have left Sedalia on the 5th of July, or by the 6th, on a liberal allowance, and reached Pilot Grove in a few hours. It is to be conceded to the plaintiffs that on the receipt of the order they recognized the importance of activity, for they left an order with the shipping agent at Richmond, Ind., over whose line they made the original shipment, to order by telegraph the car to be forwarded from Sedalia. And they claim that they also notified one of the defendants of this fact by telegram. But it does not appear that either of these telegrams were received. This being an action to recover the contract price, it devolves on plaintiffs to show that they performed essentially on their part. Did the plaintiffs discharge their whole duty, under the contract, by simply giving a memorandum order to the local railroad agent in Indiana, and returning to their place of business, and not making any

inquiry for seven days, to ascertain whether or not the order had been executed? They did not perform their undertaking to ship this car by merely leaving directions with an agent in Indiana to attend to it. The neglect of the railroad agent was their neglect, so far as these defendants are concerned. The plaintiffs might have their remedy against the railroad company, but their contract required that they should deliver the machine on board the cars, or, as applied to the facts of this case, that they should reship from Sedalia to Pilot Grove, to Mackler, as consignee. This undertaking on their part they had not executed on the 9th day of July, when they learned through Mackler that the machine had not reached Pilot Grove on the 7th. They then bestirred themselves by telegram, and not until the 10th of July did the reshipping order reach the agent at Sedalia; and the car did not reach Pilot Grove until the 14th day of July. No reason is assigned, nor a word of evidence offered, by plaintiffs to account for the delay of four days more after the shipping order reached Sedalia before the car was sent to Pilot Grove. It is true that under the contract the machine would, technically, be regarded as delivered to defendants when shipped from Sedalia. But plaintiffs fail to show the date of shipment; and, as the car did not reach Pilot Grove until the 14th of July, a distance of only 28 miles, and the evidence shows that there is a freight train each morning from Sedalia to Pilot Grove, the presumption is that the car was not reshipped from Sedalia until the morning of the 14th. Here, then, was a period of over 2 weeks after the order was given, and 12 days after plaintiffs received it, before it was executed; when, as already demonstrated, 5 or 6 days afforded every reasonable facility and time for its execution. As shown by the evidence, and as must have been known to plaintiffs,—for as much was indicated to them by defendant Mackler's letter of the 7th July,—when this machine left Sedalia the season for threshing grain was two-thirds over, and the main inducement to the purchase was passed. This was not, in the language of the authorities, "within a reasonable time, with an undertaking to do it in the shortest practicable time."

The great mistake which has led to this litigation was the thoughtless security with which plaintiffs sat down after leaving an order with the local railroad agent at Richmond, on July 2d. They trusted him to do that which they should have seen was done. His neglect, his delay, cannot be attributed to these defendants, nor exonerate the plaintiffs. Plaintiffs, in fact, seem to have acted with little business sense, conservatism, or prudence, throughout. After being advised, as they were, by Mackler that the machine would not be accepted if shipped after that date, they had two courses open to them,—to have stopped there, and sued defendants for damages consequent upon their refusal to accept, or, after shipping to Pilot Grove, and finding no one to receive the machine, they should have housed it, and sold it for the best price attainable, and sued for the difference in damages. They would neither advise the defendants to house it, without prejudice, nor reship to Sedalia, but abandoned the machine to its fate, to be sacrificed by the railroad for freightage. The exercise of a little common sense, and a spirit of compromise,

to a reasonable extent, often pay better in the end than a swift and ready resort to litigation. In the view thus taken of this case, it is unnecessary to discuss the other fact in evidence, and relied on by defendants, that the machine, when it did reach Pilot Grove, was without a smoke-stack, without which it could not be operated. The first defense is conclusive enough. It follows that the issues are found for the defendants. Judgment accordingly.

FARWELL v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 18, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—WOOLEN DRESS-GOODS.

Women's and children's dress-goods, which contain no cotton, except about 6 per cent., carded into the wool from which the warp is spun, come within the description of goods composed in part of wool, and are dutiable at 5 cents per square yard, and 35 per cent. *ad valorem*, under Act Cong. March 3, 1883, (Heyl's Arrangement, cl. 365, pars. a, b,) though the cotton was used for the purpose of securing a lower classification.

At Law.

Action by John V. Farwell against Anthony F. Seeberger, collector of customs, to recover excessive duty alleged to have been levied on certain goods.

Shuman & Defrees, for plaintiff.

W. G. Ewing, U. S. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiff imported a quantity of women's and children's dress-goods, composed mainly of wool, and weighing less than 4 ounces to the square yard, upon which the collector imposed a duty of 9 cents per square yard, and 40 per centum *ad valorem*, under paragraph e, clause 365, Heyl's Arrangement of the act of March 3, 1883. The plaintiff, insisting that said goods were composed in part of wool and part cotton, and dutiable, under paragraphs a and b of said clause 365, at 5 cents per square yard, and 35 per centum *ad valorem*, paid said duties under protest, appealed to the secretary of the treasury, by whom the action of the collector was affirmed, and brought this suit in apt time to recover the excess of duties so paid. The proof shows that the goods in question are women's and children's dress-goods; that they are composed mainly of wool; that there is about 6 per cent. of cotton carded into the wool from which the warp of said goods is spun; and that there is no cotton in the filling of the goods. The proof also shows that this mixture of cotton in the warp of the goods was made purposely to secure the classification of the goods as composed in part only of wool. There is proof in the case also tending to show that the mixture of the cotton with the wool in the warp adds to the strength and firmness of the goods, and makes them less liable to shrink; but my conclusion is that one of the

witnesses for the plaintiff honestly and frankly stated the facts in the case when he said, from the witness stand, "that he understood the object of mixing the cotton with the wool was to secure a lower classification for the purpose of assessment for duties." The goods contain no separate threads composed entirely of cotton, or other material than wool, but all the cotton in the goods is carded into and made a part of the yarns composing the warp. The collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a lower classification, and assumed also that so small a quantity of cotton would not materially change the character of the goods as merchandise, when offered for sale to consumers, and therefore looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty, under paragraph *e* of the same clause of the customs act. Congress having made special provision for a lower rate of duty upon goods, when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, I am of opinion that manufacturers and importers have the right to adjust themselves to this clause of the tariff, and to manufacture these goods mainly of wool with only a small percentage of cotton, for the purpose of bringing them specifically within paragraphs *a* and *b* of clause 365, and making them dutiable at the low rate contended for. The policy which dictated the revision of the tariff laws by the act of March 3, 1883, was evidently to secure a reduction of duty upon many articles, and to that end this clause was adopted specifically, making low-priced goods, composed only in part of wool, dutiable at a lower rate. The court has nothing to do with the policy of congress further than to construe their acts, as far as possible, according to the intention of the legislators, as it can be gathered from the law itself; and it seems very clear to me that the purpose in enacting this provision was to admit certain grades of woollen goods, with any mixture of material which should cheapen them, at a lower and reduced rate of duty. The proof shows that the goods in question contain so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, but I do not see that this changes the legal right of the plaintiff to bring his goods within the operation of the clause invoked by the admixture of even a small percentage of cotton, if he can do so; and I cannot see why goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton do not fairly come within the description of goods composed in part of wool. I am therefore of opinion that the collector should have classed these goods at the rate of duty contended for in the protest.

CASTRO v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 18, 1889.)

1. CUSTOMS DUTIES — ACTION TO RECOVER EXCESS — PURCHASER PENDING APPEAL TO SECRETARY OF TREASURY.

Under Rev. St. U. S. § 2981, which provides for an appeal to the secretary of the treasury, by the owner, importer, consignee, or agent of the merchandise, from the decision of the collector in ascertaining the duties, and makes the decision on appeal final, unless suit shall be brought within a certain time thereafter, a person who purchases merchandise of the importer, while in bond and pending an appeal, may sue for the excess of duties claimed to have been paid.

2. SAME—CLASSIFICATION—SCRAP TOBACCO.

Tobacco composed of fragments broken or cut off in the manufacture of cigars, and known to the trade as "scrap tobacco," is dutiable as unmanufactured tobacco, under Tariff Act March 3, 1883, (Heyl, cl. 251.) Following *Cohn v. Spalding*, 24 Fed. Rep. 19.

At Law.

Action by Daniel Castro against Anthony F. Seeberger, collector of customs, to recover the excessive duty claimed to have been levied on certain tobacco imported by the Roper & Baxter Cigar Company, and sold to plaintiff.

Shuman & Defrees, for plaintiff.

W. G. Ewing, U. S. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. The Roper & Baxter Cigar Company imported into the port of Chicago a quantity of tobacco clippings, being the ends cut off, and pieces of leaf broken from, cigars in process of manufacture, upon which the collector assessed a duty of 40 per cent. per pound, as "manufactured tobacco," under clause 249 of Heyl's Arrangement of the act of March 3, 1883. The importers insisted that said tobacco was dutiable at 30 per cent. *ad valorem*, as "unmanufactured tobacco," under clause 251 of Heyl, protested, and appealed to the secretary of the treasury, by whom the action of the collector was affirmed. After the assessment of duties, as aforesaid, and pending such appeal, the tobacco remained in bond, and while the appeal was pending plaintiff purchased the tobacco from the importer. After the decision of the appeal plaintiff paid the duties so assessed in order to obtain possession of the tobacco, and brought this suit in apt time, after the decision of the appeal, to recover the difference between the duties assessed and paid, and the rate contended for by the importer.

The question as to the classification and rate of duty upon tobacco clippings, like the goods in question, was fully considered and decided by this court in *Cohn v. Spalding*, 24 Fed. Rep. 19, and I see no reason for changing the ruling there made.

But it is further contended in behalf of defendant that as plaintiff did not import this tobacco, and was not the owner, consignee, or agent of the goods at the time they were classified, and the duties imposed upon them by the collector, and did not take the appeal to the secretary of

the treasury, he cannot maintain this suit to recover the excess of duties claimed to have been paid. Section 2931 of the Revised Statutes provides for an appeal to the secretary of the treasury by the owner, importer, consignee, or agent of the merchandise, if dissatisfied with the action of the collector in the ascertainment and liquidation of the duties; and the contention is that, as plaintiff was neither the owner, importer, or agent of the goods at the time the duties were assessed, he is not one of the persons allowed to bring suit, under the law, to recover the duties so paid. It seems to me that a liberal interpretation of this provision of the statute authorizing a suit to test the legality of the collector's action in the matter of the assessment of duties should be given so as, if possible, to bring all cases which may occur in the course of business before the proper tribunal for adjudication. In the case before us there is no doubt but that the importer of the goods, who was also the owner at the time they were imported, entered, and the duty assessed, took the proper steps to question before the courts the action of the collector. A protest in due form was made, and an appeal to the secretary of the treasury taken from the collector's action, and pending such appeal the importer sold the goods, which still remained in bond, to the plaintiff, and after the decision of the appeal the plaintiff, having become the owner of the goods, paid the duties exacted, and against which due protest had been made. The purchase by him virtually places him in the shoes of the importer. He takes the goods with the contest upon them, and it seems to me he has the election to continue the contest, which the importer had commenced by the protest and appeal, by asking the judgment of the court in regard to the validity of the classification and assessment for duty made by the collector. I cannot see how any harm can come to the government or to the collector from this construction of the law. The only objection that is seriously urged to it is that it would be in the power of the importer to split an importation up into many cases, by selling the goods in bond to different persons, and allowing each of them to maintain a suit for the duties paid upon the portion so purchased; but this is not so serious an objection as would be a ruling which should prevent a sale by the importer pending a contest as to the validity of the collector's action. If the owner or importer who has appealed can only bring the suit, an importer or owner would be compelled to hold the goods, perhaps greatly to his loss, until the contest is decided by the secretary of the treasury, or submit to the exaction of the collector's assessment, and if a purchaser who has paid the duties, properly protested against, cannot maintain a suit, then no one has any remedy. I am therefore of opinion that the objection taken to the right of the plaintiff to maintain this action as to the Roper & Baxter Cigar Company tobacco is not well taken, and that the plaintiff is entitled to recover as to all the tobacco in question in this case.

THE MIRANDA.¹

THE JOGGINS RAFT.

LEARY v. THE MIRANDA.

NEW YORK, N. F. & H. S. S. Co., Limited, v. LEARY.

(District Court, E. D. New York. November 13, 1889.)

TOWAGE—RAFT—CONTRACT—STORM—NEGLIGENCE.

The owner of the steamer *Miranda* contracted to tow a large raft of logs by sea from Port Joggins, Nova Scotia, to New York. The tow left Port Joggins on the 6th of December, 1887. On the 18th, in the midst of a heavy gale, the towing hawsers parted. The steamer lay by the raft for a time, and then started for New York, arriving there on the 22d. The raft became a total loss. Suit was brought to recover for the loss of the raft, and a cross-action to recover the towage money under the contract. The raft-owner claimed various faults in the *Miranda*: (1) That the original contract had been modified by an agreement that the raft should be towed to Eastport for orders, and not directly to New York, which modification had been violated. *Held*, that such agreement was not proved. (2) That the tow was taken to sea against the protest of a representative of the raft-owner aboard the *Miranda*. *Held*, that the charter-party contained no provision which gave any one power to direct the master of the *Miranda* where to go, and, on the evidence, the master committed no breach of duty in going as he did, for at the time he made such determination the weather was fine, and the danger of a voyage to New York was not so obvious as to make the attempt negligence. (3) That the contract was violated when the master determined to go outside Nantucket shoals, instead of through Vineyard sound. *Held* that, under the then known facts of the availability of Vineyard sound for the passage of such a tow, it was no breach of the master's duty to omit to go through that sound. (4) That the master's failure to keep near ports of safety caused the loss. *Held* that, under the condition of weather which existed when the master determined to go outside, such failure was no breach of duty. (5) That the *Miranda* had insufficient hawsers and stores. *Held*, that such insufficient provisioning was not proved. (6) That there was fault in not sooner sending the *Miranda* out again to look for the raft after arrival of the steamer at New York. *Held*, that this was no fault, as by the time the steamer's necessary repairs were finished it had become evident that further search was useless. The libel for the loss of the raft was therefore dismissed, and the cross-libel for the towage money sustained.

In Admiralty.

Action by Leary, owner of a raft known as the "Joggins Raft," against the steamer *Miranda*, for negligence in towage, resulting in the loss of the raft. Cross-action by the owner of the *Miranda* for towage money.

John Berry, (F. A. Wilcox, advocate,) for Leary.

Butler, Stillman & Hubbard, for the *Miranda*.

BENEDICT, J. These are cross-actions. The first is brought to recover damages for an alleged breach of a contract made between the libellant Leary and the owners of the steamer *Miranda* for the towage of a log raft from New Brunswick to New York, the raft having been lost on the voyage, and, as the libellant Leary asserts, by the fault of the steamer. The second action is brought by the owners of the *Miranda* against James D. Leary to recover compensation for towing the raft, demurrage, expenses, etc., according to the stipulations of the contract. The evidence shows that in the spring, summer, and autumn of 1887 a log raft

¹Reported by Edward G. Benedict, Esq., of the New York bar.

was constructed at Port Joggins, Nova Scotia, in the Bay of Fundy, for the libellant Leary, under the superintendence of Hugh R. Robertson, who had an interest in the profits. The raft consisted of round timbers, 10 to 30 inches in diameter, and 35 to 70 feet long, and contained in all some 3,000,000 of feet of timber. It was 525 feet long, 32 to 33 feet high, 50 feet beam, and 15 feet in diameter at each end, being cigar-shaped. It drew over 19 feet in the center, and weighed over 6,000 tons. It had no rudder or steering apparatus, and was intended to be towed by means of a chain leading through the center of it, to which were fastened other chains, surrounding the timbers at intervals, and so arranged that the strain upon the core-chain would tighten the chains around the timbers, and so hold the raft together.

On the 16th day of November, 1887, in anticipation of the launching of the raft at Port Joggins, the contract sued on was made in New York between Leary and Bowring & Archibald, agents of the owner of the steamer *Miranda*. The charter-party provided that the steamer should tow the raft from St. Johns, or other safe port in New Brunswick or Nova Scotia, to New York for the sum of \$3,000, to be paid on delivery of the raft in New York. The contract also provided that the charterer was to have representatives on board, not exceeding three, and that the officers and crew were to render all assistance and facilities that might be required for the safety of the raft; and it further provided that should the raft get adrift the steamer should search for the raft until she found it, or until she should be ordered to desist by the charterer's representatives on board the steamer. Considerable delay occurred in dispatching the steamer for the raft, so that it was the 6th of December when the steamer arrived at Port Joggins, where the raft lay. On the 8th of December the steamer set sail from Port Joggins with the raft in tow. On Friday morning, December 9th, she was off St. Johns, and at the close of the day was five or six miles from Lepreaux, on a course between Grand Manan and the main-land, the weather being fair. At 7:30 of that day the steamer's course was altered from W. to S. by W. $\frac{1}{4}$ W., and the steamer thus put on a course for New York by the open sea. On Sunday, the 11th, the weather came on thick, blowing from southward, with a nasty sea, the raft laboring and the steamer rolling. On Monday, the 12th, the weather moderated. On Tuesday, the 13th, there was a strong north-west wind, and high cross-sea. On Wednesday, the 14th, the weather was fine. On Thursday, the 15th, southerly winds, and heavy weather. At midnight it was blowing a gale, which continued on Friday, the steamer rolling, rails under, the sea breaking over the raft. A part of the time the steamer lay under the lee of the raft, drifting. On Sunday, the 18th, a gale blew from the south-west, called a "severe gale" by some witnesses, and a "hurricane" by others. Up to this time the voyage had been without disaster. The towing lines had proved sufficient, the raft had withstood the wind and the sea, and the steamer had been able to manage it. On Sunday morning, when the gale was at its height, the raft lying in the trough of the sea, every wave breaking over it, the port hawser by which the raft was being towed

parted. Immediately afterwards the starboard hawser carried away the steamer's fore-bitts and after-bitts, and ran out, and so all connection between the raft and the steamer was severed. The steamer lay by until 5 p. m.; then she started for New York, and arrived at Whitestone December 19th, and at New York December 22d. On December 21st and December 25th the United States steamer Enterprise went in search of the raft, with hawsers for towing, and found only logs adrift, and felt assured from what was seen that the raft must have been entirely broken up. On the 25th of December the master of the steamer Missouri passed through a field of logs, stretching to the horizon, five miles wide and seven miles long. The Morse was also sent out by Leary to search for the raft, but nothing was found but some drifting logs. Thereupon, on the 21st of January, Leary filed his libel *in rem* against the Miranda, claiming damages for breach of the towing agreement.

On the part of the libelant Leary it is insisted, first, that after the arrival of the vessel at Port Joggins the towing contract was modified, by agreement between the master and Robertson, according to which the raft was to be towed from Port Joggins to Eastport, the nearest American port, some 100 miles from Port Joggins, and there await orders from the owner, instead of being towed from Port Joggins to New York, as the charter contemplated. The claimants deny that any such modification of the charter was made. Upon this issue of fact there is conflicting testimony, but, taking it altogether, in connection with the action of the parties in New York, I am unable to find that an agreement to modify the charter-party, as claimed by the libelant Leary, was concluded with the master of the steamer.

It is next contended on the part of the libelant Leary that the contract was violated when the course of the vessel was changed to go outside the Grand Manan and to sea, against the protest of Robertson. The evidence shows that at this time Robertson, who was on board the steamer as a representative of Leary, demanded of the master that he take the raft to Eastport or Machias, and protested against proceeding to sea with her. The weather was then fair, and the sea smooth, but the season was late. Robertson's protest did not rest upon any present danger to the raft, but upon the dangers he anticipated in case a voyage to New York by the steamer, with such a raft in tow, was attempted at that season of the year. Here the contention of the libelant Leary is that the charter bound the master to take the instructions of Robertson as to the steamer's movements with the raft; and when, against the instructions of Robertson, he proceeded to New York, he thereby assumed a liability for the loss of the raft. The difficulty with this contention is that the charter-party contains no provision which gave Robertson or Littlefield, or even Leary himself, power to direct the master to take the raft to Eastport or Machias. The charter-party contains no language indicating an intention to allow Leary, by his representatives on board, to direct the movements of the steamer with the raft, or to control the destination of the steamer. Robertson indeed had a letter from Leary, which he showed to the master, in which Leary says to Robertson:

"You are the sole judge of all the steamer's movements with the raft. They are to navigate her. I will see the captain to-morrow, and give him to fully understand that." But this letter, which was written several days after the execution of the charter, does not refer to any provision of the charter containing such power, and states that such power is to depend upon a subsequent understanding to be had with the master; which understanding, so far as it appears by the evidence, was never had. When, therefore, the request was made by Robertson that the vessel put into Eastport instead of going to sea, it had no legal effect upon the master's duty, and the case upon this point resolves itself into this: whether it was a breach of the master's duty to take the vessel to sea, instead of going into Eastport or Machias, at that season of the year.

Upon the evidence I cannot hold that the master committed a breach of duty when he determined not to go to Eastport, but to go to sea. At the time he made that determination the weather was fair, and the sea smooth. He had then some experience with the raft, and was justified in believing that it was a reasonable undertaking to attempt to take it to New York. This is shown by the result, for the raft was safely towed for some 10 days of stormy weather. Undoubtedly the lateness of the season increased the hazards of such a voyage, but I am unable to hold that the danger of a voyage to New York at that season of the year was so obvious as to make it a breach of duty on the part of the master to make an attempt to take the raft to New York instead of taking it to Eastport.

Again, it is contended that the contract was violated when the master determined to go outside of Nantucket shoals instead of over the shoals, and through the Vineyard sound. Upon this point the evidence for the owner of the raft is that the master of the vessel was requested by both Robertson and Littlefield to take the vessel through Vineyard sound, to which request the master replied by showing instructions from his owner forbidding him to go through Vineyard sound. But assuming, as has already been pointed out, that the charter gave neither to Robertson nor Littlefield nor Leary the power to direct the master as to the course to be pursued by the vessel in the performance of the charter, I am unable to find that it was a breach of the master's duty to omit to take the passage of Vineyard sound. The raft was a large structure, without steering power of her own, and of a weight sufficient, under some circumstances, to overcome the power of the steamer. Vineyard sound is narrow and difficult. The only raft which up to that time had been taken through it was of a different construction, containing only 5,900 sticks of timber, while Leary's contained 21,000, and the passage was made in the summer time. The fact that a raft larger than Leary's, and similar in character, has been taken through the Vineyard sound in safety since the loss of the raft in question, may lead some to believe that Leary's raft could have been taken safely through on this occasion. But no such fact was present when the master of the *Miranda* was called on to elect between the Vineyard sound and the outer

passage. At that time the known facts respecting the availability of the Vineyard sound for the passage of such a raft did not, in my opinion, make it the duty of the master to take Vineyard sound. In this connection it is to be noticed, and the fact is significant, that neither in the original libel nor in the various amendments since made is the omission to take a course through Vineyard sound put forth as a ground of recovery.

Again, it is insisted on behalf of the libelant Leary that the master of the steamer was guilty of a breach of duty in taking a course for New York by the open sea, instead of going near the land, where ports of safety would have been available in case of storm. But no such occasion for resort to ports of safety arose up to the time when the master determined to go outside of the shoals instead of over the shoals and through the Vineyard sound, and, if the course by the Vineyard sound had been then resorted to, the vessel would have passed Chatham in fair weather, and without occasion to resort to any port of safety. The omission to keep near ports of safety, therefore, had nothing to do with the loss of the raft.

Still further, it is urged on behalf of the libelant Leary that the loss of the raft was owing to the use of hawsers insufficient in quality, size, and length. But the fact proved, that the steamer with the hawsers employed was able to manage the raft, and tow it in safety through several storms prior to the violent gale of the 18th, makes it plain that it cannot be held that insufficient hawsers were employed to make fast to the raft.

Yet again, it is contended that the parting of the port hawser in the storm of Sunday, the 18th, arose from the fact that the hawser had been permitted to chafe in the chock to such an extent as to make it unsafe to put it further out, as was done on the 14th, without splicing. But the hawser held from the 14th to the 18th, and when it parted the severe storm was at its height. The chafing is denied by the master. I am not satisfied by the evidence that the loss of the raft can be justly attributed to an unsafe condition of the hawser, when it was put further out on the 14th; by reason of chafing.

As to the claim on behalf of the libelant Leary that the steamer was insufficiently supplied with provisions and supplies, and thereby prevented from staying to search for the raft as the contract provided, there are two answers made: *First*, that the weight of the evidence is against the assertion that the steamer was short of provisions; *second*, that the loss of hawsers, the condition of the vessel, with deck broken up and bitts torn away, and mast strained, made it impossible for the steamer to do anything more for the raft. All on board seem to have concurred in the opinion that no more could be done.

Lastly, as to the claim that a breach of contract was committed in not sending the steamer out again in search of the raft, it is sufficient to say that by the time the necessary repairs were done to the steamer it had become evident that further search was useless.

There remains but to say that I have made a careful examination of the voluminous testimony in the case, which is by no means free from

extraordinary contradictions, and that I am unable to arrive at the conclusion that the loss of the raft was caused by any neglect or want of care or skill on the part of the steamer. It follows that the libel of Leary against the steamer must be dismissed, with costs, and that in the action of the New York, Newfoundland & Halifax Steam-Ship Company, owners of the steamer, against Leary, the libelants must have a decree for the sum of \$3,600, being for 12 days' service, at \$300 a day, as the contract provided.

In regard to the claim for demurrage, it is disallowed, and, as at present advised, the claim for chains, etc., is also rejected; but as to this latter claim I will hear counsel further on the settlement of the decree, if they desire then to be heard.

THE DAISY DAY.

(District Court, W. D. Michigan, S. D. February 26, 1889.)

1. MARITIME LIENS—PRIORITY—WAGES.

Maritime liens for seamen's wages are superior to a lien for damages from negligent towage, where it does not appear that the seamen contributed to such negligence.

2. SAME—DAMAGES.

A lien for damages from negligent towage has priority over a lien for supplies and repairs.

3. SAME—SUPPLIES.

The lien for supplies furnished to a vessel in a home port, given by How. St. Mich. § 8236, stands on the same footing as maritime liens for supplies and repairs furnished in foreign ports.

4. SAME—INSURANCE PREMIUMS.

A lien for unpaid premiums on insurance on a vessel, whether maritime or statutory, is subordinate to liens for supplies and repairs.

In Admiralty. On application for distribution of proceeds.

M. C. & A. A. Krause, for Gunderson.

Peter Doran, for intervening libelants for supplies and repairs.

Fletcher & Wanty, for Marine Insurance Co.

SEVERENS, J. On the 17th day of September, 1888, Charles G. Alley and others, composing the firm of C. G. Alley & Co., filed their libel in this court against the propeller *Daisy Day*, for the purpose of enforcing an alleged lien for supplies furnished the vessel during the season of navigation for that year. The owners having made default, a decree was entered pursuant to the claim of the libelants on the 21st day of November following, and the vessel ordered sold. Meantime a number of additional libels had been filed, some for sailors' wages, some for supplies, some for material and repairs, some for repairs, and one (that of G. F. Gunderson) for damages arising from the negligent towage by the propeller of the schooner *G. Barber*, belonging to that libellant. The vessel was sold under the decree upon the original libel, and the proceeds brought into the registry of the court. Supplemental decrees

have since been passed, establishing the claims of the other libelants, in whole or in part, and upon the intervention of the Marine Insurance Company an order has been made admitting its claim for an unpaid premium for an insurance effected by the owners upon the vessel in May, 1888. Hitherto the proceedings in the case have run on under the direction of the proctors for the parties interested, without seriously attracting the attention of the court. But it now appearing that the several sums allowed for seamen's wages, damages for negligence, insurance, supplies, materials, and repairs, together with the costs of the suit, amount to more than the proceeds of the vessel, it becomes necessary to determine the rank in which the several claims are entitled to stand in the order for distribution. And here serious questions arise; for the decisions on almost every one of them are in conflict, and the only resource left to the court is to follow such adjudications as should have here the force of authority, and, where such adjudications are wanting, to follow the lights which seem fed with the better reasons.

1. And first, with regard to the seamen's wages. The Gunderson claim for damages in tort contests with that class the priority of lien. It is not contended that any other claims could do this. Notwithstanding what is said in *Norwich Co. v. Wright*, 13 Wall., at page 122, namely, "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc., but they stand on an equality with regard to each other, if they arise from the same cause," I am satisfied that the rule in the admiralty law of this country is to prefer the claims of seamen for wages to claims for such torts as negligence in towage, provided the seaman whose claim is in question was free from fault. It would most generally happen that the subordination of common seamen in the marine service would render them guiltless in such occasions as collisions, and accidents from negligent towage; but if it appeared (as it does not here) that the seaman was in fact in fault, his claim should be postponed to the damages to which he had contributed. If I were satisfied that this question was present to the mind of the supreme court in *Norwich Co. v. Wright*, and intended to be adjudged, I should, of course, unhesitatingly follow what was there held; but I do not understand that it was so presented and adjudged. The line of reasoning in which the court was employed did not involve it. The lien for seamen's wages is a highly favored one, and, with the proviso above stated, I am of opinion that the rule declared and acted upon in *The Orient*, 10 Ben. 620, and *The Samuel J. Christian*, 16 Fed. Rep. 796, that this claim should be preferred to claims against the offending vessel for torts of such a character as the one in question, is correct.

2. The next question arises upon the relative rank of the claim for damages, as compared with the claims for supplies and repairs and insurance. And here I feel compelled to adopt the rule affirmed by Judge Nixon in the case of *The M. Vandercook*, 24 Fed. Rep. 478, and which I think the supreme court by necessary implication did adopt and hold in *Norwich Co. v. Wright*, *supra*, namely, that such claims in damages outrank the claims arising *ex contractu*, above enumerated. It is

true the district judges in the eastern and southern districts of New York held otherwise in *The Samuel J. Christian*, 16 Fed. Rep. 796; *The Grape-shot*, 22 Fed. Rep. 123; and *The Young America*, 30 Fed. Rep. 789; and freedom of action, as against the case of *Norwich Co. v. Wright*, is sought to be vindicated by the suggestion that in the quotation made from MacLachlan (and heretofore quoted) Mr. Justice BRADLEY was thinking only of the ranking together of claims arising from the same cause, and I have no doubt this was so. But it cannot be doubted that the supreme court did adjudge in that case that the claim for the loss of the cargo laden upon the offending vessel under a contract of affreightment was entitled to the same rank and to share equally with the claims for the injury to the wronged vessel and its cargo. It was necessary for the court to decide that question, because the damages of the libelants did not extend to the amount at which the liability of the ship-owner was limited by the act of congress, and unless the value of the cargo upon the libeled vessel would share with the claim of the libelants (which was for the value of the lost vessel and its cargo) no further question was in the case. But the court, having held as above stated, proceeded to adjudge the other questions upon that footing. And it seems to me that that adjudication destroys the validity of the reasoning pursued in the New York cases above cited. Their argument is that, conceding the damages resulting from collision are entitled to priority over claims for supplies and the like, arising *ex contractu*, still the damages resulting from fault in towage arise substantially from a breach of contract, and are suffered by one who has voluntarily come into contract relations with the towing vessel, as distinguished from one who has exercised no freedom of action, as in a case of collision. And the inference drawn is that the damages, being thus essentially for breach of contract, must rank with ordinary claims arising upon contract, and fall under those arising out of tort, as in collision. But every incident thus assumed as the basis for the difference of rank in claims for collision and negligent towage exists in the case of the claim for damages to the cargo on board the offending ship in collision. Surely there would seem to be no solid ground for distinguishing in this particular between claims arising out of a contract of affreightment and those arising out of a contract for towage. Besides, the question whether a claim is one in contract or for tort is by no means a sure test of priority, as the course pursued in one of those cases of giving priority for seamen's wages shows. But, aside from all that, the reasoning adopted by those courts to show that a claim arising from negligent towage is in its nature and analogies *ex contractu* is not, I must say, with great deference, satisfactory to me, and it seems that the view taken by Judge NIXON in *The M. Vandercook* is the correct one, (and see, also, *The Liberty No. 4*, 7 Fed. Rep. 226;) for, although the parties are in contract relations, they contemplate the opposite of negligence. By the contract the towing vessel undertakes the duty of vigilance and skill. It is quite similar in its general features to that implied in the contract for carriage, though it may not be in all respects the same. Is the duty which binds to skill and watchfulness

any the less because the contract relation exists? The law imputes the duty in either case, whether to a vessel proceeding on her course among strangers, or to one who has by stipulation undertaken an obligation wherein the law implies that duty as specifically and distinctly due to one. An action in tort would lie for a violation of that duty, (*The Quickstep*, 9 Wall. 665, 670,) and I know of no rule of law or anything in reason which should lead to any distinction in the character of the duty or in the merits of the claim for damages in the two cases. It was also said in *The Samuel J. Christian*, 16 Fed. Rep. 796, 798, as a reason for postponing such damages to those for supplies, that the contract of towage has no relation to any necessity of the tug, in no way tends to increase the value of the tug, or to preserve her, or to enable her to earn freight; and that it is one of the necessities of commerce that a ship needing repairs and supplies should be forthwith relieved. This is true, undoubtedly, but it is also essential to commerce that the ship when equipped should find employment. Giving it legs and wings to speed on its way is profitless, if it goes empty. The ultimate object of the system of maritime liens was the encouragement and increase of commerce. It is therefore held that the claim for damages will have priority over those for supplies and repairs.

3. The third question arises in regard to the different claims for supplies, material, and repairs, upon the circumstance that some of them were furnished at the home port of the vessel, and within the state, while others were furnished abroad. The statute of Michigan (How. St. § 8236) gives a lien for such furnishing at the home port. But it was held by WITHEY, J., in *The St. Joseph*, Brown, Adm. 202, that liens for supplies and repairs furnished in foreign ports, which are strictly maritime liens, should have priority over liens under state laws. That rule has been followed in this district ever since by acquiescence and without question. Its correctness is challenged now. The question also arose in the eastern district, in the case of *The General Burnside*, 3 Fed. Rep. 228, and was decided by Judge BROWN in the same way; but on appeal to the circuit court this decision was reversed by BAXTER, J., who held, for reasons which were then stated, that claims for which the state law gives a lien should have equal rank with claims for which a lien is given by the maritime law, and should share with them *pro rata* in case of deficiency. This rule was followed by the district judge in the southern district of Ohio in *The Guiding Star*, 9 Fed. Rep. 521, and on appeal the decree below was affirmed by Mr. Justice MATTHEWS in the same case, (18 Fed. Rep. 263,) the circuit judge being also present and concurring. I feel bound to follow this ruling, without entering upon any discussion of it. The effect of the latter cases is to overrule *The St. Joseph*, *supra*. The supplies, etc., in the home port, will therefore stand on the same footing with the foreign claims in respect to those items.

4. The remaining question is in regard to the location on the schedule of the claim for insurance. It was held in *The Dolphin*, 1 Flap. 580, that the maritime law gives a lien for such claims, but that they were of low rank, and should go to the foot of the schedule. In *The Guiding*

Star it was held that there was no maritime lien, but as the statute of Ohio gave a lien, and the contract itself had been held to be maritime in its nature by the supreme court in *Insurance Co. v. Dunham*, 11 Wall. 1, the court of admiralty would enforce it, and in that case it was directed to be put with the claims for foreign and domestic supplies, and to share with them in the proceeds. It is not clear to my mind that the relative rank of this claim was considered by the court in the case of *The Guiding Star*. If it were clear that it was considered, I should, of course, follow it; but the case of *The Dolphin* had been decided, and the volume of Reports containing it published several years before. That decision, which contained a full discussion of the subject, was not referred to, nor was any other authority referred to, and the matter was not discussed. The fact that the statutes in that state and in this give a lien for this claim does not at all determine its relative merit, nor confound the principles which prevail in admiralty. If it did it would put such a claim on a footing with seamen's wages and other favored claims. This court will not admit the statute of a state to accomplish such results in its procedure. The claim for insurance, though admitted, must stand on its own merits; and considering that the contract is one simply of indemnity to the owner, in no way helps the ship, and is collateral to its employment, I shall, with a little misgiving of my right to this opinion, in view of what was done in the case of *The Guiding Star*, hold that this claim should be subordinated to the claims for supplies and the like, and given the next place. In holding this, no stress is laid upon the question whether the lien is maritime or statutory, consideration being given solely to its merits as a lien upon the ship; having in mind the principle and purpose for which the court as a court of admiralty must regard such liens as attaching. It has been the practice in this district in such cases to adjust the costs, so that the costs on the original claim should be paid first, and after that so that those incurred in respect of each class of claims should precede in payment the class to which such claims respectively belong, and so on down through the list. That practice will be followed in the present case. An order for distribution will be entered in accordance with the foregoing opinion.

LAVERTY *et al.* v. CLAUSEN.¹

(District Court, S. D. New York. November 26, 1889.)

SHIPPING—LIMITATION OF LIABILITY ACTS—CONTRACT TO INSURE—ACT JUNE 26, 1884.

Where a carrier contracts to insure cargo, and fails to do so, and the cargo is lost by the sinking of the vessel, the carrier cannot limit his liability to the value of the vessel. The limitation of liability acts do not affect the liability of vessel owners upon their direct personal contracts outside of the ordinary business of the vessel.

In Admiralty.

Action for the value of a cargo of tin lost on respondent's lighter.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Hyland & Zabriskie, for libellant.

E. G. Davis, for respondent.

BROWN, J. Taking all the testimony together, respondent's as well as libellant's, I am satisfied that the understanding upon which the tin was shipped upon the respondent's lighter was that it should be insured by the respondent. Whether a common carrier or not, he is here practically in the same situation. For the injury and loss of the tin by the subsequent sinking of the lighter the respondent is therefore answerable.

The amended answer claims a limitation of his liability to the value of the vessel, under the acts of 1851, (Rev. St. § 4283,) and of June 26, 1884, (23 St. at Large, p. 57, § 18.) In previous cases I have expressed the opinion that the act of 1884 does not limit the liability of the owners of vessels upon their direct personal contracts outside of the ordinary business of the vessel, but only the liability cast upon them by law, by reason of their ownership of the vessel, through the contracts or torts of the master or others engaged in her navigation. *The Amos D. Carver*, 35 Fed. Rep. 669; *Force v. Insurance Co.*, Id. 778; *Miller v. O'Brien*, Id. 783.

The contract in the present case was the personal contract of the respondent; and, following the view previously expressed, I must hold him not entitled to the limitation of liability as claimed, and order judgment for the libellant for \$2,100, the amount proved, with interest and costs.

UNITED STATES v. THE RESOLUTE.

(District Court, D. Rhode Island. November 9, 1889.)

1. NEUTRALITY LAWS—FORFEITURES.

Rev. St. U. S. § 5283, provides for the forfeiture of vessels violating neutrality laws, "one-half to the use of the informer, and the other half to the use of the United States." *Held*, that where a vessel is forfeited and sold under this provision, and one-half of the proceeds is paid to the United States, the other half remaining in the custody of the court, the latter half will not be paid to the United States, even after the lapse of many years, where it does not appear that it will not be needed to satisfy a judgment for some claimant as informer, and it is immaterial that Rev. St. U. S. § 8689, provides for refunding moneys "received and covered into the treasury before the payment of legal and just charges against the same."

2. SAME.

Even if no other claimant ever appears, such fund is not the property of the United States, under the statute.

In Admiralty. Petition for payment of moneys into the United States treasury.

Rathbone Gardner, U. S. Atty., for the petitioner.

CARPENTER, J. The schooner *Resolute* was libeled and condemned for violation of the neutrality laws, (3 St. at Large, c. 88, § 3, p. 447; Rev. St. § 5283,) and the proceeds of sale were paid into court in the year 1874. One-half of those proceeds was paid to the United States, and the other one-half, amounting to \$2,322.42, remains in the registry of the court. A claim was filed by David Ritchie, alleging that he was entitled to this fund, as informer, and his claim was heard and dismissed by the court. This petition is now filed on behalf of the United

States, praying that the fund now in the registry be paid into the treasury. To the granting of this motion there are, as it seems to me, two objections:

First. It does not appear that the money will not be needed to satisfy a judgment in favor of some claimant who may prove his right as informer. Such a result, in this case, after the lapse of so much time, seems very improbable; but I cannot make a judicial finding based on the proposition that it is impossible. The district attorney suggests that if such a contingency should arise the money would be still available for the satisfaction of the informer, under the provisions of Rev. St. § 3689, which appropriates such sums as may be necessary "to refund moneys received and covered into the treasury before the payment of legal and just charges against the same." This suggestion does not meet the difficulty. The appropriation act above quoted is intended to pay sums erroneously, or by inadvertence, paid into the treasury; and, however efficient it may be for that purpose, it does not justify a payment into the treasury in a case where it is known at the time of the payment that there may be a just and legal claim on the part of some other person. Still further, it seems to me clear that the statute quoted would not be efficient to secure the repayment of this fund, if it should be needed. A claimant who had established his right, and obtained the judgment of this court for the payment to him of the fund in question, would be then obliged to present his claim for the money to the accounting officers of the treasury, in which he must allege that the money had been paid into the treasury "before the payment of legal and just charges against the same." To support this allegation he must, of course, maintain the proposition that his claim is a "legal and just charge." If the statute contained a provision, in express and unmistakable language, that the judgment of the court should be conclusive on this question, it might, perhaps, be argued that the fund would certainly be paid over in pursuance of the judgment, or, at least, that the court should assume that it would be so paid over. But, in the present state of the case, I should think it not improbable that the accounting officers of the treasury would conceive themselves required to make an independent examination of the question whether the claim were a "legal and just charge," and to decide the question of payment according to the result of such examination. I do not think it right to subject to such contingencies a fund now properly in the custody of the court.

Secondly. It does not appear that the fund now in court is the property of the United States, even if no further claimant should ever set up a demand to receive it as informer. The statute provides that the ship or vessel "shall be forfeited, one-half to the use of the informer, and the other half to the use of the United States." Rev. St. § 5283. There does not appear to be in this language any expression of an intention that the whole shall go to the United States, in case no person establishes his right as an informer. Such a case seems to have been left without any provision as to the disposal of the share set apart for the informer.

On the whole, therefore, I am of opinion that the petition should be denied and dismissed. Petition dismissed.

VELIE v. MANUFACTURERS' ACCIDENT INDEMNITY CO. OF THE UNITED STATES.

(Circuit Court, E. D. Wisconsin. December 18, 1889.)

REMOVAL OF CAUSES—TIME OF APPLICATION.

Under the removal act of 1888, (25 St. U. S. c. 866, § 3, p. 435,) providing that the petition for removal must be filed "at the time or any time before the defendant is required, by the laws of the state or the rule of the state court in which suit is brought, to answer or plead to the declaration," an extension of the time to file the answer beyond the time expressly provided in the state statute does not extend the time to file a petition for removal beyond that time.¹

At Law. On motion to docket cause.
Fairchild & Fairchild, for defendant.
Webster & Wheeler, for plaintiff.

JENKINS, J. The plaintiff brought action in the state court against the defendant, a foreign corporation, by service of summons and complaint, on the 20th day of May, 1889. By law the answer was due June 9th. The defendant appeared to the action, and on the 3d day of June obtained from the plaintiff a stipulation extending the time to plead until July 9th. On July 6th the defendant filed in the state court its answer, and also its bond and petition for the removal of the cause into the federal court, and moved for an order accordingly. The motion was denied by the state court, upon the ground that the application was not timely filed. The defendant now presents a certified copy of the record, and asks leave to docket the cause in this court.

The present removal act requires, with respect to the time within which the right to removal is to be asserted, that the petition must be filed "at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought to answer or plead to the declaration of the plaintiff." 25 St. c. 866, § 3, p. 435. The question presented is whether an extension of time to plead enlarges the time to petition for removal of the cause. The history of legislation with respect to the removal of causes from state to federal courts throws light upon the intention of congress, and aids to properly construe the provision under consideration. By the judiciary act of 1789, (1 St. 79,) the application for removal must be made by the party "at the time of entering his appearance." Under that act it is clear that the right must be exercised with the initial step in the cause, or it was lost. Under acts of 1866 (14 St. 306,) and of 1867 (14 St. 558,) the right of removal could be exercised at any time before the trial or final hearing of the cause. These acts enlarged both the right and time of removal, and under them abuses sprung up. The right was frequently exercised to delay the cause, rather than to obtain its adjudication in a federal court. The act of 1875 (18 St. 470) sought

¹As to what is the proper time for filing a petition for removal of a cause, see *Burck v. Taylor*, 39 Fed. Rep. 581, and note.

to correct those abuses by restricting the time. Under that act the petition must be made and filed "before or at the term at which such cause could be first tried, and before the trial thereof." By the acts of 1887 (24 St. 552) and of 1888, (25 St. 435,) the time was still further restricted to the time designated by the law of the state or by rule of the state court to answer or plead to the declaration. This act is less stringent than the act of 1789, and less liberal than the other statutes. Under the act of 1875, it has been ruled that the election must be made at the first term at which the cause was triable. That was declared to be "that term in which, according to the rules of procedure of the court, whether they be statutory or rules of the court's adoption, the cause would stand for trial, if the parties had taken the usual steps as to pleading and other preparations. This term at which the case could be first tried is to be ascertained by these rules, and not by the manner in which the parties have complied with them, or have been excused for non-compliance by the court, or by stipulation among themselves." *Car Co. v. Speck*, 113 U. S. 84, 86, 5 Sup. Ct. Rep. 374.

So, here, the statute provides a definite time, viz., the time designated by the law of the state to answer the declaration, or, when the law is silent, by the rule of the state court. In most of the states that time is fixed by statute; in some of the states,—notably in Tennessee and Indiana,—by rule of court. In that respect congress sought to conform to the usage in the several states. Possibly, under the variant practice, no more definite time could have been designated. By the law of Wisconsin (Rev. St. Wis. § 2648) the answer must be served within 20 days after service of the complaint. In my judgment, it is no more competent to enlarge the time by stipulation of the parties or by order of the court extending the time to answer than it was competent, under the act of 1875, by demurrer, continuance, or stipulation, to enlarge the time beyond the term at which the cause could have been first tried. This right of removal is not a floating right, adrift upon the uncertain sea of stipulations, demurrers, dilatory pleas, and proceedings; but is fixed and stable, measured, as to the time of its exercise, by the statute law of the state when that law speaks to the subject, or by the rule of the court where the time of pleading is so determined, in the absence of statute law. As to the state of Wisconsin, the act is to be read as providing that the petition for removal must be filed within 20 days after service of the complaint. Such construction effectuates the manifest intention of congress, insures certainty and uniformity in the proceeding, prevents abuses, and, in my judgment, conforms to the plain meaning of the language employed. Other construction tends to confusion and uncertainty. The time appointed would not be uniform in all actions in the same state, and could be indefinitely extended, limited only by the ingenuity of counsel in postponing a plea to the merits. In this state, where decisions upon demurrers may by direct appeal be reviewed in the court of last resort, an answer to the merits might readily be postponed for a year. The very evil sought to be remedied by congress would, by such construction, be perpetuated, not restricted. It is not to be

permitted, as was said in the *Removal Cases*, 100 U. S. 473, that a party "may experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take the case to another tribunal." It is a cardinal principle of construction that statutes should be interpreted to suppress the mischief and advance the remedy. Looking, then, to the clear design of congress to abate the abuses that had arisen under the acts of 1866 and 1867, and to further restrict the time allowed by the act of 1875, it is apparent that congress intended that the right should be exercised at the earliest period possible. That period was designated to be at or before the time prescribed by law for answering; not the time when the cause, by reason of dilatory proceedings, might be ripe for an answer; not the time enlarged by stipulation of the parties or by order of the court, but the determinate time specified in the statute or in the rule of court. The statute or the general rule of the court speaks that time, not the order or stipulation made in the particular case.

Upon this question there has been lack of uniformity in the federal courts. In all the cases to which I am referred the decision was right, but in some, with deference be it said, not bottomed upon exact reasoning. In but few of them was the question directly involved. Some of the opinions contain expressions which might authorize the inference that the time might be enlarged by order extending the time to answer. Such declaration was unnecessary to the decision, and therefore not entitled to the weight given to a conclusion determinately reached upon careful consideration, and upon a question essential to the decision. In *Simonson v. Jordon*, 30 Fed. Rep. 721, the petition was filed after the expiration of the extended time for answering. The cause was rightly remanded. Judge WALLACE asserts, however, that the petition would have been timely filed within the enlarged time for answering. The remark is *obiter*, and possibly an inadvertent expression. In *Hurd v. Gere*, 38 Fed. Rep. 537, the same learned jurist held that the petition comes too late when filed within the enlarged time for answering obtained through an *ex parte* order made after expiration of the time designated by the law. I am unable to reconcile this ruling with the opinion expressed in the former case. Judge WALLACE concedes that the *ex parte* order, although irregular, was not void. Until vacated, it was as effectual as if made upon notice. It had not been vacated, and was consequently operative to annul the default. The petition was therefore seasonably filed, if the time for such filing can be enlarged by stipulation or order. The cause was properly remanded, because of failure to prefer the petition within the time limited by statute to answer the declaration. In *Dwyer v. Peshall*, 32 Fed. Rep. 497, by oral agreement, the time to answer was extended indefinitely. Judge LACOMBE, *arguendo*, refers approvingly to the statement in *Simonson v. Jordon*, that an extension of time to answer enlarges the time for removal, but holds an oral stipulation ineffectual. He asserts that the act of 1887 materially shortened the time for removal allowed by the act of 1875, and should be "strictly construed against any one seeking to evade the additional lim-

itations which it puts upon the right of removal." Such construction, I venture to observe, would be wholly defeated, if the *obiter* suggestion in *Simonson v. Jordan* were accepted as the correct interpretation of the statute. The cases of *McKeen v. Ives*, 35 Fed. Rep. 801, and *Lockhart v. Railroad Co.*, 38 Fed. Rep. 274, are not in point. These cases arose in Indiana and Tennessee, respectively, where the time for pleading is regulated by rule of court. In each case it was held that the petition was filed within the time for pleading allowed by the rule of court. In *Wedekind v. Southern Pac. Co.*, 36 Fed. Rep. 279, the cause was properly remanded, the petition being filed after expiration of the time for answering. Judge SABIN holds to the necessity of a strict compliance with the statute, which he says "was intended to compel parties to decide *in limine* in what court they wish the trial of the case to be had, and to make them abide by such decision." Any inference sought to be drawn from certain expressions in the opinion that the time for removal might be enlarged by extension of the time for answering is nullified by the decision in *Delbanco v. Singletary*, *ante*, 177, in which Judge SABIN explicitly holds that the time cannot be enlarged by order or stipulation of any kind. In *Kaitel v. Wylie*, 38 Fed. Rep. 865, the cause was remanded. The petition was held too late, although filed before answer was due to an amended declaration. Judge BLODGETT expressly declares the statute to be imperative that the application for removal must be made when the plea is due, and that it comes too late when made after the time to plead designated by law or by rule of court. The cases of *Dixon v. Telegraph Co.*, 38 Fed. Rep. 377, and *Austin v. Gagan*, 39 Fed. Rep. 626,—decisions by Judge SAWYER,—fully sustain the conclusion which I have reached upon the proper construction of the statute, and, as I think, demonstrate its correctness. The motion is overruled.

KIMBERLY v. ARMS *et ux.*

(Circuit Court, N. D. Ohio, E. D. November 22, 1889.)

1. EQUITY—BILL OF REVIEW—PENDING APPEAL TO SUPREME COURT.

The circuit court cannot entertain a bill of review to vacate a decree, from which the petitioners have prayed, and been allowed, an appeal to the supreme court, though they aver that they do not intend to perfect their appeal in the supreme court.

2. SAME—DECREE ENTERED IN PURSUANCE OF MANDATE.

Where the circuit court has, under and in pursuance of a mandate from the supreme court, entered a decree, it cannot entertain a bill to review such decree, either for errors of law apparent or for newly-discovered evidence, without leave first had from the supreme court.

3. SAME—ERRONEOUS CONCLUSIONS FROM EVIDENCE.

A bill of review cannot be entertained to correct supposed erroneous deductions or conclusions from the evidence.

4. SAME—FAILURE TO AVER PERFORMANCE.

The proposed bill must aver performance of, or inability to perform, the decree sought to be reviewed.

5. SAME—FRAUD AND PERJURY.

A bill of review sought on the ground of fraud and perjury will not be entertained, where it appears that the alleged fraudulently procured and perjured evidence was not controlling in the determination of the case on its merits.

6. SAME—ALLEGATIONS OF DEFENSE ON MERITS.

In order to obtain relief on the ground of fraud, it must be averred and shown that there was a valid defense on the merits.

7. SAME—LEAVE OF COURT.

Though a bill of review on the ground of fraud in obtaining the decree may be filed without leave of the court granting the decree, where that ground of relief is united in the same bill with others, which require such previous leave, the bill cannot be separated and leave granted as to part and refused as to the others.

In Equity. On application for leave to file a bill of review.

A. W. Jones and Judge Griffith, for Kimberly.

Stevenson Burke, for Arms and wife.

JACKSON, J. Under and in pursuance of a mandate of the supreme court of the United States, a final decree in favor of complainant, Kimberly, was entered in this cause in May, 1889. The defendants Arms and wife now make application to this court for leave to file a bill of review, for the purpose of vacating and setting aside that decree. The grounds chiefly relied on for annulling said decree, as set forth in the bill of review sought to be filed, are alleged errors of law apparent on the face of the record, newly-discovered evidence, and fraud on the part of Kimberly in procuring said decree. It appears from the record in the case and the proposed bill of review, which is presented with the application for leave to file, that in 1878 complainant, Kimberly, and defendant Charles D. Arms entered into partnership for the purchase of mining interests and properties,—Arms being the active partner in making the purchases and conducting the business of the firm; that in 1879, while said partnership was still in existence, Arms, in connection with one Fairbanks, purchased an interest in the Grand Central mine, in Arizona. In 1880 the partnership of Kimberly & Arms terminated, and thereafter a controversy arose between them as to the interest acquired by Arms in said Grand Central mining property. Kimberly claimed that this acquisition, to the extent of Arms' interest therein, was partnership property, in which he was entitled to share. This claim was denied by Arms, who insisted that it was purchased on his private account. Thereupon Kimberly, in September, 1881, filed his bill in this court, charging and alleging that Arms' interest in said Grand Central mine was partnership property; that Arms had agreed with him in advance to make the purchase on joint account, and, after it was acquired, had repeated that he had made it as agreed. Kimberly sought to have his interest declared, and for an account of profits. Arms answered the bill, denying the alleged agreement to purchase said interest on joint account, and insisting that it was well understood and agreed between himself and Kimberly that said purchase was made solely on account of himself and said Fairbanks. As a corroboration of his statement of the transaction, and as a further answer to the relief sought by Kimberly, Arms set up the defense that in March, 1880, there was a settlement of all partnership matters between himself and Kimberly; that in that settle-

ment it was understood and agreed that he was to, and that he did, reserve to himself, as his absolute property, said interest in the Grand Central mine, etc. Such were the main issues made by the pleadings. After much testimony was taken on both sides, the parties, by consent, had the case referred to Hon. R. A. Harrison, as special master, to hear the evidence, and decide all the issues between them, with directions to make his report to the court in the premises, stating therein separately his findings of law and fact. In April, 1885, the special master made his report to this court, finding generally all the issues of fact and conclusions of law in favor of said Kimberly. To this report the defendants filed various exceptions. Said report and exceptions came on for hearing before Circuit Justice MATTHEWS, who sustained said exceptions, set aside the master's report, and dismissed the bill. From this decree, Kimberly appealed to the supreme court of the United States. The cause was heard on appeal in that court, and on March 5, 1889, a decision was rendered, reversing the decree below and remanding the cause to this court, with directions to confirm the report of the special master, and to take further proceedings not inconsistent with the opinion of the supreme court. See *Kimberly v. Arms*, 129 U. S. 512-530, 9 Sup. Ct. Rep. 355. In conformity with, and under the directions of, said mandate of the supreme court, this court, in May, 1889, confirmed said report of the special master, and entered a final decree in Kimberly's favor, in accordance with its findings of fact and conclusions of law.

The bill of review, which defendants now apply for leave to file, seeks to open, vacate, and set aside that decree. But before making said application the defendants, during the term of court at which said decree was rendered, prayed an appeal to the supreme court, which was allowed upon their giving bond, with sureties, to be approved by the court. Such appeal-bond was duly executed and approved, and said appeal, so far as this court is concerned, was thereby perfected before defendants presented this application for leave to file a bill of review. It is, however, stated in the bill of review which defendants ask leave of this court to file that it is not the purpose of defendants, as at present advised, to perfect their said appeal by filing the record and docketing this cause in the supreme court, as required by the rules of practice of that court. This averment does not, of course, amount to an abandonment of said appeal, nor to a definite purpose or intention to do so, but leaves the question of its further prosecution to the option of appellants. No new proceedings having been had in this court between the mandate of the supreme court and the decree based thereon, said appeal by defendants was no doubt improvidently taken and allowed. Still, it has the effect of transferring the cause, and the decree sought to be reviewed, into the supreme court, where it will remain until heard and disposed of on the merits, or dismissed, under the provisions of the ninth rule of said court, for appellants' failure to file the record and docket the case. The authorities settle that an appeal, in cases thus situated, will not be entertained by the supreme court. *Stewart v. Salmon*, 97 U. S. 361; *Humphrey v. Baker*, 103 U. S. 736; *Hinckley v. Mor-*

ton, Id. 764. With said appeal pending in the supreme court, whether there rightfully or improvidently, this court clearly has no authority or jurisdiction to entertain a bill of review to impeach said decree, over which it has, for the present, at least, [no jurisdiction.]

A party cannot concurrently pursue the two remedies of appeal and bill of review for error apparent on the record, as the latter is only a substitute for, or in the nature of, a writ of error or appeal. It is accordingly settled (*Ensminger v. Powers*, 108 U. S. 302, 303, 2 Sup. Ct. Rep. 643) that while an appeal is pending in the supreme court, although there is no *supersedeas*, the circuit court has no jurisdiction to vacate the decree in pursuance of the prayer of the bill of review, because such relief is beyond its control. The appeal of Arms and wife having taken this cause, and the decree complained of, beyond the control of this court, thus depriving it of all authority, pending said appeal, to grant the relief sought by the proposed bill of review, leave to file the same cannot, for that reason, be properly granted.

But, aside from this difficulty in the way of granting defendants leave to file a bill of review, there are other objections, of a still more serious character, to the allowance of their application by this court. The decree of May, 1889, which the proposed bill of review seeks to impeach, is the decree, not of this court, but of the supreme court; and the only power which this court can rightfully exercise over the same is to carry it into execution. Thus, in *Stewart v. Salamon*, 97 U. S. 361, it is said that "an appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree; and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and, if it conforms to the mandate, dismiss the case, with costs. If it does not, the case will be remanded, with appropriate directions, for the correction of the error." So, in *Humphrey v. Baker*, 103 U. S. 737, it is said: "The decree we directed is the final decree in the original suit, and the court below had nothing to do but to carry it into execution, under the rule established in *Stewart v. Salamon*." Even the objection of a want of jurisdiction on the part of this court cannot be entertained in respect to a cause remanded to it by the supreme court for further proceedings. This was so ruled at an early day in *Skullern's Ex'rs v. May's Ex'rs*, 6 Cranch. 267, where, after a case was remanded by the supreme court, with directions for further proceedings therein, it appeared that the cause was not one coming within the jurisdiction of the court. It was held, nevertheless, that the circuit court was bound to carry the mandate into execution. So, in *Ex parte Story*, 12 Pet. 339, the action of the court below in refusing to allow the defendant to file a supplemental plea and answer setting up new matter was sustained because the case was before it upon a mandate from the supreme court, and the court below was bound to execute the mandate. To the same effect is the case of *Ex parte Sibbald*, Id. 488, where it was held that "the inferior court is bound by the decree, [of the supreme

court,] as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief." In *Ex parte Railroad Co.*, 1 Wall. 69, the court below, after entering judgment according to the mandate of the supreme court, granted a motion for a new trial upon affidavits of new and material facts; but the supreme court issued a *mandamus* commanding the lower court to vacate and set aside the order awarding said new trial, on the ground that the authority of the court extended only to the execution of the mandate. In that case it was said by the supreme court:

"When this court, under the twenty-fourth section, of the judiciary act, reverses a judgment of a case stated, and brought here on error, remanding the case, with a mandate to the court below to enter judgment for the defendant, the court below has no authority but to execute the mandate, and it is final in that court. Hence such court cannot, after entering a judgment, hear affidavits or testimony and grant a rule for a new trial; and if it does grant such rule a *mandamus* will issue from this court, ordering it to vacate the rule."

By reference to this case, it will be seen that it was originally tried upon an agreed statement of facts, resulting in a judgment for the plaintiff. The defendants sued out a writ of error to the supreme court, which reversed the judgment of the court below, and remanded the case, with a mandate to the lower court to enter judgment for the defendants. The court below entered judgment for the defendant. Thereafter the plaintiff filed affidavits showing new facts, and moved the court for a new trial, which was granted. But the supreme court issued its *mandamus* to said court, commanding it to vacate the order granting such new trial. If the judgment in question had been in any sense the judgment of the lower court, its authority to award a new trial upon newly-discovered and material facts could not have been questioned. But, as the judgment entered in pursuance of the mandate was that of the supreme court, the district court was without authority to vacate or set it aside for any error in law or new matter of facts. The principle announced in the foregoing authorities is essential to the close and proper subordination of inferior to superior courts, to the orderly administration of justice, and to the prevention of interminable litigation.

In harmony with this rule laid down in the above decisions, it is settled that the granting of leave to file a bill of review for error of law apparent, or for newly-discovered evidence, rests in the sound discretion of the court. It may be refused although the facts, if admitted, would change the decree, where the court, considering all the circumstances, may deem it unadvisable. Story, Eq. Pl. § 417, and cases cited. As bills of review for error apparent and for new matter can only be filed by leave of the court, such leave must properly be applied for and procured from the court whose decree is complained of. In the present case the mandate of the supreme court not only directed an absolute and final decree in Kimberly's favor, but, under the authorities, made that decree the judgment or decree of the supreme court. This court has no authority

to review or vacate that decree for alleged errors of law apparent on the face of the record, nor can it properly entertain such a bill for newly-discovered evidence until application has been first made to the supreme court, which pronounced or directed the decree, and its leave obtained to file the same. The court rendering the decree should properly exercise the discretion of granting or withholding leave to the unsuccessful party to file a bill of review to impeach or set it aside either for error apparent or for new matter. The inferior court should not be called upon to exercise such discretion, or to grant such leave, in respect to a decree of a superior court, over whose judgment it possesses no control or right of supervision. It is accordingly the better if not the settled practice, in cases like the present, to require the application for leave to file a bill of review to be made to the supreme court. Thus, in *Southard v. Russell*, 16 How. 570, the supreme court, speaking by Justice NELSON, say:

"As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with. The better opinion is that a bill of review will not lie at all from errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie, in the case of newly-discovered evidence, after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and house of lords in England, and we think it founded on principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits. Neither of these prerequisites to the filing of the bill before us have been observed."

The court cite numerous cases, English and American, in support of the rule thus announced. Counsel for applicants claim that the cases cited do not sustain the court's conclusions. We need not, however, go into the consideration of that question, as the rule laid down, whether supported by the authorities cited or not, is binding upon this court. But by reference to the case of *Barbon v. Searle*, 1 Vern. 418, cited by Justice NELSON, it will be seen that the rule laid down in *Southard v. Russell* conforms to the practice of the English chancery court. In that case a bill of discovery was filed for the purpose of bringing before the house of lords, on bill of review, a deed which complainant alleged had been burned pending the appeal in the house of lords. It was alleged that the defendant had destroyed this deed; and complainant asked for a discovery, to the end that he might submit the fact to the house of lords upon an application for leave to file a bill of review to vacate its judgment in the case. The chancellor ordered the defendant to answer as to whether or not he had burned the deed; but he further ordered that the case should proceed no further without special leave, which was done for the purpose of allowing the complainant to bring before the lords the suppressed deed, in making application to that appellate

court for leave to file a bill of review. So, too, in *Haskell v. Raoul*, 1 McCord, Eq. 22-29, where an application was made to the chancery court to modify or change the decree or judgment rendered by the appellate court, COLCOCK, J., said:

"No arguments were used, nor authority adduced, to show that the chancellor had the power to enlarge or modify the decree made by the appeal court. Nor, indeed, can any be conceived; for, if he had power to alter, in the smallest particular, the decree, the same power would have authorized him to reverse it entirely, which would involve a manifest absurdity," etc.

The supreme court, in case of *U. S. v. Knight*, 1 Black, 489, reassert the rule laid down in *Southard v. Russell*, and say upon this question, as to the correct practice in cases like the present:

"The defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in a court below, to review the judgment which this court had rendered."

In conformity with the rule announced in *Southard v. Russell*, and *U. S. v. Knight*, petitions were presented to the supreme court in the cases of *Bentley v. Coyne*, 4 Wall. 509, and *Rubber Co. v. Goodyear*, 9 Wall. 805, asking for leave to file bills of review for alleged errors in the judgments or decrees of said court. We think the foregoing authorities establish the rule that where a final decree has been entered in an inferior court, under and in pursuance of a mandate from the supreme court, such inferior court cannot, without leave first had and obtained from the supreme court, entertain a bill of review, at the instance of the defeated party, to vacate or annul such decree. Any other rule of practice would reverse the order of judicial procedure, and permit the subordinate tribunal to sit in judgment on the decree of its superior or appellate court. It should not be assumed that the supreme court would deny such an application in any case where leave to review its decision should properly be granted.

Counsel for defendants insist that this rule of requiring application for leave to file a bill of review, in cases like the present, to be made to the supreme court, is not uniformly observed, and that at most it is administrative, rather than jurisdictional. He cites *Ricker v. Powell*, 100 U. S. 104, in which it is claimed that a bill of review was allowed after decree below had been affirmed in the supreme court. But it will be seen by reference to the case that Ricker, who filed a bill of review, did not appeal to the supreme court; that there was no judgment of that court as to him; that the decree which he sought to review was not the decree of the supreme court, but solely and only of the circuit court, which might, therefore, so far as Ricker was concerned, entertain a bill of review without in any wise contravening the rule laid down in *Southard v. Russell*. Whether the rule under consideration is administrative rather than jurisdictional, it is not important to determine. The material question is, should this court, in respect to decrees of the supreme court, exercise the discretion of granting leave to attack such decrees, or should such leave be obtained from the court which pronounced the judgment? We are clearly of the opinion that the application should

be made to, and leave procured from, the supreme court in the present case, before this court can properly sanction the filing of the proposed bill.

But, aside from the objection that defendants have not made their application for leave to the right court, it appears from the proposed bill of review that the errors of law alleged to exist in the case are nothing more than supposed erroneous deductions or conclusions from the evidence. A bill of review will not lie to correct such errors. The only questions open for examination on bill of review for errors of law on the face of the record are such as arise on the pleadings, proceedings, and decree, exclusive of the evidence, which cannot be looked to or considered. The party setting up error apparent as ground of relief cannot go into the evidence at large to establish objections to the decree founded on supposed mistake of the court in its deductions from the evidence. *Whiting v. Bank*, 13 Pet. 6; *Buffington v. Harvey*, 95 U. S. 99; *Shelton v. Van Kleeck*, 106 U. S. 532, 1 Sup. Ct. Rep. 491.

Again, if the discretion vested with this court to grant the leave applied for, the proposed bill of review is fatally defective in not averring or alleging that the defendants have either performed or are unable, by reason of poverty or otherwise, to perform the decree rendered against them. In *Ricker v. Powell*, 100 U. S. 104, it is said that "the rule is well settled, subject, however, to some exceptions, that 'before a bill of review * * * can be filed the decree must be first obeyed and performed. * * * Thus, if money is directed to be paid, it ought to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded.'" After citing numerous authorities the court quotes from Chancellor Kent as follows, (page 108:)

"This appears to be a settled rule, laid down both in the ancient and modern books; but the petitioners have paid no attention to this rule, for there is no offer to perform any part of the decree, or even to bring the money into court, or any pretext of poverty, want of assets, or other inability to do it. There is wisdom in the establishment of such a provision, and it ought to be duly enforced. Its object is to prevent abuse in the administration of justice, by filing of bills of review for delay and vexation, or otherwise protracting the litigation, to the discouragement and distress of the adverse party."

The rule thus sanctioned by the supreme court is neither changed nor modified by what was said and decided in *Davis v. Speiden*, 104 U. S. 83-87. In that case the complainant in review had brought himself within the exceptions to the general rule by showing his inability to perform the decree. So far from intending to qualify the rule as laid down in *Ricker v. Powell*, the court expressly declares that no bill of review will be admitted unless the party first obeys and performs the decree, and gives bond to satisfy costs and damages of delay, unless in case of poverty, etc. While this rule is administrative, rather than jurisdictional, it is still generally incumbent upon a party to show performance or inability to perform the decree before leave will be granted him to file a bill of review to impeach such decree. In the present case the decree required defendants to transfer stocks, and to pay over to complainant,

Kimberly, considerable sums of money. No performance, or inability to perform the decree, is alleged by defendants. For this reason, this application should be denied.

The newly-discovered evidence and fraud relied on by defendants as grounds for impeaching such decree are so intimately connected that they may be considered together. It is alleged in the proposed bill of review that Kimberly falsely and fraudulently antedated a certain letter, written, or purported to be written, by himself to defendant Arms, which was introduced in evidence as part of said Kimberly's proof, in rebuttal of the defense that by the contract of March 4, 1880, and the written instrument prepared by Arms on March 5, 1880, reserving to himself the interest in the Grand Central mine, Kimberly could make no claim to said interest. Said letter of Kimberly purported to notify Arms that he would not recognize Arms' right to said interest, but claimed a share thereof himself. This letter, it is charged, was written in July or August, 1881, but was falsely and fraudulently antedated to July 22, 1880, for the purpose, as alleged, of showing the prompt repudiation or disaffirmance of the March, 1880, contract made by Kimberly, or his agent, and embodied in said instrument of March 5, 1880. Kimberly and one Wolfkill testified to the writing and mailing of said letter at or about the time it bore date. Wolfkill now makes affidavit, exhibited with the proposed bill of review, that he and Kimberly committed perjury in what they stated in their depositions about said letter having been written in July, 1880; that it was in fact a year later, etc. It is alleged that this false testimony, and fraudulently antedated letter, was material testimony in the case, and greatly influenced and controlled the special master and the court in reaching their conclusions in the case. Defendants claim that they had no means, by the exercise of any diligence on their part, to discover these facts before the final decree, and that they have only recently been disclosed by said witness Wolfkill, etc. As newly-discovered evidence, these facts would hardly be sufficient to sustain a bill of review in this case, when considered in connection with the real issue between the parties, and the ground on which the supreme court rested its opinion and decision. The main controverted question raised by the pleadings was whether the interest in the Grand Central mine or stock was purchased by Arms for the joint account of Kimberly and himself, as a partnership, or for his private individual account. Kimberly claimed that it was understood and agreed between them that said interest should be acquired on joint account, and that it was so acquired. This was denied by Arms. The special master and supreme court found this issue in favor of Kimberly. Neither rested their findings of fact or conclusion of law establishing Kimberly's right in and to said interest upon the alleged false, and fraudulent, and antedated letter. It was in no sense made or considered a controlling fact or circumstance by either the special master or by the supreme court. The 7th, 8th, and 9th findings of the special master established Kimberly's right to the relief he sought; for they found the agreement as claimed by Kimberly,—that said interest was to be, and was, purchased on joint or partnership account, and,

as a result, that Kimberly was entitled to his share thereof, and of the profits or dividends received by Arms therefrom. Turning to the opinion of the supreme court, (*Kimberly v. Arms*, 129 U. S. 525, 9 Sup. Ct. Rep. 355,) we see that these findings of the special master are sustained. The court say:

"We are therefore constrained to hold that the learned court below failed to give to the findings of the master the weight to which they were entitled, and that they should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made. That there was no such conflict is manifest. Upon nearly every important particular relating to the partnership between Arms and Kimberly, and its business, there is hardly any discrepancy in the testimony of the parties. It is only as to the circumstances under which Arms obtained his loan from Fairbank, with which he purchased the shares in the Grand Central Mining Company, that there is any serious dispute; and, as that transaction is viewed as the act of a partner or agent of the firm, or as the act of the individual, without regard to such partnership, the conclusion is reached as to his liability to account for them. If the findings are taken as correct, there not being sufficient evidence to justify a disregard of them, there is an end to the controversy; for, in accordance with them, the firm had an interest in the shares purchased, and the complainant an equitable right to his proportion upon its dissolution. But, independently of the finding, the facts, which are undisputed, or sustained by a great preponderance of evidence, must, we think, lead to the same conclusion."

The opinion then sets out the facts establishing the agreement to purchase on joint account, and, after reviewing the transaction, states that "under these circumstances the purchase must be deemed to have been made in the interest of the partnership." And on pages 528, 529 the court say they attach no importance, as against the conclusions reached, to the instrument of March 5, 1880, in which Arms undertook to reserve said interest to himself, as his absolute property, and to which the alleged false and fraudulently antedated letter related. It cannot, therefore, be properly urged that the newly-discovered evidence, even assuming it to be of a satisfactory character, relating to the antedating of said letter, is of such a material, important, and controlling character as to justify either this or the supreme court in granting Arms and wife leave to file a bill of review to open the decree in the case.

The remaining ground on which the defendants rest their application is the alleged fraud on the part of Kimberly in concocting and antedating the letter bearing date July 22, 1880, and the false testimony given by himself and his witness Wolfkill in relation thereto, which it is claimed greatly influenced the special master and the supreme court in reaching a conclusion adverse to defendants. The courts have not, and cannot, accurately define the acts done, or facts concealed, which will constitute such fraud as will vitiate or invalidate judgments and decrees. It may, however, be stated generally that where a successful party has by meditated and intentional contrivance kept the opposing side and the court in ignorance of material and controlling facts, whereby he has secured an unjust advantage, or a decree adverse to the real merits of the controversy, a court of equity will entertain a bill to impeach and annul such

decree. This is substantially the rule laid down in the well-considered case of *Patch v. Ward*, L. R. 3 Ch. 203. But it is settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. *Vance v. Burbank*, 101 U. S. 519; *U. S. v. Throckmorton*, 98 U. S. 66. In the latter case the act of fraud relied on to support the bill was the false and fraudulent antedating of the grant, so as to impose on the court the belief that it was made at a time when the party or official executing the same had power to make it, and the supporting of such simulated and false document by perjured witnesses. Page 62. But there were other controlling facts and circumstances in the case, and the supreme court affirmed the decree of the circuit court sustaining a demurrer to the bill and dismissing it on the merits. The case, in its general aspects, cannot be distinguished in principle from that under consideration. The bill of review now sought to be filed, if read in the light of the facts found by the special master and the supreme court, and the conclusions drawn therefrom in favor of Kimberly's right to share in the Grand Central purchase, is insufficient to impeach the decree, because it very clearly appears that the alleged fraudulent letter, and perjured evidence in connection therewith, were not controlling facts in inducing or leading the court to the conclusions reached on the merits. Again, it is settled that in order to obtain equitable relief against a judgment alleged to have been fraudulently obtained, it must be averred and shown that there is a valid defense on the merits. *White v. Crow*, 110 U. S. 184, 4 Sup. Ct. Rep. 71. In view of the 7th, 8th, and 9th findings of the special master, which the supreme court, in its opinion, sustain as manifestly correct from the evidence, the defendants have not and cannot show that they have any valid defense on the merits. The antedated letter, and false testimony in relation thereto, if true, would fall short of showing a valid defense on the merits. While a bill of review based solely on fraud in obtaining the decree complained of may be filed without the leave of the court which rendered such decree, because such a bill is regarded as an original bill, in the nature only of a bill of review, still, where that ground of relief is united in the same bill with others, which require the previous leave of the court, the bill cannot be separated into parts, and leave be granted as to part and refused as to other parts. The application is for leave to file the bill as a whole, and it must be acted upon as a whole, and not in parts. The supreme court take this view of such applications. Thus, in *Ricker v. Powell*, 100 U. S. 109, it is said:

"The application was for leave to file the bill as a whole, and not in parts; and if, as a whole, it required leave, the part which, if it stood alone, could be put on file without, must stand or fall with the incumbrances that have been attached to it."

In the present case the application is for leave to file the bill of review as a whole, and, as the part based upon fraud, even if such fraud were sufficient, standing alone, to be filed without leave, cannot be separated from the other branches, which require the previous leave of the court,

it must stand or fall with the other grounds to which it is attached. It may be doubted whether it is in consonance with proper practice thus to join or unite in one bill several different and distinct grounds of review, which invoke different relief under each branch, and separate defenses to the several parts of the bill. The object and effect of that branch of the bill resting on fraud is to vacate the decree *in toto*, not to retry the case; and the fraud should be of such character as to warrant that relief. The object and effect of a bill of review for error of law apparent upon the face of the record is to reverse the decree so far as erroneous, and to retry the cause upon the original record, while the purpose and effect of a bill of review based upon newly-discovered evidence is to suspend the decree, and retry the cause upon the original and new proof. *Moore v. Moore*, 2 Ves. Sr. 596; *Catterall v. Purchase*, 1 Atk. 290; *Cook v. Bamfield*, 3 Swanst. Ch. 607. To unite these three grounds of review and relief in one and the same bill must lead to great confusion, and render the bill multifarious. *Perry v. Phelps*, 17 Ves. 188; *Campbell v. Mackay*, 1 Mylne & C. 618; *Attorney General v. College*, 7 Sim. 254. Upon the whole case, as presented by the record and by the proposed bill of review, the court is clearly of the opinion that the defendant's application for leave to file said bill of review should not be granted, and it is accordingly denied, with costs.

McCLASKEY *et al.* v. BARR *et al.*

(Circuit Court, S. D. Ohio, W. D. December 4, 1889.)

1. EQUITY—PLEADING—BILL—ANSWER.

A prayer that each of the defendants may be required to answer unto the premises, in a bill for relief, being a good general interrogatory, complainants are entitled to an answer to every material allegation of their bill.

2. SAME—EXCEPTIONS.

The doctrine that exceptions to the answer for insufficiency are confined to cases where complainants are compelled to rely on defendants to prove their case, and are not properly taken where all the matters concerning which complainants ask discovery are of record, does not apply to bills for relief.

3. SAME—PARTITION—DISCOVERY.

In a bill for partition, averments that complainants and defendants are tenants in common of the land sought to be partitioned, being in support of complainants' case, defendants are bound to discover their title in answer thereto.

In Equity. Bill for partition.

C. W. Cowan, Howard Ferris, and H. T. Fay, for complainants.

Lincoln, Stephens & Lincoln and Bateman & Harper, for defendant.

SAGE, J. This cause is before the court upon exceptions for insufficiency to the answer of the defendant John Keeshan to the second amended bill, and to the amendment thereto. There are 24 exceptions. It is not necessary, nor would it come within the ordinary limits of an opinion, to set them out at length. The bill is for partition. There are 200 or

300 defendants, each holding one or more lots of the tract described in the bill, but all averred to be tenants in common with the complainants, who sue as heirs of Mary Jane Barr. It is averred in the amendment to the second amended bill that William Barr, Sr., died in 1816, seised of the real estate in the second amended bill fully described, also that he died testate, and that his will was admitted to probate; and the terms and conditions of said will are set forth in said amendment. It is further averred that upon the death of said Mary Jane Barr said real estate descended, by virtue of the facts set forth in said amendment, and of the laws of descent then in force in the state of Ohio, to the brothers and sisters of William Barr, Sr., and to the lineal descendants of those of them who are deceased. Also, that certain conveyances were made by Maria Bigelow, life-tenant of said real estate, and that certain other conveyances were subsequently made by her grantees, of lands of which said William Barr, Sr., died seised, and in which the complainants claim an interest as co-parceners; and that in said conveyances under which the defendants claim, and in certain legal proceedings concerning said lands, the same including the premises now occupied and claimed by the defendant Keeshan, there are recitals, binding upon him and the other defendants, indicating the recognition of the co-tenancy claimed by complainants, and inconsistent with the claim that defendants have held adversely more than 21 years, and thereby acquired exclusive rights. The exceptions are to the failure of the defendant Keeshan to answer any of said averments.

The first proposition urged for the defendant is that exceptions for insufficiency are confined to cases where the complainants are compelled to rely upon the defendants to prove their case, and that all the matters concerning which the complainants ask discovery are matters of record; also, (citing *Ingilby v. Shafto*, 33 Beav. 31,) that discovery will never be compelled merely for the purpose of saving the complainants the labor of collecting and presenting their proof. The cases cited in support of this proposition are cases where the holding was with reference to bills for discovery merely, or where the question was considered as it arises on such bills. For illustration, in *Ex parte Boyd*, 105 U. S. 656, the court said that it had nothing to do with any question but that of discovery. Also, in *Ingilby v. Shafto*, the bill was for discovery merely, in aid of the defense of actions of ejectment, and the court held that a complainant in such a case was not justified in coming into equity for the purpose, merely, of getting the defendant to admit documents, to save him the trouble of proving them. The court further said that there was a distinction between a bill for discovery, merely, and a bill asking for relief. Discovery is sought in both cases. In the latter, it is sought with reference to the case stated and the relief prayed by the bill, and the complainant may, within certain limits, call upon the defendant to state how, and on what ground, he can oppose the relief asked; because in such a suit the complainant may disprove the whole of it. But the court further said that, when the discovery is asked in aid of an action at law, all that the complainant can ask is for the discovery of facts and

documents in the defendant's possession, knowledge of which will assist complainant in proving his own title in the action. Further on the court say that in bills for relief the complainant may compel the defendant to answer what defense he makes to the case, and on what grounds; and that is so for the reason that the court requires the case of each party to the suit to be pleaded, in order that neither may be taken by surprise. The case before the court is for relief, and not for discovery merely; and *Ingilby v. Shafto* is, properly considered, an authority against the defendant, and not in his favor. The complainant has the right to anticipate defenses, and to introduce into his bill, originally, or by amendment, by proper averments, a statement of the facts upon which he expects to rely to overcome those defenses. He is entitled to an answer to every material allegation in his bill of complaint, if for no other reason, in order that he may know precisely what is admitted, and what he will be required to establish by proof. The case of *U. S. v. McLaughlin*, 24 Fed. Rep. 823, is cited as an authority that an answer cannot be required without interrogatories, general or special; and counsel insist that the amendments to the complainants' second amended bill contain no interrogatories of any description whatever. But these amendments do not constitute an independent pleading. They are only amendments to, and therefore a part of, the second amended bill. It is to be remembered that under the fortieth equity rule special interrogatories are not necessary, excepting where the bill is for discovery merely. But, say the defendant's counsel, there is not even a general interrogatory in the second amended bill. In this counsel are in error. The second amended bill contains a prayer that the defendants may each be required "to answer unto the premises;" and *Ames v. King*, 9 Allen, 258, is a satisfactory authority that that is a good general interrogatory. Moreover, the interrogating part of a bill is not regarded by Justice Story as absolutely necessary, because, as he says in his works on Equity Pleading, § 38, "if the defendant fully answers to the matters of the bill, with their attendant circumstances, or fully denies them, in the proper manner, on oath, the object of the special interrogatories is completely accomplished." So, also, in Langdell on Equity Pleading, § 55, it is stated that all the substance of a bill in equity is contained in the stating part, the charging part, the interrogating part, and the prayer for relief; and that of these the second and third may be dispensed with, at the option of the draughtsman, "for all that ever was essential to a bill was a proper statement of the facts which the plaintiff intended to prove, a specification of the relief which he claimed, and an indication of the legal grounds of such relief."

The next contention by counsel for the defendant is that complainants are not entitled to discovery of defendant's title, and that they must rely upon the strength of their own title, and not upon the weakness of his. There is no doubt of the correctness of the general proposition here stated, as applied to bills for discovery. The rule, and the reason for it, are well stated in Bispham's Principles of Equity, § 561:

"The defendant is bound to discover those matters only which relate to the plaintiff's title, and is not compellable to discover his own title, or the means
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by which he expects to prove it. The reason of this rule is that experience has shown that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend; and, accordingly, each party in a cause has thrown upon him the *onus* of supporting his own case, and meeting that of his adversary, without knowing beforehand by what evidence the case of his adversary is to be established, or his own opposed."

But the author continues:

"This reasoning, however, is not to be extended too far, for the right of the plaintiff to discovery in support of his own case is not to be abridged, as to any particular discovery, by the consideration that the matter of such particular discovery may be evidence of the defendant's case, in common with that of the plaintiff."

So, in Story, Eq. Pl. § 859, if the documents and papers of which discovery is sought "relate solely to the defendant's title, they will not be required to be produced. If they relate to the plaintiff's title, they will." Now, here the question upon which the right to partition depends is whether the complainants and the defendant are co-tenants; and the averments which the defendant has failed to answer are directly in point. They set forth what title the defendant has; how it has been derived; that it is for an undivided interest only, and not the entirety. These averments are therefore in support of the complainants' case for partition. And right here it may be remarked that not one of them calls for any disclosure by the defendant. All relate to matters of public record. The complainants do not call for the production of a single deed or title paper of any description. They have no need to do so. Certified copies from the record are by the statute law of the state competent and sufficient evidence,—better, in fact, than the originals. There is therefore no danger of perjury because of full and complete answer by the defendant. It is only technically that it can be said that the amended bill, as amended, calls for discovery. It is true that there are averments that the defendant, and those under whom he claims, have not now, nor have they ever had, any title other than that set forth by the complainants; but no disclosure in that behalf is called for,—nothing more than an admission or denial.

The fourth exception relates to the failure of the defendant to answer averments that Lot Pugh, on or about the 13th of September, 1839, quitclaimed all his interest in certain premises, included in the lands now sought to be partitioned, to Ephriam Morgan. Counsel for defendant wish to know what those averments have to do with the complainants' case. The answer is that prior averments set forth that, after the death of Mary Jane Barr, Maria Bigelow, the life-tenant of said premises, quitclaimed the same to Lot Pugh and Ephriam Morgan; and the averments with reference to which the inquiry is made set forth that Ephriam Morgan subsequently, by quitclaim from Lot Pugh, acquired the entire interest conveyed by Maria Bigelow; these being links in the chain of defendant's title, and, what is more to the point, in the line of conveyances indicating that the complainants and the defendants are tenants

in common, or, in other words, that the complainants are entitled to partition of the land occupied by the defendants. *Gaines v. Agnelly*, 1 Woods, 238, is not in conflict with the views here expressed. There the complainant claimed certain lands as devisee of Daniel Clark. The bill called upon the defendants to show their title to the particular portions of said land claimed by them. The defendants set up title in themselves by prescription, under the laws of Louisiana, and failed to make the disclosures called for. The complainant excepted for insufficiency. BRADLEY, Circuit Justice, in disposing of the exceptions, said, (page 244:)

"Had the bill charged that the defendants claimed title to the lands in their possession under Relf & Chew, acting as executors of Daniel Clark, it might, perhaps, have been incumbent on the defendants to have cleared their possession of the imputation thus cast upon it. But no such charge is made in the bill. On the contrary, the bill expressly states that the complainant is ignorant of the title, and claim of title, by which the defendants severally hold, and calls upon the defendants to show their title. The defendants do show title sufficient to lay the foundation of a prescription; and on that defense they take their stand. It seems to me that they are not called upon to answer further. The bar set up is *prima facie* a good defense; and the exceptions must be overruled."

The difference between that case and this is that here not only do the complainants charge that the defendant claims title to the land in his possession under Mary Jane Barr, under whom the complainants claim by inheritance, but the complainants also charge that the defendant, and the heirs of Mary Jane Barr and their grantees, under whom he claims, have not now, nor have they ever had, any title other than that set forth by the complainants. This case is within the very exception stated by Justice BRADLEY, which he says might have made it incumbent on the defendants to clear their possession of the imputation thus cast upon it; and it is therefore an authority in favor of the complainants' exceptions. It is not necessary to go further into particulars. Enough has been said to make it clear that the exceptions must be sustained, and the defendant required to answer fully.

The motion to suspend proceedings until complainants establish their title at law will remain undisposed of until after the defendant answers in accordance with the entry to be made under this opinion. It may be said now, however, that this is not a cause to be dismissed, if it shall appear that the complainants' title is disputed. The case was brought in the state court under the Code, which abolished all distinctions between actions at law and suits in equity, so far as relates to name and form, and substituted the civil action as the only form of action at law or in equity, excepting only proceedings specially provided for by statute. The case is here by removal; and if the court shall be satisfied that it is necessary for the complainants to establish their title at law it will at the proper time make an order staying proceedings and for the trial at law of the question of title. The court will first, however, see to it that the pleadings are complete, and that the parties respectively have opportunity to take and file the depositions of any witnesses whose testimony, by reason of their age or infirmities, may be lost by delay. It

has been held that the bare denial of complainant's title is not any obstacle to the court's proceeding in equity.

"The defendant must answer the bill; and, if he sets up a title adverse to the complainant, or disputes the complainant's title, he must discover his own title, or show wherein the complainant's title is defective. If, when the titles are spread before the court upon the pleadings, the court can see that there is no valid legal objection to complainant's title, there is no reason why the court should not proceed to order the partition." *Lucas v. King*, 10 N. J. Eq. 280.

So, also, in *Overton's Heirs v. Woolfolk*, 6 Dana, 374, the court said.

"If a bare denial of the title, where there was no reasonable doubt or suspicion attending it, would authorize the dismissal of the complainants' bill, it would place this equitable jurisdiction, which has been established by a long train of decisions, and is deemed of much public convenience, at the mercy of every profligate or unconscientious defendant, and render the court the mere ministerial agent to carry into effect the wishes of the parties, in cases where there were no matters of controversy between them."

There is no objection to the filing of the demurrer tendered by the defendant Keeshan and other defendants to the portions of the second amended bill, and the amendment thereto specified in the exceptions to Keeshan's answer. The defendants think it a proper precaution to file the demurrer, and have it passed upon in order to save their rights, and the court is disposed to accommodate them. But, as the questions presented are in no wise different from those considered in this opinion, an entry will be made sustaining the exceptions, and overruling the demurrer.

LIBBY *et al.* v. CROSSLEY *et al.*

(Circuit Court, D. Massachusetts. December 10, 1889.)

1. BILL OF EXCEPTIONS—DELAY IN PRESENTING FOR SIGNATURE.

A bill of exceptions must be presented to the judge not later than the term at which the judgment is rendered, and the delay will not be excused on the ground that certain proceedings had taken place between the parties by reason of which they had hoped it would not be necessary to take the case up on review.

2. SAME—FORM.

A paper presented to the judge, containing nothing but the propositions of law argued at the hearing, on the margin of which the judge, for the convenience of the counsel, noted his rulings on the several propositions,—the paper not having been presented as a bill of exceptions, and the judge not having been asked to sign it,—cannot, after judgment has been rendered, be amended and signed as a bill of exceptions.

At Law. On motion to settle bill of exceptions. For opinion on the merits, see 31 Fed. Rep. 647.

Oliver C. Stevens and *James McKeen*, for plaintiffs.

Thomas Hillis and *John Hillis*, for defendant Crossley.

Bryant & Sweetser, for trustees.

CARPENTER, J. This is an action at law, in which the writ was served in trustee process on certain insurance companies, for the purpose of attaching a fund in their possession as the property of the defendant James E. Crossley. The claimants, Wilkinson Crossley and others, have intervened, and allege that the fund belongs to them by virtue of an assignment made to them by James E. Crossley before the attachment was made. The question thus arising between the plaintiffs and the claimants was heard by me without a jury in the October term, 1886, to-wit, on the 3d and 4th of February, 1887, and was on or about the 23d of February submitted to me on written arguments, and held for advisement. In the May term, 1887, to-wit, on the 29th of July, I delivered my opinion, to the effect that the claimants were entitled to the fund. 31 Fed. Rep. 647. Shortly afterwards the counsel for the plaintiffs presented to me a paper containing only a statement of the propositions of law which they had argued at the hearing, and in the margin of each proposition, for the convenience of the counsel, I noted whether it was, in my opinion, allowed or refused, in effect, by the determination which I had already made. They also filed in the clerk's office a paper wherein they stated, in general terms, that they excepted to the rulings which had been made in the case. Afterwards, during the October term, 1887, a decree was settled and entered in accordance with the opinion. No further proceedings took place material to this inquiry until the 5th of December, 1889, on which day the plaintiffs' counsel presented to me, for my allowance, a bill of exceptions wherein were stated several of the propositions of law which were urged by them at the hearing, and which were not adopted by me in my decision, together with an abstract of such parts of the evidence to which it is conceived these propositions of law should properly apply. I think the bill of exceptions ought not to be signed. It is well settled that a bill of exceptions cannot be allowed unless it is presented to the judge not later than the term at which the judgment is rendered, "without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances." *Muller v. Ehlers*, 91 U. S. 249. The question has since been fully discussed by Judge DYER in *Sweet v. Perkins*, 24 Fed. Rep. 777, and I came to the same conclusion in *Stave Co. v. Manufacturing Co.*, 32 Fed. Rep. 822. There are no extraordinary circumstances in this case. The plaintiffs excuse their delay by saying that certain proceedings have taken place relating to the controversies between the parties by reason of which they have hoped that it would not be necessary to take this case up for review. Under these circumstances, it seems clear that their proper course was to present their bill of exceptions seasonably, and obtain an allowance, and then wait until they should be advised to sue out their writ of error.

The plaintiffs urge that the paper which their counsel presented to me soon after the opinion was delivered should be considered as a bill of exceptions, and should now be amended and signed. But that paper had in no respect the form of a bill of exceptions, being simply a list of propositions of law. Nor did it contain the substance of a bill

of exceptions, since it contained no statement of the case, and no reference to the evidence. Furthermore, it was not presented to me as a bill of exceptions, and I was not asked to sign it. It was evidently, as it was doubtless intended to be, only a memorandum from which I might afterwards verify a bill of exceptions, as I should from my own minutes. I therefore decline to sign the bill.

LUCAS v. RICHMOND & D. R. Co.

(*Circuit Court, D. South Carolina.* December 2, 1889.)

RAILROAD COMPANIES—WALKING ON TRACK—NEGLIGENCE.

In an action for personal injury, it appeared that plaintiff was walking on defendant's railroad track, and stepped off a few feet, when a train passed, and he saw the shadow of something, and was felled to the ground; that a severe wound was found on his head, and a stick of wood, similar to the sticks used on the locomotive, was found imbedded in the earth near where he fell. There was no other evidence that the wood was thrown from the locomotive, or how it was thrown, or that it struck plaintiff. The speed of the train was about 60 miles an hour. *Held* that, as there was no contractual relation between plaintiff and defendant, there was no presumption of negligence against the latter, and a verdict should be directed for the defendant.

On Motion to Instruct the Jury to Find for Defendant.

Andrew Crawford and *G. T. Graham*, for plaintiff.

J. L. Orr and *J. C. Haskell*, for defendant.

SIMONTON, J. The plaintiff brings this action against the defendant for negligence. He was walking on the railroad track from Batesburg to Leesville, in this state. The track had been used for over 20 years as a pathway by the inhabitants of these two towns, which are about two miles apart. While so walking he heard a coming train, and stepped off the track, placing himself along-side of an embankment, about breast high, and some eight or nine feet from the track. Just as the engine and tender which constituted the train passed him, he saw the shadow of something in the air, and was felled to the ground. He lost consciousness for a time. Recovering, he pursued his way to Leesville, and was attended by a physician. A severe wound was found on the side of his head, made by some blunt instrument. The accident was about noon-day. In the afternoon he walked to the place of the accident, some 600 yards from Leesville. There he found a piece of wood, similar to that used for firing up locomotives on this road, and supposed that it was the piece which struck him. It was imbedded in the bank where he was standing. The witnesses for plaintiff say that the train was running at an unusual speed, some say 60 miles an hour. The track at this place is smooth and straight, within the corporate limits of Leesville, in the outskirts of the town. The gist of this action is negligence. It must be alleged and proved. There being no contractual relation be-

tween these parties, there is no presumption of negligence against the defendant. There is no proof that the stick of wood found by plaintiff, and supposed to be the cause of the injury, was not lying in the place it was found anterior to the accident. There is no proof that it ever was on the engine or tender. None that it came from either, or, if it did come from either, whether it came from under the engine, from in front of it, or from the top or the back of the tender. It may have been on the track, thrown off by the cow-catcher. It may have been on the rail, and have been thrown off by the wheel. It may have come from the tender, although there is no proof that the tender was full of wood, or, indeed, had any wood at all in it. This constitutes the distinction between this case and the class of cases quoted by Mr. Thompson in his work on Negligence. *Kearney v. Railway Co.*, and notes, 2 Thomp. Neg. 1220. The maxim, *res ipsa loquitur*, does not apply. A case must be made out by facts, not conjecture. Proof must be furnished the jury, not grounds for guess-work; and these facts and proofs the plaintiff must establish before he can retain his standing in court. The jury are instructed to find a verdict for defendant. The circuit judge has been detained in Baltimore by trial of a capital case. This case is important to plaintiff. He should have the benefit of a full court. Leave is given him to move for a new trial before the court as soon as the circuit judge shall arrive.

ON MOTION FOR NEW TRIAL.

(December 5, 1889.)

Before BOND and SIMONTON, JJ.

BOND, J. It appears from the statement of facts in this case that the plaintiff, Lucas, was walking along the track of the defendant company, where the people of the neighborhood were accustomed to walk when visiting from one village to another. He saw the train of the defendant company approaching, and stepped off the track, and placed himself in an upright position, nine feet from the track, with his back against the bank of earth left there when the cut was made through which the track was laid. The engine and tender were propelled at the rate of 60 miles an hour. After it had passed about 20 minutes, the plaintiff was discovered seriously wounded in the road. There was, near where the plaintiff was standing, found imbedded in the bank a piece of wood like that found at a neighboring wood-pile where the tender had been supplied with wood. It appears the embankment against which plaintiff was standing was about breast high, as some say, others making it as high as his head. The piece of wood was not found on this elevation. Upon this case, the district judge, then sitting in the circuit court, directed the jury to find a verdict for the defendant. A motion for a new trial was made, which, at the request of the district judge, I have heard argued. I do not see upon what ground the plaintiff can recover. He was walking upon the railroad track, a common place to walk, perhaps, but still the railroad company was bound to exercise no extraordinary care because

of any permission or license he may have acquired by custom to walk there, and there is no proof that they were not as careful on this occasion in the management of their locomotive and tender as on any other part of their road. To run a train at 60 miles an hour is not negligence, nor in itself to be reprimanded. The plaintiff, when he undertook to walk the defendant's track, took all the risks of such a promenade incident to the railroad's proper conduct of its business. While standing there the plaintiff says he saw the shadow of something in the air, which struck him, and then he lost consciousness. This is all the proof there is that the thing that wounded him came from the engine or tender of the defendant, except that a stick was found imbedded in the bank, behind his back, not head, after he was picked up. It would be mere guess-work for the jury to find that the wound was produced by this stick of wood. It might have been there for weeks. There was no blood on it; nothing but the shadow of something in the air to indicate the cause of plaintiff's unfortunate wound. But suppose, for the sake of the case, the stick of wood fell from the tender, or, already upon the track, was struck by the cow-catcher, and sent flying through the air. What help would that be to plaintiff's case? Would any amount of care prevent this? Is not a cow-catcher put on the engine to knock things off the track? The plaintiff in this case, it seems to me, took all the risks of danger and accident incident to running cars on the track where he was. If it were proved, which it is not, that the accident was caused by defendant's engine or tender, and it appeared, as it does, that the machinery was run in the ordinary way, he would not be entitled in law to recover. Sixty miles an hour for short distances is not unusual. I think the district judge was right in instructing the jury that plaintiff had no case, and directing a verdict for defendant.

SIMONTON, J., concurred.

DIECKERHOFF *et al.* v. ROBERTSON, Collector.

(*Circuit Court, S. D. New York. December 2, 1899.*)

CUSTOMS DUTIES—CLASSIFICATION—LINEN TAPES.

As linen tapes, composed wholly of flax, or of which flax is the component material of chief value, woven in a loom, and having a warp and weft; linen corset laces, a braided fabric; and linen "braids" or "bobbins,"—come within the description in both paragraphs 834 and 836, (Tariff Index, new,) of Schedule J of the tariff act of March 3, 1883, viz., "manufactures of flax, or of which flax shall be the component material of chief value," they are dutiable under the highest rate provided in the two paragraphs mentioned, viz., 40 per cent. *ad valorem* under 836, according to Rev. St. U. S. § 2499, as amended by the act of March 3, 1883, which provides that, when two or more rates are applicable, the article shall be classified under the highest.

At Law. Action to recover back customs duties.

The plaintiffs, in 1885, imported certain goods consisting of linen tapes, corset laces, and braids, the latter being commercially known as "bobbins." These articles were classified by the defendant, the collector at the port of New York, under Schedule J of the tariff act of 1883, (Tariff Index, new, 336,) providing for "flax or linen thread, twine and pack thread, and all manufactures of flax, or of which flax shall be the component material of chief value, not specially enumerated or provided for in this act, forty per centum *ad valorem*." The plaintiffs paid the duty under protest, claiming that the goods were dutiable under a preceding paragraph (Tariff Index, new, 334) of the same schedule as "brown and bleached linens, ducks, canvas, paddings, cot bottoms, diapers, crash, huckabacks, handkerchiefs, lawns, or other manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, not specially enumerated or provided for in this act, thirty-five per centum *ad valorem*." It was shown on the trial that the tapes were linen, or composed chiefly of flax fibres; that they were woven fabrics having a warp and weft; that the corset laces were made of linen threads braided, as were also the other "braids" or "bobbins." When the plaintiffs rested, the defendant's counsel moved the court to direct a verdict for the defendant; citing *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. Rep. 714; *Powers v. Barney*, 5 Blatchf. 202; *Liebenroth v. Robertson*, 33 Fed. Rep. 457; Rev. St. U. S. § 2499, as amended by act of March 3, 1883.

Alexander P. Ketchum, for plaintiffs.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) It is a pretty hopeless task, in many of these cases, to undertake to determine exactly what congress meant to provide. These tariff acts have grown in such a way, by the cutting up of old acts, by transposing sections, by additions and alterations, that there are necessarily many cases which might, under the application of the rules of interpretation as settled by the courts, be decided either way with equal propriety. In the case before us the controlling point seems to be that, if either of these paragraphs (334 or 336) were stricken out, the article would be found plainly and distinctly covered by the other. I do not appreciate the weight which is sought to be given to the use of the two words "or other" in one of the paragraphs, when the words used in the other paragraph are "and all." When read with their respective contexts, I cannot see that they grammatically import different meanings. That being so, if the law remained as it was before the passage of the act of 1883, this case would be disposed of according to the order in which the paragraphs are printed in the act, or, in other words, according to the assumed chronological order in which congress passed them,—a mere assumption, because, for all that we know, congress may have constructed paragraph 334 many weeks after it constructed paragraph 336. *Powers v. Barney*, 5 Blatchf. 202. But any question as to that method of interpretation is laid at rest by the act it-

self, (I mean the act of 1883,) which, in section 2499, has expressly provided that, "if two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates." In view of the rule of interpretation thus imposed upon the court, I feel constrained to hold that these articles, being covered by the description in both paragraphs, (384 and 336,) should pay the higher rate of duty, viz., 40 per centum. Verdict directed for defendant.

FOPPES et al. v. MAGONE, Collector.

(Circuit Court, S. D. New York. December 4, 1889.)

1. CUSTOMS DUTIES—CLASSIFICATION—RATTAN REEDS.

Rattan, from which the outer bark or enamel ("chair cane") has been cut by a first process from the raw material, leaving a product known in trade and commerce in the United States at the time of the passage of the tariff act of March 3, 1883, as "round reeds," are duty free, under that act. "Free List," (Tariff Index, new, 770.) "Rattans and reeds, unmanufactured."

2. SAME.

The articles known in trade and commerce at the same date as "square reeds," "oval reeds," and "flat reeds," being obtained by a further process of cutting from the "round reeds," above described, are liable to duty under the provision of said act, (Id. 482,) Schedule N, "Sundries," "Rattans and reeds, manufactured, but not made up into completed articles, ten per centum *ad valorem*."

At Law. Action to recover back customs duties.

The articles involved in the suit were imported by the plaintiffs from Germany into the port of New York in 1887 and 1888, and were assessed for duty by the collector at 10 per centum *ad valorem*, under tariff act of March 3, 1883, Schedule N, "Sundries," (Tariff Index, new, 482,) as "rattans and reeds, manufactured, but not made up into completed articles." The plaintiffs protested, claiming that the goods were duty free under the same act, "Free List," (Id. 770,) and brought this action to recover the amount of the duties paid. Rattan was shown to be the stem of a plant grown in the East Indies, of solid, tough, fiber, and of various lengths. It was proved by witnesses on the trial that the raw rattan was submitted to a mechanical process by which the outer bark or enamel was cut off in strips. This bark or enamel, thus produced, was called in the trade "chair cane." The inner core or pith of the rattan, which remained in a cylindrical form after the first process of cutting, was generally known in the trade, at and for some time prior to the passage of the act of 1883, as "round reed." It was the crudest form in which such "reeds" were known to the trade dealing in them. Defendant's witnesses proved that the article known as "square reed" might be obtained by a first process of cutting from the raw rattan, or might be made by squaring the "round reed," by a second process of cutting with knives operated by machinery; that the "oval reed" was always produced from the "round reed" by a second process of manufacture or cutting; and that the "flat reed" was invariably the product

or a second process of cutting, either from the "square reed" or from the "round reed." The samples offered in evidence, and the testimony, proved that the plaintiffs' importations were such "round," "square," "oval," and "flat reeds." All these varieties of "reeds" were used in certain manufactures in the United States without any further process being applied to them than cutting into proper lengths. In other manufactures the "reeds" were bleached and trimmed before being made into completed articles.

Defendant's counsel moved the court to direct a verdict for the defendant on the grounds—*First*. That the articles in question were "rattans manufactured," and not "reeds," according to the meaning of that word in the English language, viz., natural aquatic grasses, with hollow, jointed stems. *Second*. That if they were known in the trade as "reeds," still the evidence showed that they were manufactured, and not a natural product or raw material, and in either case were dutiable at 10 per centum *ad valorem*, and cited *Stockwell v. U. S.*, 3 Cliff. 284; *King v. Smith*, 4 Chi. Leg. N. 281; *U. S. v. Four Cases of Cutlery*, 1 Hunt, Mer. Mag. 167; *Lawrence v. Allen*, 7 How. 793. Plaintiffs' counsel moved the court to direct a verdict for the plaintiffs; relying chiefly upon *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240, and cases therein cited.

Hartley & Coleman, for plaintiffs.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) The two provisions of the tariff with which we are concerned in this case are paragraphs 482 and 770. The first of these is as follows: "Rattans and reeds, manufactured, but not made up into completed articles, ten per centum, *ad valorem*." The second provides that "rattans and reeds, unmanufactured," shall be exempt from duty. What the rattan is, we know by the testimony of the witnesses, and by the Exhibit S, "Rattans," introduced in this case. In its natural condition, it comes here free. When manufactured, it pays a duty of 10 per centum. It appears that when this rattan is taken and cut with certain knives, used, apparently, by means of a machine, the hard outer rind or enamel is cut through and stripped off. In the condition to which the rattan is thus reduced, both what is stripped off the outside and what is left after the stripping is completed would be "rattans, manufactured." If the statute provided, therefore, only for "rattans, unmanufactured," free, and "rattans, manufactured," 10 per cent. duty, the importations here would pay a duty. It appears, however, that the core or central part of the rattan, which is left after the stripping, is known in trade and commerce, and was for many years prior to the passage of the act of 1883 well known in trade and commerce, as a "reed." Upon that point there is no dispute on the testimony. It appears, then, that when the rattan has gone through this first transformation there is left the external rind, cut into narrow strips, and the inner core, which is commercially a "reed," and which, therefore, must be taken to be a reed,

within the meaning of the tariff act. With it as a reed, then, we are concerned. If it is a reed, unmanufactured, it comes in free; if a reed, manufactured, it should pay 10 per cent. duty. Now, the central core, or round reed, (a sample of which has been marked "S—Round,") is in the same condition in which nature produced it, except that the outer covering or enamel, which made it a rattan, has been stripped off. Nothing other or different has been done to it than that. In other words, it is one of the products of the first process of manufacture to which the rattan is subjected; and when that first process is completed, and this product, the reed, is produced, it is a reed, pure and simple, and in the first condition in which a reed, as such, is known to the tariff. I cannot see, therefore, that the round reeds can fairly be held to be "reeds, manufactured."

With regard to the oval reeds, it appears, moreover, that they are produced from the round reeds by a second step in the process, in which new machinery is introduced, and by which these oval slabs or strips are cut off. In like manner the flat reed is produced, by a second step or process, (and perhaps, in certain instances, even by a third step or process,) from the round reed; in some instances being cut directly from the round reed, and in others the round reed being first reduced to a square reed, and the flat strips then cut off from the square reed. Those two varieties of reeds seem, therefore, to be "reeds, manufactured."

The plaintiffs contend that the decision of the supreme court in the *Hartranft Case*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240, should control this court in the case at bar, and that it requires that all the varieties of reed which are introduced here should be classed as unmanufactured. No doubt the *Hartranft Case* does lay down the rule that, to constitute a "manufacture," there must be a transformation; that mere labor bestowed upon an article, even if that labor is applied through machinery, will not make it a manufacture, unless it has progressed so far that a transformation ensues, and the article becomes commercially known as another and different article from that as which it began its existence. However valuable the *Hartranft Case* may be as a rule of general application, it does not apply to the case at bar, for the reason that congress has provided, in paragraph 482, that "rattans and reeds, manufactured, but not made up into completed articles," shall pay 10 per centum *ad valorem*. Congress, therefore, contemplated that when this transformation was made, when the manufacture had progressed so far that what the supreme court contemplated in the *Hartranft Case* had really happened, that then the article should disappear from this paragraph entirely, and be found elsewhere in some other paragraph. It seems plainly to have contemplated that paragraph 482 should cover rattans and reeds in the various steps of the progressive processes of improvement to which they might be put subsequent to their appearance as a raw material.

There remains, then, for consideration only the square reed. The testimony is to the effect that it can be produced in either of two ways,—one, by cutting it out of the original rattan; and the other, by cutting it from the round reed, which has been itself produced from the original rattan.

The first method is a single process; the second, a double process. If produced under the first method, it might be fairly classed with the round reeds, as being an unmanufactured article; if by the second process, it should more properly be classed with the flat and oval reeds, as being the product of a double process, and therefore a "reed, manufactured." There is no testimony showing how these particular imported reeds were manufactured; but all presumptions are in favor of the correctness of the collector's action; and the burden of satisfying the court and jury as to how they are produced undoubtedly rested upon the plaintiffs. In the absence of any affirmative evidence, therefore, I feel constrained to hold that they are produced in the way in which it must be assumed the collector held they were, to-wit, by a double process. Verdict directed in favor of the plaintiffs for the round reeds only.

BLYDENBURGH v. MAGONE, Collector.

(Circuit Court, S. D. New York. December 5, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—CHINESE RUSH.

Unmanufactured rush, imported from China, cured, but not split or dyed, held to be "straw," within the common acceptation and definition of that word as used in this country, and therefore free of duty, under the tariff act of March 3, 1883, as "straw unmanufactured."

At Law. Action to recover back customs duties. On motion for direction of verdict.

This was an action to recover moneys exacted as duties upon certain unmanufactured rush imported by the plaintiff, Jesse L. Blydenburgh, from China, in the year 1887. The merchandise in suit consisted of small rushes cut from a tall grass or plant which grows in the neighborhood of Canton, on marshy soil along the river. There is a regular delta there, and all through that region there are miles of territory where this grass grows wild. It is cut by the natives. In its original state it is a three-cornered grass. The sample of the merchandise in suit representing the importation showed that it had been cut and cured, but not split or dyed. When cured, split, and dyed, it is used in China for the manufacture of matting, but it is not so used without being cured and split. It does not bear any grain. It is not edible. The defendant, collector of the port of New York, exacted a duty of 10 per cent. on the entry of this merchandise under section 2513, Rev. St. U. S., as a "raw or unmanufactured article not therein enumerated or provided for." The plaintiff duly protested and appealed against said exaction of duty thereon, claiming the merchandise to be free of duty, under section 2503, Id., (act of March 3, 1883,) under paragraph 796, (Tariff Index, new,) as "straw unmanufactured," or, under the same section, par. 636,

as "dried fibers," "stems," or "weeds" in a "crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture." It was conceded on the trial that the article was not the straw of commerce in this country; that it was a new article of importation since the passage of the tariff act of March 3, 1883. Straw mattings, however, had been imported prior to the tariff act of 1883. Defendant's counsel read in evidence the following definitions in Webster's dictionary: "Straw. The stalk or stem of certain species of grain, pulse, etc., chiefly of wheat, rye, oats, barley; more rarely, of buckwheat and peas." "Pulse. Leguminous plants, or their seeds; as, beans, peas, etc." "Weed. Underbrush; low shrubs; any plant that is useless or troublesome." "Rush. A plant of the genus *juncus*, of many species, growing in wet ground. Some species are used in bottoming chairs and plaiting mats, and the pith is used in some places for wicks to lamps and rush-lights. The term 'rush' is, however, often loosely applied to various plants having a similar appearance." "Fiber. One of the delicate, thread-like, or string-like portions of which the tissues of plants and animals are in part constituted; as, the fiber of flax or of muscle. Any fine, slender thread, or thread-like substance."

At the close of the evidence defendant's counsel moved for a direction of a verdict for the defendant, on the ground that the plaintiff had not proven facts sufficient to entitle him to recover; that the merchandise in suit was conceded not the straw of commerce, as known in this country at the time of the passage of the tariff act of March 3, 1883; that it was not "straw," within the dictionary definition; that the word "straw" only applied to the stalk of such plants as bore grain or seeds used for food; that there was no evidence that this rush bore any grain or seed fit for use for any purpose whatever; that the tariff act must be construed in relation to the appellations which the articles of importation had in trade and commerce at the time of its enactment, (*Rheimer v. Maxwell*, 3 Blatchf. 124;) that the fact that what is known as "straw matting" was made from this article after being cured, split, and dyed did not bring it within the free-list as "straw unmanufactured," (*U. S. v. Goodwin*, 4 Mason, 128;) that under the tariff act of March 3, 1883, "grass" was not free of duty, unless used or adapted for the manufacture of paper, (Tariff Index, 691;) that articles composed of grass or straw are dutiable under the said tariff act, (Id. 395-400;) and that the article in suit was not a "weed," a "stem," or a "fiber," but was a non-enumerated unmanufactured article, properly dutiable at the rate of 10 per cent., as assessed by the defendant collector.

Comstock & Brown, for plaintiff.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) Not without some doubt I feel constrained, by the dictionary definitions of the words referred to, to hold that this is "straw," within the use of the word in the English language as there given, and therefore I shall direct a verdict in favor of the plaintiff.

In re PALLISER.

(Southern District, New York. December 12, 1889.)

HABEAS CORPUS—APPLICATION TO CIRCUIT JUDGE—APPEAL.

The act of congress of March 3, 1885, c. 353, (23 St. 437,) gives an appeal to the United States supreme court in *habeas corpus* cases from the final decision of the circuit court only, and does not cover appeals where the writ is returnable before a circuit judge.

Application for *Habeas Corpus* to LACOMBE, Circuit Judge, by Charles Palliser, charged with an offense in the district of Connecticut.

Roger Foster, for petitioner.

Edward Mitchell, U. S. Dist. Atty., and Daniel O'Connell, Asst. U. S. Dist. Atty.

LACOMBE, J. The point raised here by the defendant is a sharp one. If this were a civil cause, where legislative intent would be largely determinative of doubtful phrases, it would probably be held that his objection is not well taken. Whether or not the same decision would be reached in a criminal case is another question, which, unless good grounds to the contrary are shown, should be determined in proceedings conducted according to the regular and orderly practice in federal courts, whereby there is, in the first instance, a decision upon the law by the district court, and, if desired, a review of such decision by the circuit court, which may, in a proper case, be constituted with two judges; and, if they differ in opinion, they may certify any question of difference to the supreme court. The petitioner's counsel asks to have the questions raised by him decided upon this application, for the reason that, as he insists, should the decision be adverse to him, he would be able to prosecute an appeal to the supreme court,—a tribunal which he assumes he can reach in no other way. He is in error as to the practice. The appeal, in *habeas corpus* cases, which, since the act of March 3, 1885, may be taken to the supreme court, covers appeals only from final decisions of such "circuit court." *Wales v. Whitney*, 114 U. S. 565, 5 Sup. Ct. Rep. 1050. It does not cover appeals in *habeas corpus*, where the writ is returnable before a circuit judge. *Carper v. Fitzgerald*, 121 U. S. 87, 7 Sup. Ct. Rep. 825. The present proceeding is before the circuit judge, not before the circuit court, which, in this district, has regularly assigned terms for the transaction of criminal business, and a judge specially designated to hold them. Let the writ be dismissed.

UNITED STATES *v.* DUBÉ.

(District Court, D. Connecticut. December 5, 1889.)

OLEOMARGARINE—RETAILING WITHOUT LICENSE.

A person having a license to carry on the business of a retail dealer in oleomargarine in the town of W., which does not specify the street or number at which the business is to be carried on, and who has paid the tax, and who peddles oleomargarine, at retail, from a wagon, through the streets, is not carrying on the business of a retail dealer, without having paid the special tax.

Indictment for Carrying on the Business of a Retail Dealer in Oleomargarine without a License.

Geo. G. Sill, U. S. Atty.

Webster & O'Neill, for defendant.

SHIPMAN, J. The accused is charged with carrying on the business of a retail dealer in oleomargarine, on July 18, 1888, without having paid the special tax therefor, as required by the statute. It appears from the pleadings and the admissions in the case that the defendant had a license to carry on the business of a retail dealer in oleomargarine in the town of Waterbury from May 1, 1888, to April 30, 1889, and paid the special tax of \$48 on May 5, 1888; that said license did not specify the street or number where the business was to be carried on; and that the defendant peddled, from a wagon through the streets of Waterbury, oleomargarine at retail, under said license. These being the only facts in the case, it does not appear that the defendant is carrying on the business of a retail dealer without having paid the special tax. What the legal result would have been if he had registered with the collector the street and number in which he was to do business, or if the license had specified the particular place in Waterbury where he was to carry on his sales, it is not necessary to determine. The facts are insufficient to constitute the offense as charged.

MORGAN ENVELOPE CO. v. ALBANY PERFORATED WRAPPING PAPER
Co. et al.

(Circuit Court, N. D. New York. December 10, 1889.)

1. PATENTS FOR INVENTIONS—TOILET-PAPER PACKAGES—NOVELTY.

Letters patent No. 325,410, granted to Oliver H. Hicks, September 1, 1885, for a "package of toilet-paper," the claim of which was for "a bundle of toilet-paper, consisting of one or more lengths of paper formed into a flexible continuous band, of oblong or oval shape, the short rounded ends of said bands serving as guides for determining the proper points at which the paper is to be separated, * * * and affording also the most advantageous surfaces upon which to tear the paper," are invalid for want of novelty.

2. SAME—TOILET-PAPER FIXTURES—INFRINGEMENT.

Letters patent No. 335,174, granted to Oliver H. Hicks, August 25, 1885, for a fixture to be used with oval-shaped rolls of toilet-paper, claimed (3) "the combination, with an elongated or oval oscillating roll of toilet-paper, actuated in one direction by a pull upon its free end of a stop constituting a knife or cutter, co-operating with the roll to sever the unwound portion therefrom when the roll has reached the limit of its motion when so actuated." The fixture was durable, and designed to last for many years, while the paper might be used up in a short time. *Held*, that a sale of such rolls of paper manufactured by defendants, mounted on fixtures which have been previously made and sold by complainants with paper mounted thereon, was not an infringement.

3. SAME.

Letters patent No. 357,993, granted to Oliver H. Hicks, February 15, 1887, claimed "(1) the combination, with an oscillating roll of toilet-paper, actuated in one direction by a pull upon its free end of a stop for arresting the roll at the limit of its motion when so actuated, whereby, upon the arrest of the roll, a portion unwound from it may be removed; (2) the combination, with an oscillating roll of toilet-paper," etc., "of stops for arresting the roll at the limit of its motion when so actuated, and also for arresting the motion of said roll at the limit of the oscillation in the opposite direction; (3) the combination, with an oscillating roll of toilet-paper having its bearings out of line with its center of gravity, and actuated in one direction by a pull upon its free end of a stop for arresting the roll, * * * whereby, when the roll has been arrested, and the length of paper removed, the roll will automatically resume its normal position." The fixture consisted of a back plate, two rigid arms extending outwardly at right angles, a flat metal core plate, on which the roll of paper is mounted, pivoted at the outer ends of the arms, and heavier on one side of the pivot than on the other, and a blade, extending between the arms at their inner end, acting as a stop and a cutter. The fixture sold by defendants differed only in that its arms were hung loosely on the back plate by means of a hinged transverse bar, which acted as a stop when oval rolls, mounted on a sufficiently wide core plate, were used with it. This fixture was a duplicate of an old one in common use at the date of the patent, which used cylindrical rolls on wooden spreaders, except that it had sometimes the core plate of the patent and oval rolls when it did the same work. *Held* that, as the core plate was not an element of the above claims, if they were infringed by a sale of defendants' fixture with oval rolls of paper, they were invalid for want of novelty; and if the stop described were an essential element of them, they were not infringed.

4. SAME.

The fifth claim of No. 357,993 was for "the combination, with the supporting arms, of an oscillating core plate, weighted on one side of its pivots so as to cause the roll supported by it to automatically resume its normal position after being oscillated, and a stop for limiting the motion of said plate." *Held*, that this claim was infringed by defendants' fixture whenever a core plate was used, weighted or hung so that its depending side, when rotated upwardly, would be arrested by the transverse bar if any paper were left on the roll, and would fall by its own gravity.

In Equity. On bill for infringement of patents by the Morgan Envelope Company against the Albany Perforated Wrapping Paper Company and others.

Church & Church and B. F. Thurston, for complainant.

A. J. Todd, for defendants.

v.40F.no.10—37

WALLACE, J. The complainant sues for the infringement by the defendants of three patents granted to Oliver H. Hicks,—the first being No. 325,410, dated September 1, 1885, for "Package of Toilet-Paper;" the second being No. 325,174, dated August 25, 1885, for "Toilet-Paper Fixture;" and the third being No. 357,993, dated February 15, 1887, for "Apparatus for Holding Toilet-Paper." All of them relate to cognate subject-matter; the first being for toilet-paper when put up in specified form, and the others being for apparatus for holding the paper, and permitting it to be removed for use.

The first patent is invalid for want of novelty. The subject of this patent is well stated in the claim that appeared in the application for the patent, filed July 10, 1885, viz.:

"As a new article of manufacture, a bundle of toilet-paper, consisting of one or more lengths of paper formed into a flexible continuous band of oblong or oval shape, the short rounded ends of said bands serving as guides for determining the proper points at which the paper is to be separated in order to produce sheets of a size desirable for use, and affording also the most advantageous surfaces upon which to tear the paper."

The only novelty in this patent consists in putting up the paper in the form of an oblong or oval shaped roll. It was old to put up such paper in the form of sheets cut the proper size for use. It was old to put it up in the form of cylindrical rolls; and when it was put up in such rolls it was sometimes in one continuous or unbroken sheet, and sometimes in a sheet perforated transversely at given intervals, so that it could be easily torn from the roll in pieces of a predetermined length. It would not seem to involve invention to put up paper in the form of oval or oblong rolls which had commonly been put up in the form of cylindrical rolls; but, however this may be, it is abundantly shown in the proofs that it was likewise old to put up the paper in the exact form of the patent. The old oval rolls shown in the patent to Peacock, and those like "Defendants' Exhibit No. 24," were of smaller size than the roll preferably contemplated by the patent, but there is no patentable difference between them. Although the rolls of the patent are not new in a patentable sense, they are peculiarly useful when employed in fixtures like those of the second and third patents, and the real invention of Hicks consists in devising the fixtures in which the paper is to be arranged.

The second and third patents in suit are for a fixture to be used with oval-shaped rolls of toilet-paper, and which is designed to arrange the paper so as to prevent more than a given quantity of it from being withdrawn from the package at a single operation, and so that in the act of withdrawing that quantity it shall be automatically severed from the package, leaving pendent from the package a free end to serve as a means for withdrawing a like quantity by the next operation. The fixture consists of a back plate, two arms rigidly connected therewith, extending outwardly therefrom at right angles; a flat metal core plate, upon which the roll of paper is designed to be mounted, pivoted on the outer end of the arms, and made somewhat heavier on one side of its pivot than on the

other; and a blade, extending between the arms at their inner end, which performs the functions of both a stop and a cutter. The blade extends forward from the back plate sufficiently to arrest the core plate, and limit its motion when rotated in either direction. In operation, after the roll of paper has been mounted upon the core plate so that a free end is depending, the free end is pulled by the person who desires to use the paper. This pull rotates the roll upwardly until it is arrested by the blade, and when its rotation is arrested, one end of the package rests upon the blade, and the depending end of the paper is severed at the edge of the blade by another pull. Thereupon the weighted core plate, pivoted as described, swings back the package automatically until the other end is arrested by the blade, when it resumes its original position. The specification states:

"It will be observed that the plate or blade, M, performs the functions of a stop for arresting the forward rotation of the roll, and holding the roll while the section of paper is being removed, as well as the function of severing said section of paper; and its importance as a stop is as great, if not greater, than its importance as a cutter, since the stopping of the roll, coupled with the continued movement of the free end of the paper, must necessarily cause the severance of the paper at some point at or near the point the end leaves the body of the roll."

The specification also states that the outer edge of the blade, M, may be made either plain or serrated.

The fixture thus described is an ingenious and meritorious invention. It immediately commended itself to the public as a simple and efficient device by which toilet-paper could be economically and readily severed from the roll in pieces of convenient length. It dispensed with the necessity of putting up the paper in sheets, or in rolls perforated transversely to enable it to be detached in pieces of the requisite length for use. But in view of the "Albany Fixture," a fixture at the time in common use, and in which cylindrical rolls of perforated paper were employed, the essence of the invention is, in such a construction or arrangement of the blade and core plate in reference to one another, that when the latter is rotated the blade will not permit it to pass by. If there were room enough between the two parts to permit the core plate to pass the blade, the apparatus would cease to work when the thickness of the roll of paper should be less than the space between the blade and the core plate.

The second patent contains five claims, each of which is for a combination in which the roll of paper and a knife or cutter (the blade, M,) are elements. The third claim, which is the only one alleged to be infringed by the defendants, is as follows:

"The combination, with an elongated or oval oscillating roll of toilet-paper, actuated in one direction by a pull upon its free end of a stop constituting a knife or cutter, co-operating with the roll to sever the unwound portion therefrom when the roll has reached the limit of its motion when so actuated, substantially as described."

The defendants manufacture and sell a fixture known as the "Universal Fixture," together with oval-shaped rolls of paper to accompany it, and be used in it. Their fixture does not contain a cutter, and this is

practically conceded by the complainant. The complainant asserts, however, that the defendants infringe this claim because they sell rolls of oval toilet-paper manufactured by them, in conjunction with or mounted upon fixtures which had been previously made and sold by the complainant with rolls of paper made by the complainant. The fixtures thus sold by the defendants were once lawfully purchased, with paper mounted therein, from the complainant, and after the paper was used up the purchasers sold the fixtures to the defendants. In other words, the case is as though the defendants were charged with infringement because they sell rolls of oval paper which they manufacture to persons who have bought the paper and fixtures from the complainant, and, having used up the paper, wish to get more to use with the fixtures. The sale of the paper to those who have a lawful right to use the fixture, and to use both the fixture and paper together, is not an invasion of the rights of the complainant. The paper, as an element of the patented invention, is one for temporary use only. The fixture proper is a durable device, which is designed to last for many years; while the roll of paper may be completely used up in a few days. This circumstance repels any inference that the right of a purchaser to use the fixture does not survive the life of the paper. The purchaser who buys a machine or device, patented or unpatented, without any restriction as to the mode or extent of the use to which he may apply it, acquires all the rights of the seller, and may do with it whatever the seller might have done if he had not parted with it. He acquires the right to use it, to repair it, and to sell it to others; and those to whom he sells acquire all his rights. If the original vendor is the licensee of the owner of the patent of the whole monopoly in the use and sale of the article, a purchase of the article from him is, in legal effect, a purchase from the owner of the patent. The sale of the article transfers the monopoly right in the article itself without qualification. *Holliday v. Matheson*, 23 Blatchf. 239, 24 Fed. Rep. 185. If the purchaser may lawfully repair the article, or remove a part of it and substitute another, it is quite immaterial whether he does it by his own hands or procures another to do it for him; and if the act when done by himself does not violate the rights of the owner of the patent, it does not when performed by another at his request. So, also, the purchaser, instead of repairing the article himself, or procuring another to do it for him, may sell the article in the condition in which it is to another, and the latter acquires all his right to repair it. These rights are all incident to the property in the article itself. The purchaser does not acquire any rights in the monopoly directly, but he does acquire the right of unrestricted ownership in the article he buys as against the vendor, including, as an inseparable incident, the right to use and enjoy it as his own, and to transfer his title to others. On the other hand, when the owner of the patent sells the patented article under circumstances which imply that the purchaser is not to acquire an unqualified property in the thing purchased, as where a license accompanies the transfer, the purchaser's rights are limited to the extent implied by the license, or the other circumstances. The right to repair a patented article bought of the patentee, or to supply a part which

has become inoperative or worn out, is distinctly declared in *Wilson v. Rousseau*, 4 How. 647, and in *Wilson v. Simpson*, 9 How. 109. If it did not exist, the value of most patented articles would be materially lessened, and thus the owner of the patent, as well as the public, would fail to derive the full benefit of the invention. There is nothing inconsistent with these views in the case of *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. Rep. 52. There the patented article was sold, "Licensed to use once only," and after it was practically worn out, and the right of the purchaser to use it had terminated, another person, who bought the parts as old iron, reconstructed them anew into the patented article. If in this case the fixtures had been worn out, or had in any other way fully subserved the use for which they were intended when sold, the doctrine of that case would apply.

The law of contributory infringement has no application to the case. That doctrine rests on the principle that he who consents with another to do a wrong is an abettor, and equally guilty with the one who actually commits it. Here no wrong has been committed.

The complainant cannot rely upon the inconclusive statement, elicited upon cross-examination from the defendant Wheeler, to establish a sale by the defendants of paper with fixtures which had not been sold by the complainant. It would be mere guess-work to infer from that testimony that the fixtures thus sold were not originally made and sold by the complainant. The affirmative upon the issue of infringement is with the complainant, and the *onus* of proof is not satisfied merely by showing a state of facts from which infringement may be conjectured.

The third patent describes the fixture of the second patent, but its claims are for combinations in which the blade has the functions of a stop, instead of a knife or cutter, as in the claims of the second patent. The claims of this patent alleged to be infringed by the defendants are claims 1, 2, 3, and 5. These claims are as follows:

"(1) The combination, with an oscillating roll of toilet-paper, actuated in one direction by a pull upon its free end of a stop for arresting the roll at the limit of its motion when so actuated, whereby, upon the arrest of the roll, a portion unwound from it may be removed, substantially as described.

"(2) The combination, with an oscillating roll of toilet-paper actuated in one direction by a pull upon its free end of stops for arresting the roll at the limit of its motion when so actuated, and also for arresting the motion of said roll at the limit of the oscillation in the opposite direction, substantially as described.

"(3) The combination, with an oscillating roll of toilet-paper, having its bearings out of line with its center of gravity, and actuated in one direction by a pull upon its free end of a stop for arresting the roll at the limit of its motion when so actuated, whereby, when the roll has been arrested, and the length of paper removed, the roll will automatically resume its normal position, substantially as described."

"(5) The combination, with the supporting arms, of an oscillating core plate, weighted on one side of its pivots so as to cause the roll supported by it to automatically resume its normal position after being oscillated, and a stop for limiting the motion of said plate, substantially as described."

It is insisted for the complainant that the Universal fixture sold by the defendants is an infringement of the fifth claim, and that when that fixture is used with oval-shaped packages of paper the combinations of the other claims are infringed. This fixture has a back plate and arms which carry a flat metal core plate, which is pivoted into them, and is heavier on one side of its pivot than on the other. The arms, instead of extending outwardly from the back plate at right angles, and being rigidly connected with it, as they are in the fixture of the patent, are hung loosely upon the back plate by means of a transverse bar, to which they are attached. This bar is hinged to the back plate. In use, after the paper has been mounted upon the core plate, and the free end of the package is pulled, the package rotates upward until it comes in contact with the transverse bar. If the package is so large that the arms will not carry it beyond the transverse bar, it is stopped, and in that case the paper is more likely to be severed where it is in contact with the bar than at any other place. When perforated paper is used, as it is largely with the Universal fixture, the bar adds a resistance to the rotation of the package which causes the paper to break on the line of the perforation. To this extent the transverse bar operates as a stop, but it is obvious that the back plate itself would operate as a stop, and that the transverse bar only does somewhat more efficiently the work which would be done by the back plate if the arms were immovably attached directly to it. When cylindrical rolls of paper are used in this fixture, and are mounted on a cylindrical core plate, which is usually the case, the transverse bar performs no other function than that of carrying the arms. When, however, oval rolls are used in it, and are mounted on a core plate of a width beyond its pivoted center, which prevents it from passing by the transverse bar when rotated, the transverse bar performs the functions of a stop. When a weighted core plate of the requisite shape and dimensions is used in it with the oval roll paper, the parts perform the functions of the fixture described in the specification, and shown in the drawings of the patent, except the cutting operation. The several parts of this fixture, exclusive of the core plate, operate conjointly when used with the oval roll of paper, just as they do when used with the cylindrical roll. They do precisely the same work which the Albany fixture does when used with oval rolls of paper, and by the same mode of operation. The Universal fixture is a duplicate in all its parts of the old Albany fixture, except that, instead of the cylindrical wooden spreader upon which the roll of paper is mounted in the Albany fixture, it has in some instances the core plate of the patent. The defendants sell both the fixture and oval paper to be used in it.

For the reasons stated in considering the validity of the first patent, oval roll paper was old at the time when the device of the patent was invented. Inasmuch as novelty does not reside in the combination of an old element with other old elements, when no new mode of operation results from their conjoint action in the new combination, none of the claims of the patent can be sustained as valid which are to be read as

for a combination consisting of the oval roll and the parts found in the Albany fixture. The core plate is not an element of either the first or the second claim of the patent, and it follows that if the Universal fixture, when used with such a roll, is an infringement of these claims, the claims are invalid. If these claims are given a more limited interpretation, by which a stop structurally such as is described in the specification is an element, the defendants do not infringe them. The same conclusions obtain respecting the third claim. The specific core plate is not an element of that claim; and the oval roll of paper, if hung on a cylindrical core plate in the Universal fixture or in the Albany fixture, would have "its bearings out of line with its center of gravity," as described in the claim.

The fifth claim is for a combination of all the parts of the fixture, and can be interpreted as one in which a core plate and a stop, so constructed and arranged with reference to each other that they cannot pass one another when the core plate is oscillated, are elements. The two parts are described by letters of reference to the drawings in the specification,—the stop as "M," and the core plate as "F;" and, although the language of the specification does not point out anything in respect to their relative dimensions, the drawings show that they are of such breadth, respectively, that the core plate cannot be rotated past the stop in either direction. It is apparent that, if this feature of relative dimensions were ignored, the parts would not co-operate, or would only co-operate imperfectly, to perform the functions assigned to them of arresting the roll of paper when mounted and rotated. The core plate of this claim is weighted on one side of its pivots. This is effected when the pivots are arranged eccentrically to the core plate, or by attaching them centrally thereto, and having one side of the core plate heavier than the other. In such a combination the transverse bar of the Universal fixture is the equivalent of the blade of the patent. When a core plate is used in the Universal fixture which is weighted or hung so that its depending side, when rotated upwardly, will be arrested by the transverse bar if there is any paper left in the roll, and will fall by its own gravity, that fixture infringes the fifth claim of the patent. Such a core plate is sometimes used in that fixture, and the complainant is accordingly entitled to an injunction and an accounting.

The defenses which rest on the prior use of the Coffee fixture, and the prior invention of Richardson, do not meet the fifth claim of the patent, as thus interpreted. Coffee did not employ the core plate, and Richardson did not employ the stop of the patent.

The complainant is not to recover costs of the suit.

HEYSINGER *et al.* v. ROUSS.

(Circuit Court, S. D. New York. December 10, 1889.)

PATENTS FOR INVENTIONS—RES ADJUDICATA.

The question of the validity of a patent is *res adjudicata*, where it has been adjudicated by another judge of the same circuit, and the parties to the two actions are the same, and the records substantially identical.

In Equity.

Joshua Pusey, for complainants.

John J. Jennings, for defendant.

COXE, J. This is an infringement suit, based upon letters patent No. 218,300, granted to Mills and Hershey, August 5, 1879, for an improvement in hair-crimpers. The patent was declared invalid by Judge SHIPMAN in the circuit court for the district of Connecticut. *Hershey v. Blakesley*, 33 Fed. Rep. 922. That the parties to that action are, in legal contemplation, the same as the parties to the suit at bar, and that the records in the two actions are substantially identical, is conceded. The defendant has taken some additional testimony, but the complainant's proofs are the same in every respect as those presented in *Hershey v. Blakesley*. I have examined the record and briefs, to discover a plausible theory upon which the two causes can be distinguished, so as to justify a re-examination of the issues presented. I find none. The court is now asked to pass upon the same question which, after deliberate and careful consideration, has been decided by another judge of the same circuit, upon precisely the same testimony. There is no precedent for such a course. The matter is *res judicata*. The bill is dismissed.

POPE MANUF'G Co. v. JOHNSON.

(Circuit Court, D. New Jersey. December 2, 1889.)

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—LACHES.

On bill for discovery and accounting of sales of patented articles by defendant under an agreement with complainant, a preliminary injunction will not be granted to restrain defendant from proceeding further under the agreement, where more than three years have elapsed between defendant's first default in making returns and the filing of the bill, and the delay is not explained, and a final decree may be had in less than five months.

In Equity. On bill for discovery, accounting, and injunction. Application for preliminary injunction.

Wetmore & Jenner, for complainant.

Philip J. O'Reilly, for defendant.

WALES, J. The complainant has brought suit against the defendant for a discovery, to compel him to make returns of sales and payments of royalties, according to the provisions of an agreement of license between them, and to enjoin him from making, using, or selling any of the patented articles mentioned in the said agreement. By this agreement, dated April 1, 1885, the defendant was to make monthly returns of sales and payment of royalties to the complainant on or before the 10th day of each month, and to perform certain other stipulations as to places of sale, advertising, etc. It is charged that the defendant has not made any returns since January 1, 1886, nor paid any royalties due since November 30, 1885, and that notwithstanding his default in this regard he has continued to sell the patented articles. The bill was filed July 5, 1889, and, pending a final hearing and decree, asks for a provisional injunction of the same tenor, force, and effect as the injunction thereinbefore prayed. An interlocutory decree of this kind is made only when the complainant, being free from fault, has been vigilant in asserting his rights, and it is considered to be necessary to protect his property or business from irreparable loss. More than three years had elapsed between the first default of the defendant and the filing of the bill. This long delay in bringing suit has not been satisfactorily explained or accounted for, and, as a final decree may be obtained in less than five months from now, the complainant will not suffer much additional loss or damage during the intervening period. A preliminary injunction has been refused where the laches of the complainant were less serious than they have been in this case. *Sperry v. Ribbans*, 3 Ban. & A. 260; *Spring v. Machine Co.*, 4 Ban. & A. 427. In *Bovill v. Crate*, L. R. 1 Eq. 388, an interlocutory judgment was refused on the ground of delay, because the plaintiff had known of defendant's infringement in August, and did not file his bill until the following July. See, also, High, Inj. § 7. For the reason stated the present application must be refused.

PHILADELPHIA NOVELTY MANUF'G Co. v. ROUSS.

(Circuit Court, S. D. New York. December 9, 1889.)

TRADE-MARKS—INFRINGEMENTS.

Complainant puts up its hair-crimpers in packages, in a red pasteboard box, on the cover of which is a white label with a black border, and in the center the head of a woman, with hair curled, together with the words "Madam Louie, Common-Sense Hair-Crimper." Defendant dealt in crimpers packed in a similar manner, in red boxes with white labels, and in the center of the label is the head of a female, surrounded by the words, "The Langtry. Elegantes. One gross, No. 1, Black, Hair-Crimpers." Complainant's crimpers were smaller than defendant's, and much heavier, and the wrappers were unlike in length, and in the words printed thereon. Defendant had the prior right to the use of the white label and the central vignette, and the labels were dissimilar in form and general appearance. There was no evidence that any one was ever misled by any resemblance between the two. Held that defendant did not infringe complainant's trade-mark.

In Equity.

Joshua Pusey, for complainant.

John J. Jennings, for defendant.

COXE, J. This is an action for the infringement of a trade-mark. The bill alleges that the complainant is engaged in manufacturing and selling hair-crimpers which are put up in packages of 12, and wrapped with a tan-colored paper, which is held in place by a rubber band. Twelve of these packages are placed in a red pasteboard box, on the cover of which is a white label, with a black border, "and, as a distinctive trade-mark, in the center, the head of a woman, with hair curled, together with the words, 'Madam Louie, Common-Sense Hair-Crimper.'" The defenses are—*First*, that the complainant is not entitled to the exclusive use of the alleged trade-mark; and, *second*, that the defendant does not infringe.

The defendant deals in crimpers manufactured by the Blakesley Novelty Company, which are packed, in a manner similar to the complainant's, in red boxes, with white labels, and are sold by the gross. In the center of the label is the head of a female surrounded by the following words: "The Langtry. Elegantes. One gross, No. 1, Black, Hair-Crimpers." For a more minute and accurate description of the two labels, see *Manufacturing Co. v. Novelty Co.*, 37 Fed. Rep. 365. It will be seen that the only marked similarity between the two is found in the fact that both are white, and have the central vignette; but these features the defendant had a perfect right to use,—a better right, in fact, than the complainant. Long before the complainant's predecessors had adopted their design, the predecessor of the defendant's vendor had sold crimpers packed, by the gross, in a pasteboard box, on the cover of which was a white label with a black border; in the center of the label, "the head of a woman with hair curled," and over the head the words, "Hair-Crimpers." Business misfortunes necessitated the discontinuance of this label for two or three years, but, in a legal sense, it was never abandoned. So far as the distinctive trade-mark is concerned, there is, manifestly, no liability. The defendant had an indisputable right to the white label and the central vignette, and in other respects there is no resemblance between his label and the complainant's. They are dissimilar in form, language, type, and general appearance.

The contention is therefore narrowed down to the question whether any right of the complainant is violated because the defendant sells crimpers wrapped in tan-colored paper, and packed in red boxes. It is thought that the affirmative of this proposition cannot be maintained, and especially so in the absence of proof that purchasers have been deceived. There is, of course, a general similarity between all crimpers of this pattern; but no one who thoroughly understood the distinguishing features of the complainant's crimpers, and preferred them to the defendant's, could ever mistake the latter for the former. In addition to the differences of the labels, before adverted to, the complainant's crimpers are smaller than the defendant's, and much heavier,—a box of them weighing over three times as much. The wrappers, too, are unlike. The defendant's wrapper is about two and one-fourth inches in length,

and contains nothing but the printed words of the "Langtry" white label. The complainant's, on the contrary, is nearly four inches in length, and in addition to the words of the "Madam Louie" white label, there appears the complainant's vignette, directions for use, and a caution against "spurious imitations." In short, there are marked differences in everything, except in the color of the boxes and wrappers; and these differences are so pronounced and unmistakable as to overshadow the two points of similarity. The language of Mr. Justice FIELD, in *Tobacco Co. v. Finzer*, 128 U. S. 182, 9 Sup. Ct. Rep. 60, seems applicable:

"The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled so as to take one tobacco for the other; and this judgment is against any such possibility. Seeing, in such case, is believing; existing differences being at once perceived, and remaining on the mind of the observer. There is no evidence that any one was ever misled by the alleged resemblance between the two designs."

There is no such evidence here. The proof is overwhelmingly to the effect that a purchaser really preferring the "Madam Louie" crimpers, and desirous of procuring them, could not be deceived by the defendant's crimpers, unless she were afflicted with partial blindness, an arrested mental development, or an unusually heedless disposition. The law cannot take cognizance of conditions so abnormal. In *Adams v. Heisel*, 31 Fed. Rep. 279, the court, in dealing with facts quite similar to those in hand, observes:

"The complainants could not obtain a trade-mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar without injury to others who may use the same forms. * * * The complainants cannot now so broaden and enlarge their trade-mark as to cover the whole box, with all its ornaments and forms of putting up the gum, and the colors used in such decorations, and thereby prevent others from using these forms of putting up gums for sale."

The trend of the law is strongly towards the proposition that, in ordinary circumstances, the adoption of packages of peculiar form and color alone, unaccompanied by any distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade-mark. *Fleischmann v. Starkey*, 25 Fed. Rep. 127; *Fairbanks v. Jacobus*, 14 Blatchf. 337; *Sewing-Machine Co. v. Gibbens Frame*, 17 Fed. Rep. 623; *Moorman v. Hoge*, 2 Sawy. 78; *Faber v. Faber*, 49 Barb. 358; *Davis v. Davis*, 27 Fed. Rep. 490; *Falkenburg v. Lucy*, 35 Cal. 52; *Chemical Co. v. Stearns*, 37 Fed. Rep. 360; *Browne, Trade-Marks*, §§ 271, 272. The courts will have time for little else, if they undertake to meddle with and regulate the color and size of the wrapping paper and boxes in which a shop-keeper displays his wares. Trade should not be hampered by vexatious restrictions in matters, apparently, so trivial.

As the distinctive trade-mark of the complainant has not been infringed, and as the public have not been deceived by the defendant's acts, it follows that the bill should be dismissed.

PHILADELPHIA NOVELTY MANUF'G CO. v. BLAKESLEY NOVELTY CO.

(Circuit Court, D. Connecticut. December 10, 1889.)

TRADE-MARKS—INFRINGEMENT.

Complainant places its hair crimpers in a bright red box, having a white label, with a black border, and on the label the words, "Madame Louie, Common-Sense Hair-Crimpers. Patented August 5, 1879," forming a column of four lines above the representation of the head and bust of a woman with curled hair, below which are the words, "Friseur Renommée. To hide the crimper, in doing up the hair, turn the ends under." Defendant's hair-crimpers are placed in a bright red box, of different shape from complainant's box, as the box is presented to the eye, on which is a white label, bearing the words, "The Langtry Elegantes," in a column of two lines above the representation of the head of a woman with curled hair, at one side of which are the words, "One Gross," and at the other side the words, "No. 1. Black," and below which are the words, "Hair-Crimpers." The use of the representation of the woman's head by defendant's predecessor antedated its use by complainant's predecessor. *Held*, that there was no infringement of complainant's trade-mark.

In Equity. Bill for infringement of patent. For motion for preliminary injunction, see 37 Fed. Rep. 366.

Joshua Pusey, for complainant.

John J. Jennings, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the alleged infringement of a trade-mark, and has now been heard upon final proofs. A motion for preliminary injunction had been previously heard and denied. 37 Fed. Rep. 366. The finding of facts upon that motion was correct, except that I was mistaken in saying that "the crimpers are ordinarily sold by the box, or are shown to the purchaser in the box." They are sold to the consumer by the small package, from an uncovered red box. What is styled in the bill "the distinctive trade-mark," *i. e.*, the printed matter upon the label, and the picture of the head of a woman with hair curled, or, in other words, the label itself, is not infringed by the defendant's label, for the reasons stated in my former opinion. The complainant's label, with its words, symbols, and distinctive appearance, not having been simulated, and the defendant's box, with its label, not being adapted to deceive or mislead the purchaser, is the use of the same or similar colors of wrappers and of boxes to be enjoined as infringing the rights of the complainant? The answer must be in the negative, unless the complainant's trade-mark proper has been imitated to some extent, or unless there is a colorable resemblance between the two marks. The case of the complainant against Rouss (39 Fed. Rep. 273) was recently heard in the circuit court for the southern district of New York upon the same record which was used in this case, and nothing need be added to the statement of the law by Judge COXE in regard to the rights of a manufacturer to the exclusive use of a particular color, when no mark or symbol has been simulated. The bill should be dismissed.

MUMM *et al.* v. KIRK.

(Circuit Court, S. D. New York. December 17, 1889.)

TRADE-MARKS—INFRINGEMENT—INJUNCTION.

The use of a capsule of the same color as that used by complainants on bottles of champagne will not be enjoined, where there is no attempt at deception thereby, and where other labels used by defendant are so unlike those of complainants that no mistake could arise between them.

In Equity. On bill for injunction.

Roland Cox, for complainants.

Louis C. Raegener, for defendant.

COXE, J. The complainants, in France, and the defendant, in this state, are engaged in the production of champagne wine. The wines of both are sold in this country. The complainants use a rose-colored capsule upon bottles containing wine made by them known as "Extra Dry." They seek by this suit to prevent the defendant from using a capsule of similar color. It is conceded that he has the right to the words "Extra Dry," and that he may offer his wine to the public in the conventional champagne bottle with a capsule of any color except rose-color. No fraud is proved. There is no attempt to show that any one has been misled or has ever bought the defendant's wine for the complainants' wine. Indeed, it must be admitted that deception is absolutely impossible, unless practiced by some one other than the defendant. When the wine leaves his hands no rational being can mistake it for the complainants' wine. The defendant's bottles are provided with labels emphatically unlike the complainants' labels, which announce that the wine is made by the Pleasant Valley Wine Company, and is known as "H. B. K." But the complainants argue that, in the process of cooling, the labels are liable to drop off, and that a dishonest bartender might, by leaving the neck of the defendant's capsule on the bottle, induce an ignorant or unwary purchaser to take it for the complainants' wine, even though the complainants have their firm name embossed in large letters upon the capsule. That this might be done is possible, but it is not probable. A man of average intelligence, exercising ordinary care, could readily ascertain the difference. If the large label were washed off, the small one would still remain. If that were removed also, the lettering on the top of the capsule, the absence of lettering on its neck, and the name on the liberated cork would still be left to tell the story. In addition, there would be the absence of complainants' narrow neck label and metal cap for the cork, and also the difference in the flavor of the wine itself. If, in spite of all this, he were imposed upon, he certainly would not be undeceived by a different colored capsule. The part played by it would be infinitesimal and unnecessary. If the vendor happened to be a knave, and the purchaser an imbecile, all manner of

imposition might be practiced, especially if previous potations had combined with nature to make the latter oblivious to surrounding occurrences. For such conditions, however, the defendant is not responsible. In short, infringement in this cause is reached through such a succession of improbable "ifs" that the doctrine, if pushed a few steps further, would drive all competitors from the field. The law cannot be so refined; it cannot deal with hypothesis and conjecture. The defendant is not an impostor. He is not representing himself or his wares in a false light. He is openly and plainly advertising his wines to be exactly what they are. It was necessary for him to use a capsule of some kind. Almost all colors harmonious for this use, such as gold, silver, and white, had previously been appropriated by other dealers in champagne. He could hardly select a capsule without coming in contact with some of them. He chose rose-color, as he had a right to do. If he had simulated the complainants' labels in other respects, a different proposition would have been presented. As it is, there is nothing of which to predicate a decree against him. No authority has been cited which, in my judgment, sustains the advanced position contended for by the complainants. The bill is dismissed.

THE NORMANDIE.

O'SULLIVAN v. LA COMPAGNIE GENERALE TRANSATLANTIQUE.

SAME *et al.* v. THE NORMANDIE.

(District Court, S. D. New York. November 20, 1889)

1. ADMIRALTY—CONCURRENT ACTIONS IN REM AND IN PERSONAM.

A suit *in rem* and a suit *in personam*, arising out of the same cause of action, may be brought concurrently in the same court.

2. SAME—APPLICATION FOR STAY OF PROCEEDINGS.

When a suit *in rem* and a suit *in personam* are brought concurrently for the same cause of action, the question whether one shall be stayed until the remedy is exhausted in the other is wholly a question of practice, to be determined with reference to the convenient administration of justice.

3. DEPOSITIONS—DE BENE ESSE—FURTHER EXAMINATION.

Where, on taking testimony *de bene esse*, the cross-examination of witnesses has been ended in ignorance of facts material to a further cross-examination, the court, upon proper affidavits, can make such order as may be just.

In Admiralty. Exceptions and motion to dismiss second libel.
Coudert Bros., (E. K. Jones, of counsel,) for claimants.
Carter & Ledyard, for libellant.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. I cannot sustain the respondents' exception that the pendency of the former suit *in personam* constitutes a bar to the subsequent suit *in rem* for the same cause of action, though both suits are in this court, and undetermined; nor is that a sufficient ground for any stay of proceedings in either suit. In the case of *Insurance Co. v. Alexandre*, 16 Fed. Rep. 279, the rule that obtains in this country, it is believed, was accurately stated, to the effect that a prior suit pending is not a bar where the relief that may be given, or the remedies available, in the two suits are different, though a stay may, in a proper case, be granted. To the authorities cited in that case may be added *Watson v. Jones*, 13 Wall. 715; *Buck v. Colbath*, 3 Wall. 334; and the recent case of *Insurance v. Wager*, 35 Fed. Rep. 364. Though Dr. LUSHINGTON once dismissed a subsequent suit, the later English cases sustain only a stay of proceedings. *The Bold Buccleugh*, 7 Moore, P. C. 283; *The Mali Ivo*, L. R. 2 Adm. & Ecc. 356; *The Peshawur*, L. R. 8 Prob. Div. 32. The fifteenth rule of the supreme court in admiralty, by implication, prohibits only the joinder of the ship and owners in the same suit. These are independent suits. No one has ever supposed that rule to forbid a suit *in personam* to recover what was not realized upon a prior judgment *in rem*, or *vice versa*. In the recent case of *The Jessie Williamson*, 108 U. S. 305, 2 Sup. Ct. Rep. 669, a collision case, Mr. Justice BLATCHFORD, in reference to rule 15, says:

It "excludes the joining in one suit of the vessel and her owners; but it does not prevent the introduction into the libel of allegations as to the ownership of the vessel at the time of the collision, with a view to a proceeding to obtain such ultimate relief *in personam*, on the basis of a recovery *in rem*, as the libelant may be entitled to."

If successive suits, upon the same demand, may be maintained *in personam* and *in rem*, or *vice versa*, until satisfaction is obtained, it is wholly a question of practice whether the two may be brought concurrently, or whether the second suit shall not be allowed until the remedy in the first shall be exhausted. That question must be determined with reference to the convenient administration of justice. Rev. St. §§ 913, 918, rule 46; *The Hudson*, 15 Fed. Rep. 162, 175. Where the actions are in different courts, and either remedy may be sufficient, it would be oppressive to proceed with two actions at the same time. In admiralty suits, when both actions are in the same court, no prejudice can ordinarily result to the defendant from concurrent suits, since, in the usual course, both would be heard together, and the costs can be adjusted according to the circumstances, being in part imposed on the libelant, if that be equitable. In suits for collision the exigencies of maritime affairs would make inexpedient and unjust any rule of practice that would prevent the filing of a libel *in rem* merely because there was pending a prior libel *in personam*, or *vice versa*, since either alone might be insufficient to insure satisfaction. The libelant is often obliged to proceed against foreign owners, or foreign ships, at the moment that chance may bring them within the jurisdiction. The

owners may be temporarily here, and the ship not here, and never expected to be here; or, if expected, not expected for a long time. The ship may be here, while the owners are not here, and have no other known property here. If service is not obtained when opportunity for service occurs, it may never be obtained; or, if obtainable afterwards, the lien *in rem* may in the mean time be lost by delay, through the sale of the *res*, or by subsequent claims. These considerations apply with special emphasis to maritime causes; and a practice that prohibited such concurrent suits would tend to defeat, rather than to promote, the administration of justice. As no harm or substantial prejudice or inconvenience can arise to the defendant by the allowance of such concurrent suits, which will, in the ordinary course, be tried together, I must overrule the exceptions and deny any stay of proceedings in either suit. The depositions already taken in the earlier action are an independent matter. Upon proper affidavits showing that a further cross-examination of the witnesses is necessary, and that the stipulation was given, and the cross-examination ended, by the respondents' counsel in ignorance of facts material to a necessary further cross-examination, the court can make such order as may be just.

BRIGGS EXCURSION CO. v. FLEMING.

(Circuit Court, D. New Jersey. November 25, 1889.)

ADMIRALTY—WRONGFUL ATTACHMENT.

A libellant who procures the seizure and detention of vessels for the purpose of enforcing an alleged lien against them, without an order of court, when, on the facts stated in his libel, he has no lien, is liable in damages to the owners, even though he acted in good faith, as an attachment issues as of course in such cases on the filing of the libel, and a special order of court is not required.

At Law. On demurrer to replication.

Trespass by the Briggs Excursion Company against Walter M. A. Fleming, for alleged wrongful seizure and detention of plaintiff's property. On August 12, 1886, the defendant filed a libel *in rem*, in the United States district court for the district of New Jersey, against the steamer General Sedgwick and the barge Republic, in a cause of damage, civil and maritime, for the breach of an executory contract in the nature of a charter-party. On the same day process of attachment and monition was issued to the marshal, by virtue of which, on the following day, that officer seized and took in custody the vessels named, being the property of the Briggs Excursion Company, the plaintiff in this action, and held them until released on bond. The allegations of the libel were, in substance, that the vessels were owned by the plaintiff corporation, and that the plaintiff and defendant had entered into a contract, which is recited at length in the libel, to the effect that the Briggs Excursion Company had agreed to charter the two vessels to the defendant for a day's excursion; that when the day arrived for the fulfillment of the contract the vessels were not ready, and the defendant was compelled to hire other boats, and was put to great loss and damage, amounting, in all, to \$1,282. On the return of the writ the plaintiff appeared, by its proctor, in the district court, only to make exceptions to the libel, and object to the jurisdiction of the court, and after a hearing the libel was dismissed for want of jurisdiction. See *The General Sedgwick*, 29 Fed. Rep. 606. The plaintiff thereupon brought this action for an illegal seizure. The defendant has filed two pleas to the declaration: (1) The general issue; (2) justification, in that the writ was issued by the order of the district court. To the first plea there is a joinder; to the second plea there is a replication that the writ was illegal and void, for the reason that the court had no jurisdiction of the matters alleged in the libel. Demurrer to replication, and joinder.

Mark Ash, for the plaintiff, cited 1 Wat. Tresp. 391; *Id.* 510; *Kerr v. Mount*, 28 N. Y. 659; *Chapman v. Dyett*, 11 Wend. 31; *Smith v. Shaw*, 12 Johns. 257; *Hayden v. Shed*, 11 Mass. 500; *Codrington v. Lloyd*, 8 Adol. & El. 449; *Parsons v. Lloyd*, 2 W. Bl. 845; *Wehle v. Butler*, 61 N. Y. 245; *Miller v. Adams*, 52 N. Y. 409.

Robt. H. McCarter, for defendants, cited Hen. Adm. 337; *The Adolph*, 5 Fed. Rep. 114; *Thompson v. Lyle*, 3 Watts. & S. 166; *The Evangelismos*, 12 Moore, P. C. 352; *The Cathcart*, L. R. 1 Adm. & Ecc. 314; *The Kate*, v.40F.no.10—38

10 Jur. (N. S.) 444; *Turnbull v. Strathnaver*, L. R. 1 App. Cas. 58; 2 Add. Torts, § 856; *Leigh v. Webb*, 3 Esp. 165; *Wyatt v. White*, 5 Hurl. & N. 371; *Grove v. Van Duyn*, 44 N. J. Law, 661.

WALES, J. The question raised by the demurrer is whether a libellant who procures the seizure and detention of vessels for the purpose of enforcing the payment of an alleged lien against them, when, on the facts stated by him in his libel he had no lien, is liable to respond in damages to the owners of the property as for a trespass. The positions taken in support of the demurrer depend on the theory that the process of attachment was issued by the special order of the district court, which had a general jurisdiction of the subject-matter of the libel, although in this instance the court may have acted in excess of that jurisdiction. It is conceded that the writ was improperly issued, but, at the same time, the defendant claims that this was the error of the court, and not his own. The record of the district court, and the practice of the admiralty courts in this circuit, do not sustain the defendant in this contention. That practice and the admiralty rules do not require a special order of the court for the issuing of writs of attachment on libels *in rem*. The ordinary practice is for the libellant to file his libel with the clerk of the court, with a stipulation for costs, and the writ is issued by that officer, in most cases, as a matter of course. Ben. Adm. § 415. But in libels *in personam*, no warrant for the arrest of the person or property of a defendant will be issued for a sum exceeding \$500, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof. Adm. Rule 7. Such writs have been issued out of the district courts in this circuit, in the manner and according to the practice just stated, for many years past; and any person who conceived that he had a maritime lien or claim could obtain a writ by filing his libel *in rem* or *in personam*, as the particular circumstances of his case required. If the proceeding was *in rem*, the writ would be issued by the clerk of the court in whose office the libel had been filed, without a special order of the judge or of the court; but, if the proceeding was *in personam* for the arrest of the defendant or his property, the allowance of the writ by the court would be requisite. It is not true, therefore, that the attachment of the plaintiff's vessels was ordered or directed by the court. In point of fact, the attention of the court was for the first time drawn to the case when the exceptions to the libel were heard, and when it was admitted by the defendant that he had mistaken the form of his remedy. Analogies drawn from criminal proceedings are not applicable. A person making an affidavit before a magistrate, who thereupon issues a warrant of arrest for a felony, when the facts sworn to do not constitute a felonious offense, will not, in the absence of collusion or malice, be liable to the party arrested for false imprisonment. But this does not resemble a proceeding in which a libellant obtains a writ on his own application, without the consent or knowledge of the court. In the latter case, the party acts on his own responsibility; in the former, the magistrate exercises his official judgment, and his error will not be imputed to the party who makes the complaint.

It is also insisted by the defendant that the declaration does not charge him with bad faith or malicious motives in attaching the vessels, and that so long as he acted in good faith, and without evil intent, he cannot be held liable for the erroneous order of the court. But this proposition, like the others, assumes what is not true, namely, that the attachment was ordered by the court. If the defendant was honestly mistaken in adopting the course he did, it may affect the quantum of damages, but does not justify the wrong done to the plaintiffs. A void writ taints with illegality all that may be done under it. In *O'Brien v. Roosevelt* the plaintiff was indebted to the defendants in the sum of \$400 for repairs to the plaintiff's vessel. The defendants caused the vessel to be libeled and seized by process issuing out of the United States district court. The libel was subsequently dismissed for want of jurisdiction, on the ground that the repairs had been made in the home port of the vessel. On an action brought for damages in the court below, the jury found for the plaintiff, and the verdict was sustained. In *The Margaret Jane*, L. R. 2 Adm. & Ecc. 345, the suit was brought to recover £2,500 for salvage service rendered to the arrested vessel and cargo, the value of which had been reported by the receiver of wreck to be £746. By a provision of the merchant shipping act (25 & 26 Vict. c. 63, § 49) the court had no jurisdiction of salvage causes in which the value of the property saved was under £1,000. The plaintiffs eventually abandoned their suit, and, on motion to condemn the plaintiffs in costs and damages, the court decided that, "although the services of the plaintiffs are of considerable merit, yet as the vessel had been detained after they knew, or had the means of knowing, that the report of the receiver was substantially correct, the motion should be granted." In *The Cathcart* plaintiffs in admiralty were condemned in damages, on the ground that, with adequate knowledge of the circumstances, they had arrested the ship when no money was due to them. The court there said "the plaintiffs had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel." These authorities exhibit the legal consequences of improperly causing the arrest of vessels by admiralty process. *The Evangelismos* is an exceptional case, and the reasoning of the court on the facts is not above criticism. Besides, that case is not directly applicable, as there was a disputed fact before the court, but here the facts were ascertained and known before the attachment was issued. To enforce the payment of liens and the recovery of maritime claims, in admiralty, it is often necessary to use summary means, and the fact that proceedings *in rem* require the attachment of property should make suitors cautious in causing the arrest and detention of vessels which are actively engaged in business, and especially in a case like the present one, where the defendant, by the exercise of a little forethought, might have known that he had no right to seize and hold the property of the plaintiff. The demurrer is overruled.

SEABROOK v. RAFT OF RAILROAD CROSS-TIES.

(District Court, D. South Carolina. November 6, 1889.)

1. ADMIRALTY JURISDICTION—COLLISION—RAFTS.

Rev. St. U. S. § 8, defines "vessel" as including "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation by water." *Held*, that a raft made of cross-ties, used as a convenient mode of bringing them to market, manned by a pilot, crew, and cook, who lived and had shelter thereon during the voyage, which lasted many days, and propelled by the tides and by poles and large oars, was a vessel, so as to give jurisdiction to admiralty of a libel *in rem* against it for a collision on navigable waters.

2. COLLISION—NEGLIGENCE—EVIDENCE.

A dredge 20 feet wide by 60 feet long, having a lighter 40 feet long and 14 feet beam on one side, and a smaller one on the other, was at anchor at night in a navigable river not less than 1,000 feet wide, and lay two-fifths of the width of the channel from one shore. She carried the legally required light to indicate that she was at anchor, and the river was straight for about half a mile. She had out 6 anchors, and no means of locomotion. There were no range or shore lights. A pilot on a raft 100 feet square, floating down the stream, who had had long experience, saw the lights on the dredge long before he reached her, but having never seen a vessel at anchor there, and thinking she was in motion, took no precautions until within 150 yards. He then went promptly to work, and nearly escaped collision; but, owing to having another raft attached, collided with the dredge. The raft had no regulation light, but had a large fire on it. The evidence was conflicting as to whether the raft's crew and the men on the dredge were asleep. The raft had been on that side of the river nearest which the dredge lay, but when the latter was discovered to be at anchor it was pushed to the other side. The river was of a uniform depth of 8 feet, shoaling towards the shore. One end of the raft took bottom, and the current swung the other end around, causing the collision. *Held*, that the dredge was not in default, but that the pilot's misreading the signals was negligence, rendering the raft in default.

3. SAME—DAMAGES.

Damages for such collision include cost of repairs, compensation for loss of time within which repairs should have been made, and reimbursements for expenses incurred in saving property, but not punitive damages.

In Admiralty. Libel for collision.

W. H. Parker, Jr., for libellant.

I. N. Nathans, for claimant.

SIMONTON, J. The libellant is the owner of a steam-dredge used in mining phosphate rock from the bed of navigable streams. While at anchor in the stream of Stono river, a navigable salt-water river, on 13th September last, his dredge was run into by a raft floating down the stream with the tide, and injured. He brings this libel *in rem*. An exception is taken to the jurisdiction. Will a libel *in rem* lie against a raft for collision on navigable waters? The precise question has not been decided in any case reported. Chief Justice TANEY, in *Tome v. Four Cribbs of Lumber*, Taney, 533, was of the opinion that rafts anchored in a stream, although it be a public, navigable river, are not the subject-matter of admiralty jurisdiction, when the right of property or possession alone is concerned. In that case he refused to allow salvage for saving rafts. But his decision went off on the custom of the Chesapeake. See *Fifty Thousand Feet of Timber*, 2 Low. 64. In *Jones v. The Coal Barges*, 3 Wall. Jr. 53,—a libel for collision,—Justice GRIER held, with respect to coal-barges: "Mere open chests or boxes of small com-

parative value, which are floated by the stream, and sold for lumber at the end of their voyage. A remedy *in rem* against such a vessel, either for its contracts or its torts, would not only be worthless, but ridiculous; and the application of the maritime law to the cargo and hands employed to navigate her would be equally so. * * * Every mode of remedy and doctrine of the maritime law affecting ships and mariners may be justly applied to ships and steamboats, but could have no application whatever to rafts and flat-boats." Since this decision, however, other judges have had wider views of the jurisdiction of admiralty. In *The General Cass*, 1 Brown, Adm. 334, a scow—a mere float or lighter—was held to come within the jurisdiction of the court. In *The Pioneer*, 30 Fed. Rep. 206, a steam-dredge was held subject to a maritime lien for supplies. In *Disbrow v. The Walsh Bros.*, 36 Fed. Rep. 607, a barge without sails or rudder, used for transporting brick, on which men are employed for loading, carrying, and delivering brick, is held subject to a lien for wages of the men in this service. In *The Hezekiah Baldwin*, a canal-boat used as a floating elevator, having no motive power of its own, or capacity for cargo, is held maritime property. 8 Ben. 556. In this circuit, Judge BOND held that flats on which machinery for digging phosphate in navigable streams, and the lighters attached to them, were vessels, and that the hands employed on them had a lien for wages, and material-men a lien for supplies. *Miller & Kelly v. Dredges*, MS. Circuit Court S. C. 1884.¹ So, also, with respect to salvage, other judges entertain different views from the late chief justice. In *Fifty Thousand Feet of Timber*, 2 Low. 64, Judge LOWELL held that a salvage service is performed when a raft of lumber is saved from peril on navigable waters, and that a claim for such service may be made in a court of admiralty. He quotes Judge BETTS, *A Raft of Spars*, 1 Abb. Adm. 485. Judge PARDEE, in *Muntz v. A Raft of Timber*, 15 Fed. Rep. 555-557, held that a raft of timber is subject to the jurisdiction of the admiralty court in the matter of salvage; reserving, however, the question whether it can commit a maritime tort. In *Gastrel v. A Cypress Raft*, 2 Woods, 213, it was held that admiralty has not jurisdiction to try title to logs because they have been formed into a raft; but on examination of that case it will be seen that the raft was made up of logs cut on a piece of land, the title to which was in dispute, and that the libel was filed in order to determine the title to this land. The logs were in New Orleans, their navigation was over, and they were really nothing but a pile of timber. The cases are collected and commented upon in *The F. & P. M. No. 2*, 33 Fed. Rep. 512. The result is that, while there have been *obiter dicta* on the point, there is no direct decision. Such being the state of the authorities, we can safely proceed on general principles.

That a raft is a water-craft distinctly appears in section 4233, Rev. St. rule 12: "Coal-boats, trading-boats, rafts, or other water-craft." In *U. S. v. One Raft of Timber*, 13 Fed. Rep. 796, Judge BOND held that a raft was a vessel, under sections 4233, 4234, and must carry lights.

¹ No opinion.

"The true criterion by which to determine whether any water-craft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion." *The General Cass*, 1 Brown, Adm. 334. The raft in this case was of cross-ties, and was used as the cheapest and most convenient mode of bringing them to market. It was made up of several small rafts, 36 in number, technically known as "bulls." Each bull was made up of cross-ties, three or four deep, securely and compactly joined together, and fastened in a crib, so as to be immovable; and then all the bulls were united by fastenings, making one body,—the raft,—in the shape most suited for navigating the streams which it must pass. It was manned with a pilot, who was in command, a crew of four men, and a cook. The pilot and crew, during the voyage,—many days in duration,—lived on the raft, on which was constructed a small shelter. The raft had come from the Edisto river, and, pursuing its way towards the sea, had used the many navigable streams forming the inland navigation of this coast. Necessarily, it was constructed to withstand the buffeting of the waves and winds, and the strain of passing over shallow places. Its locomotion depended almost altogether upon the tides; but poles and large oars, known as "sweeps" were used constantly, as well in the propulsion of as in giving direction to, the raft. Rafts like this are in constant use. Sometimes they bring down only the timber or lumber which forms the raft; at others, cargo in the shape of cross-ties or fire-wood is brought. Their proper navigation requires vigilance, experience, and skill. Courts of admiralty have jurisdiction *in rem* in cases of collision between vessels on navigable waters. "The word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation by water." Rev. St. § 3. "*Navigium*"—vessel—is a general word used for any kind of navigation. Ben. Adm. §§ 216, 218. The first vessels were rafts. The raft is the parent of the modern ship. *Encyclopædia Britannica*, art. "Ship." "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them." Per FIELD, J., *The Rock Island Bridge*, 6 Wall. 213. In my opinion, this raft fulfills the definition of the subject of maritime lien, and the libel will lie.

ON THE MERITS.

The dredge was a quadrangular flat, 20 feet wide by 60 feet long. On one side of her was a flat or lighter 40 feet long and 14 feet beam; on the other side, a smaller lighter ——— feet long and ——— feet beam. She was lying in Stono river, between Rantowles creek and Wappoo cut, the highway over which all rafts from the Edisto river to Charleston must pass. She was in the channel. At that point the river is at its greatest width, estimated by some witnesses at half a mile, by others

500 yards, and certainly not less than 1,000 feet. Her exact location was two-fifths of the width of the channel from the south shore. The channel of this river extends from shore to shore, of the uniform medium depth of 8 feet, gradually shoaling as it reaches the shore. Poles can be used anywhere about this place in navigating a raft. The dredge was at anchor fore and aft with the stream. She had out a double anchor and chain at the end looking up the stream, styled her "stern;" one anchor with chain cable on each side; and two anchors with chain cables out at the forward ends, styled the "bow." She had on her two lights. One of these was a bright white light, in a round lantern, about 12 feet from her deck. On the night of the collision, 13th September last, and at the time, there were on the dredge two hands,—one a colored boy, apparently 20 years of age, who was called the "watchman," and another, a deck hand. Stono river, between the two creeks indicated, has in it several bends. At the place where the dredge was lying, there is a straight reach of about half a mile, running east and west from the bend above. The current of the river flows down this reach in a direction east, a little south. The raft on 12th September, the day preceding the collision, had reached the mouth of Rantowles creek as it enters the Stono. There it awaited the ebb-tide. High water was between 11 and 12 o'clock midnight. Taking the first of the ebb, the raft floated down the Stono. Her pilot, who had large experience, and who was on the lookout, saw the lights on the dredge in her position, 2½ miles below Rantowles. He had never seen a vessel at anchor at that place. He came to the conclusion that the lights were on a vessel in motion. He did not discover that she was at anchor until he got within 150 yards of her, and then he began to take his precautions. At that moment he was about 25 yards from a small wharf or landing on the south shore. All hands having been called, they put out their poles, and tried to get the raft out of the way of the dredge. They succeeded in getting her towards the opposite bank, where one end of the raft took the bottom. Thereupon the current swung the other end around, and, as she passed the dredge, a raft of timber which, a day or two before, the pilot had permitted to be lashed to the one side of his raft, caught the chains of the stern anchor of the dredge, and held it fast, dragging the dredge some 50 yards. After some effort, the chain was dislodged from the timber, and the raft went on its course alone. The dredge floated a short distance further, and lodged on a bank. There is no evidence that there are any shore or range lights on Stono river near this place.

There is much conflict in the testimony upon one or two matters: Whether the raft had a light; whether her crew were asleep; whether the men on the dredge were awake. The raft, without doubt, had the large fire built on it which all rafts carry in the rivers. She had no regulation light. As the dredge had out 6 anchors, with no means of locomotion, it would not have been possible to move her so as to avoid collision if every hand she had was awake. Whenever there is a collision between a vessel at anchor and one in motion, if it appear that the

vessel at anchor is without fault, the vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent the collision by adopting every practicable precaution. *The Clarita*, 23 Wall. 1; *The Virginia Ehrman*, 97 U. S. 315. The dredge was in the channel, two-fifths of its width from the south shore. If the channel was only 600 feet wide, this left 240 feet on the south, and 360 feet on the north, of her as a passage. If it was 1,000 feet wide,—and this is less than the weight of evidence fixes,—there would be 400 feet on the south of her, and 600 on the north of her, less the width of herself and her flats. Respondents say the raft was 150 feet square. It consisted of 36 bulls, and, being square, there must have been 6 bulls on each side. Each bull consisted of two lengths of cross-ties. A cross-tie is 8 feet long; that is to say, each bull was 16 feet wide. Each side of the raft was 96 feet, and, allowing for spaces, call it 100 feet. So there was not such an obstruction of the channel as prevented the passage of the raft. The dredge had up the light required by law, and, as there are no range lights or shore lights on the Stono at this point, there was no excuse for not understanding them. So the dredge was not in default. *The Virginia Ehrman*, *supra*; *The Milligan*, 12 Fed. Rep. 338. "A vessel at anchor in a proper place, with a proper signal light, and with one of her crew on deck, is sufficiently lighted and watched." *The Clarita*, 23 Wall. 1.

Was the accident inevitable? The pilot of the raft had a long and large experience, and is an intelligent man. He saw the lights of the dredge long before he reached her. He was sure that they were on a vessel in motion, because he had never seen a vessel at anchor in that place before this. But the sailing regulations designed to prevent collisions are precise and clear. Section 4233. All vessels in motion but pilot-boats must carry colored lights. Pilots carry white lights, but must exhibit a flare-up every 15 minutes. Rules, 3, 8, 11. Vessels at anchor carry a white light, like the one on the dredge; and this light told the pilot that she was at anchor. The fact that he had never seen a vessel at anchor just there should have stimulated his curiosity and care. He took no precaution, because he was under misapprehension until he got within 150 yards. He then showed his skill, and proved that he had his raft under control. Going promptly to work, he nearly escaped collision; indeed, but for the timber raft accidentally with him, he would have escaped the collision. It is probable that if the pilot had not disregarded the lights, and had taken his precautions when he saw them, the raft would have passed the dredge safely. It is not improbable that, skilled in the management of his own raft, the pilot would at all events have passed safely if he had not perhaps forgotten, or perhaps had not miscalculated, the timber raft attached to him. Be this as it may, the misreading the lights was negligence, forbidding the idea of inevitable accident. *The Clarita*, *supra*. The burden being on the pilot to exonerate himself, this fact operates against him. I find that the raft was in default.

DAMAGES.

The remaining question is that of the damages. These must be such as will furnish complete indemnification to the libelant for his loss. *The Atlas*, 93 U. S. 302. The items which enter into the estimate of damages are the actual cost of repairs, compensation for the loss of time within which the repairs should have been made, the reimbursement for the expenses incurred in saving property, and thus reducing the amount of the loss. *The Fannie Tuthill*, 17 Fed. Rep. 87; *The Venus*, Id. 925; *Vantine v. The Lake*, 2 Wall. Jr. 52. These damages must not be the result of conjecture; they must be actual. There is no room in this case for punitive damages. The evidence for the libelant, on these points, consists simply of his statement. No receipts nor memoranda nor items are produced. He testifies that so much money was paid for searching for the anchors, the collision having torn the dredge from its moorings; that so much money was expended for beaching the dredge and repairing it; that the loss of service of the dredge was 9 working days, with an average of 9 tons of phosphate rock per day. There is nothing before the court which can enable it to test the reasonableness or the accuracy of these statements and estimates. More light is needed on these points, and I will refer the matter. The libelant actually ceased work for 15 days. Four of these days were consumed in consultation with his attorney, and in deciding on his course. The restitution and repairs were made during the 10 days subsequent. He can only charge for these 10 days, or for so many of them as were actually required for the restitution and repairs. He charges certain items of personal expense. If his presence contributed to the work, and was necessary for this purpose, that is a proper charge. If, however, he visited the place simply to see how the work progressed, it is not a proper charge. Let the case be referred to C. R. Miles, Esq., to inquire and report such evidence as will state in detail the items of damage, and the reasonable time and money expended in repairing the same.

JOHNSON *et al.* v. MAYOR, ETC., OF NEW YORK.¹

(District Court, S. D. New York. December 3, 1889.)

COLLISION—BETWEEN STEAM AND SAIL—FAILURE TO BACK.

Libelants' lighter was beating down the East river, and coming down the stream, astern of her, came the respondents' steamer, D. The lighter went about when off Seventeenth street, on the New York side, and ran some distance out into the river, when the steamer collided with her, striking her on the port side. The steamer saw the lighter in time to have avoided her. The lighter was prevented from running further towards New York by reason of an eddy near the shore. *Held*, that the collision was caused by the steamer's failure to stop and back with reasonable promptness, and the steamer was answerable for the lighter's damage.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Action for damage by collision.

A. W. Seaman and W. T. Cox, for libelants.

A. H. Clark, Corp. Counsel, (*Mr. Carmatt*, of counsel,) for respondents.

BROWN, J. On the 2d of November, 1888, as the libelants' lighter, *Styles Hall*, was beating down the East river, with the ebb-tide, against a south-west wind, she came in collision, when off Seventeenth street, with the respondents' steamer, the *Dassouri*, and sustained some damages, for which this libel was filed. Both vessels had come from Newtown creek. The lighter had come across the river upon her port tack. She tacked 200 or 300 yards from the New York shore, and, as she was coming about, first observed the steamer several hundred yards further out in the river, and above her. She soon filled away, and within two or three minutes afterwards was struck upon the port side by the steamer.

The testimony on behalf of the respondents, as well as of the libelants, is that the lighter ran at least an eighth of a mile after tacking before the collision; and the distance from the shore to the point of collision confirms this estimate. It was the duty of the steamer to keep out of the way of the lighter. There were no other vessels near to prevent her doing so. The lighter was seen from the steamer before she tacked, and when she tacked. The steamer was bound for the Seventeenth-Street dock; and there can be no question that when the lighter was seen to be tacking there was abundant time and space for the steamer to keep out of her way. This is proved, not only from the distance the lighter sailed upon her starboard tack before collision, but from the consideration of the additional time it would take her to come about. There was nothing to require the steamer to pass ahead of the lighter's course. Before collision the steamer backed, but too late. It was evidently a case of miscalculation on the steamer's part, and the respondents are answerable therefor.

The lighter, doubtless, might have run a little further towards the shore; but there was an eddy there of some breadth, and the lighter, uncertain of its extent, was entitled to keep away from it, by a sure margin. Had she failed to run out her tack, and come about unnecessarily, so near the steamer as not to leave the latter reasonable and abundant time to keep out of her way, the lighter must have been held in fault; but I cannot find that to be the fact in this case. The time and distance were such that, had the steamer stopped or backed with reasonable promptness after the lighter was seen to be in the way, there would have been no collision.

The fault, therefore, must be charged to the steamer, and a decree allowed for the libelants for the sum of \$127.65, the damages proved, amounting, with interest, to \$135.31, with costs.

THE DAISY DAY.

MARINE INS. CO. v. THE DAISY DAY.

(Circuit Court, W. D. Michigan, S. D. September 23, 1889.)

1. MARITIME LIENS—INSURANCE PREMIUMS.

Admiralty law gives no maritime lien on a vessel for unpaid premiums on insurance thereon.

2. SAME.

Though a state law confers a lien on a vessel for unpaid premiums on insurance thereon, such lien is subordinate to maritime liens for supplies and repairs, and for damages from negligent towage.

In Admiralty. Application for distribution of proceeds. On appeal from district court, *ante*, 538.

M. C. & A. A. Krause, for original libelants.

Fletcher & Wanty, for Marine Insurance Company.

Peter Doran, for other intervenors.

JACKSON, J. The decree of the district court, directing the distribution of the proceeds arising from the sale of the propeller *Daisy Day*, is only appealed from by the intervening libelant, the Marine Insurance Company. The decree below ordered the fund to be distributed as follows, viz.: *First*, in payment of seamen's wages, with costs; *second*, in payment of damages awarded *G. F. Gunderson* for injuries sustained by his schooner *G. Barber* from negligent towage by the *Daisy Day*, with costs; *third*, in payment of claims for supplies and repairs, (foreign and domestic claims of this class being placed upon the same footing, under the authority of *The General Burnside*, 3 Fed. Rep. 228, and *The Guiding Star*, 18 Fed. Rep. 263-269,) with costs; and, *lastly*, in payment of the Marine Insurance Company's claim for unpaid premiums on insurance upon said propeller *Daisy Day*, said insurance having been taken out by and for the benefit of the owners of said propeller. The fund will be almost, if not altogether, exhausted before reaching the claim of the Marine Insurance Company, which alone appeals from said order of distribution. This appeal of the insurance company does not bring up or make it necessary to consider the correctness of the order of distribution as between the seamen and *Gunderson* and the material-men. Those parties all acquiesce in the decree. But the Marine Insurance Company complains of the position assigned it in the distribution. It contends that its debt for unpaid premiums should rank and be paid equally with the claims for supplies and repairs, and should have priority or precedence over the claim of said *Gunderson* for damages sustained by him from negligent towage of his schooner *G. Barber* by the *Daisy Day*. In support of these claims on behalf of the insurance company it is urged—*First*, that by the general admiralty law of the United States, said insurance company had a maritime lien on the *Daisy Day* for unpaid premiums on the policy of marine insurance, which the owners of said pro-

pellor procured from libellant; and, *second*, that, if no such maritime lien existed by the general admiralty law, the statutes of Michigan confer such a lien, and the contract of insurance being maritime in its character, and being supplemented by the lien conferred by state law, this court should place the claim of the insurance company upon an equal footing with material-men, presenting claims for supplies and repairs, and should give it priority over the claim of Gunderson for damages resulting from negligent towage.

The first position is supported by the case of *The Dolphin*, 1 Flip. 580, but the weight of authority and of reason is against the correctness of that decision, and this court, in the fall of 1888, at Detroit, declined to follow the ruling announced in *The Dolphin*, and held in conformity with the decision in *Re Insurance Co.*, 22 Fed. Rep. 109, and other cases holding the same doctrine, that no maritime lien existed by the admiralty law for unpaid premiums of insurance. This court adheres to this view of the law.

As to the second position, while it is true that the admiralty court will enforce the lien given by the state law for unpaid premiums, as was done in the case of *The Guiding Star*, 18 Fed. Rep. 264, still it does not follow, nor was the question either made or decided in *The Guiding Star*, that claims under insurance contracts or for unpaid premiums should rank and be placed upon the same footing as strictly maritime claims and liens in the distribution of funds insufficient for the payment of all claims. When we consider that insurance is effected for the personal indemnity of the owner or owners, and in no way aids the vessel or promotes its security, or the better prepares it for undertaking and conducting the business of commerce, and then reflect that the supplies and repairs which material-men furnish are directly for the benefit of the vessel itself, and enable it the better to perform the duties and responsibilities of navigation and carrying, we think it is perfectly just and proper to postpone the claim for unpaid premiums to those for supplies and repairs. In the case of *Insurance Co. v. Proceeds*, 24 Fed. Rep. 560, Judge WALLACE has well expressed the true character of such insurance claims, and their relative value to maritime claims. We concur in the distinction he there draws between the two classes of claims. The claim of Gunderson was clearly maritime. It is not material to determine whether his claim for damages be considered as arising out of a maritime tort, or for a breach of contract implied from the undertaking of the *Daisy Day* to tow his schooner carefully and without negligence. Whether a tort or a breach of contract, the negligent towage causing injury to his schooner gave him a valid maritime lien for damages, which under the authorities entitles him to priority of payment over the Marine Insurance Company.

In the judgment of this court there is no error in the decree of the district court of which the Marine Insurance Company can properly complain, and the same is accordingly affirmed, as against said insurance company, with costs of the appeal.

RILEY v. A CARGO OF IRON PIPES.

(District Court, S. D. New York. November 2, 1889.)

1. DEMURRAGE—ABSENCE OF STIPULATION—BURDEN OF PROOF.

When the contract is silent on the subject of demurrage, the burden is on the libellant to show some negligence in the consignee of the cargo, or that he exceeded some customary period which, by implication, is a part of the contract.

2. SAME—NOTICE OF CLAIM—ACTION IN REM.

When no notice of any claim or lien for demurrage is made at the time of delivery of the cargo, nor before the commencement of a suit to recover demurrage, no action *in rem* against the cargo can be sustained.

3. SAME—UNREASONABLE CONDUCT OF VESSEL OWNER.

Though the cargo has not been discharged within a reasonable time, the vessel cannot recover demurrage, if it appears that the unreasonable conduct of libellant has induced the delay.

In Admiralty. Action for demurrage.

Peter S. Carter, for libellant.

Alexander & Ash, for claimant.

BROWN, J. The contract being silent on the subject of demurrage, the burden of proof, in order to recover for demurrage, is upon the libellant to show that the consignee is chargeable with some negligence in unloading the vessel, or that he exceeded some customary period which, by implication, is a part of the contract. *A Cargo of Lumber*, 23 Fed. Rep. 301; *The Z. L. Adams*, 26 Fed. Rep. 655; *The John Cottrell*, 34 Fed. Rep. 907; *Railroad Ties*, 38 Fed. Rep. 254. No customary period is proved in the present case, and the testimony is conflicting as to the precise time necessary to unload the cargo. If it was improper that more than one boat should be sent at a time to Dobb's Ferry, the libellant who took them there is as much chargeable with blame as the respondent. His own acts preclude him from claiming damages on that account. His objections to unloading at the steam-boat wharf prevent any account of the delay in going to the upper wharf. The weight of evidence is that six days were a reasonable time for unloading two boats like those in which cross-beams created some delay. There would remain one day's demurrage, to which the libellant might have been entitled; but his unreasonable conduct in interrupting the delivery for a considerable period, to the loss of the respondent, before the delivery was completed, more than balances the one day's demurrage; so that nothing is equitably due him; and as the weight of evidence against the libellant's testimony is that no notice of any claim or lien for demurrage was made at the time of the delivery of the cargo, nor before the commencement of this suit, some time after, no action *in rem* against the cargo can be sustained. *Bags of Linseed*, 1 Black, 108; *The Giulio*, 34 Fed. Rep. 909, 912. The libel is therefore dismissed, but without costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

JORGENSEN v. THREE THOUSAND ONE HUNDRED AND SEVENTY-THREE
CASKS OF CEMENT.¹

(District Court, E. D. New York. November 27, 1889.)

UNITED STATES MARSHAL—FEES—ATTACHMENT—CUSTODY OF GOODS.

A deputy-marshal, by permission of the collector of the port, entered a warehouse in which goods were stored in the custody of the collector, and made service of process, and affixed a notice of seizure to the property, and thereafter a keeper visited the store-house three times a day, though without entering it. *Held*, that the marshal had effected an attachment, and was entitled to tax as custody fees such amount as he had actually paid a keeper for that service.

In Admiralty. On appeal from taxation of marshal's fees.

Certain casks of cement, brought into the port of New York on the bark Dictator, were taken into custody by the collector of the port for non-payment of duties, and were stored in a bonded warehouse. A libel was subsequently filed against the property by the master of the Dictator to recover freight, on which libel process was issued. No claimant appeared for the property.

Butler, Stillman & Hubbard, for libelant.

Charles M. Stafford, U. S. Marshal, *in pro. per.*

BENEDICT, J. This case comes before the court upon an appeal from the taxation of the marshal's fees. The only item in dispute is a charge for necessary expenses of keeping the property proceeded against, which is 3,173 casks of cement. At the time the process was issued the cement was in the custody of the collector of the port, stored in Bonded Store No. 23. Upon receipt of the process application was made to the collector to allow the marshal to seize the property, whereupon the collector gave permission that the warehouse be opened, and that the deputy-marshal enter therein for the purpose of making a seizure of the property. Under that permit the warehouse was opened, and the marshal's deputy allowed to enter and make service of the process, and affix a notice of seizure to the property. Thereafter, according to the affidavits, the marshal's keeper visited the store-house three times a day, every day, and the marshal now seeks to tax the sums paid by him to the keeper for the services described.

It is impossible, upon these facts, to deny that the marshal effected an attachment upon the property. Notwithstanding the collector had the property in his possession, when he opened the warehouse for the purpose of permitting the property to be seized, and allowed the deputy-marshal to enter, levy his attachment upon the cement, and affix thereto notice that the same had been seized by virtue of the process of the court, the marshal's custody of the property was complete, and it was his duty to see that the property was forthcoming to answer the decree.

An affidavit by the store-house keeper is submitted on behalf of the objectors, which shows that since the time the attachment was levied the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

deputy-marshal had at no time asked permission of the store-keeper to enter the store-house; that during at least 30 days of the time in question the bonded store had been locked all day, and no one allowed to enter, and of the remaining time there have been at least 40 days when the stores were only open for a short time, and then only in the presence of the store-keeper, and that during none of those days did the marshal's deputy enter the stores. These facts do not affect the question. The store-keeper was not keeper for the marshal, nor was the collector. When the marshal's keeper found that the cement was in the store-house, it was only necessary for him to see that it was not removed. There was no necessity, in order to maintain the marshal's custody, that the deputy enter the store-house or see the property again. It was the marshal's right to employ a keeper to see that the cement be not removed in case the store-house should be opened. That was accomplished by sending a keeper to visit the warehouse, for the purpose of ascertaining whether goods were being delivered from that warehouse, and in such case whether the cement was being interfered with, and the marshal is entitled to tax what he has actually paid for that service.

The taxed bill is not before me, but what has been said will enable the parties to ascertain the amount properly taxable.

LEARY v. THE MIRANDA.¹

(District Court, E. D. New York. November 29, 1889.)

COSTS—DISBURSEMENT FOR TRAVELING EXPENSES OF WITNESSES.

Proof that a party disbursed, in traveling expenses and maintenance of his witnesses while attending court, a sum exceeding that sought to be taxed as witness fees, will not enable him to tax such fees. The statute requires proof that the amounts sought to be taxed be amounts actually paid the witnesses as fees.

In Admiralty. Appeal from taxation of costs.

John Berry, for libellant.

Butler, Stillman & Hubbard, for claimant.

BENEDICT, J. This case comes before the court on an appeal from the clerk's taxation of the claimant's costs. The items in dispute relate to witness fees. The clerk disallowed various witness fees in the absence of proof that the amounts charged had been paid the witnesses. In regard to these fees, the only proof is that the claimant disbursed, in traveling expenses and maintenance of these witnesses while attending court, in each case, a sum exceeding that now charged for fees of the witness. This proof is not sufficient. The statute requires proof that the amounts sought to be taxed be amounts actually paid the witnesses for witness

¹Reported by Edward G. Benedict, Esq., of the New York bar.

fees. No such payment is here proved. If the proof showed an agreement with the respective witnesses, made at the time, or previous to the time, of disbursing the amounts alluded to by the claimant, to the effect that their witness fees should be applied to reimburse those expenses, it might be that the claimant could in that case tax the witness fees. *Woster v. Handy*, 23 Blatchf. 133, 23 Fed. Rep. 49. No agreement with the respective witnesses in regard to their fees has been proved; and, for all that appears, the witnesses might now come forward in their own behalf, and claim their fees, notwithstanding the fact that their expenses of traveling and maintenance have been paid. The clerk's taxation is affirmed.

THE GOOD HOPE.¹

HILLARD *et al.* v. THE GOOD HOPE.

(District Court, E. D. New York. November 13, 1889.)

ADMIRALTY—TENDER—COSTS.

A payment of money into court, on plea of tender, at the filing of the answer, will not affect the question of costs, unless it is specified how much is tendered as payment of the claim, and how much for costs.

In Admiralty.

Goodrich, Deady & Goodrich, for libelants.

Carpenter & Mosher, for claimants.

BENEDICT, J. In this case, which is brought by the owners of the tug George G. Meade to recover salvage compensation for services rendered the barge Good Hope, in towing that vessel away from the fire which broke out at the oil docks upon the steamer Hafis, then lying on the upper side of the pier at the foot of North Eleventh street, Brooklyn, in October, 1888. The proofs show a salvage service, but not of a high character. Fifty dollars will, I think, be a proper compensation for a service of the character in question. The decree will therefore be for the sum of \$50, and it must carry costs; for the payment into court, at the filing of the answer, of \$80, upon a plea of tender after suit brought, is without effect upon the question of costs, because of uncertainty. The statement of the answer is that the value of the services, with the libellant's accrued, taxable costs, does not exceed the sum of \$80, which sum the claimants deposited in court. But how much was tendered for services, or how much for costs, nowhere appears. For all that appears, \$10 may have been tendered for services and \$70 for costs. In order to make the payment into court available, the sum paid in for services should have been stated. Let a decree be entered for the sum of \$50, and the costs of the cause, to be taxed.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

RAWITZER *et al.* v. WYATT *et al.*

(Circuit Court, S. D. California. December 11, 1889.)

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.

Under the act of congress (25 St. U. S. 434) providing that, when an action is between citizens of different states, it may be brought "in the district of the residence of the plaintiff or defendant," an action by a non-resident against a partnership, whose members are residents of different states and districts, may be brought in the district of the residence of one of them.

2. ABATEMENT—ANOTHER ACTION PENDING.

The facts that a partnership has become insolvent, and passed into the hands of a receiver appointed by a state court of another state, before the commencement of an action against it in the federal court of the district of the residence of one of its members, and that plaintiff's claim has been presented to the receiver, who still retains the partnership affairs in his hands unsettled, are no bar to the action.

At Law. On demurrer to plea.

Rothchild & Ach and Brunson, Wilson & Lamme, for plaintiffs.

Dooner & Burdett, for defendant Henry G. Newhall.

Ross, J. The plaintiffs, who are citizens of the state of Connecticut, bring this action against C. A. Wyatt, who is alleged to be a citizen and resident of the state of New York, and Henry G. Newhall, who is alleged to be a citizen and resident of the state of California and of this judicial district, and for cause of action aver, in substance, that at the times stated in the complaint the defendants were partners doing business under the firm name of C. A. Wyatt & Co., and that plaintiffs sold and delivered to defendants, at their instance and request, goods, wares, and merchandise of the value of \$74,391.76, no part of which has been paid, although the whole thereof is due, and payment has been demanded. The defendant Newhall has appeared and filed a preliminary answer in abatement of the action, in which it is alleged that the obligation upon which the suit is brought was a copartnership obligation of the firm of C. A. Wyatt & Co., which firm was, prior to the bringing of the suit, insolvent, and had theretofore passed into the hands of a receiver appointed by the supreme court of the state of New York; and that the demand sued on by the plaintiffs, verified by the plaintiff Lewis F. Rawitzer, was presented to the receiver for adjustment and that said copartnership affairs are still unsettled, and in the hands of the said receiver. The sufficiency of this plea is raised by a demurrer thereto filed by the plaintiffs. In neither the complaint nor the plea is it made to appear where the obligation arose.

The jurisdiction of this court is founded only on the fact that the action is between citizens of different states, and, that being so, the suit is authorized to be brought only "in the district of the residence of the plaintiff or defendant." 25 U. S. St. at Large, 434. It has been brought in the district of the residence of the defendant Newhall, and I think, by virtue of the statute referred to, rightly so. Since the defendants are citizens and residents of different states, and therefore of different districts, to hold otherwise would be, in effect, to hold that where there is

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more than one defendant, and they are residents of different states, and of different districts, the suit can only be brought in the district of the residence of the plaintiff; which would, it seems to me, be contrary to the language and intent of the statute.

The fact that the firm of Wyatt & Co. had, prior to the commencement of the action, become insolvent, and had passed into the hands of a receiver appointed by the New York supreme court, is not a bar to the present suit. It is true that it is alleged in the plea that the demand sued on herein was presented by the plaintiffs to the receiver appointed by the New York court, and that the partnership affairs of Wyatt & Co. are still in the hands of the receiver there, and unsettled. But that circumstance does not alter the case. The pendency of a prior suit, in another jurisdiction, is not a bar to a subsequent suit in a circuit court, even though the two suits are for the same cause of action. *Stanton v. Embrey*, 93 U. S. 554, and authorities there cited. In this action the plaintiffs do not seek to subject the property in the hands of the receiver appointed by the New York state court to their claim, and, of course, could not do so if they did. The sole object of the action here is to reduce the indebtedness to judgment. As said by Chief Justice WARRE in the somewhat analogous case of *Parsons v. Railroad Co.*, 1 Hughes, 279: "It will be time enough to consider how he [the plaintiff] can reach any portion of the property involved in the litigation pending in the state court, for the purpose of subjecting it to the payment of his judgment, when he attempts to do so."

As has been seen, while the plaintiffs have sued both of the joint obligors, service of process has only been, and could only be, had on one of them. This fact would be good ground for a plea in abatement, according to the principles of the common law; but the common-law rule in that regard has been changed by statute in this state,—section 414 of the Code of Civil Procedure of California providing that, "when the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all, of them, the plaintiff may proceed against the defendants served, in the same manner as if they were the only defendants." Demurrers sustained.

UNITED STATES v. SOUTHERN PAC. R. CO. *et al.*

(Circuit Court, S. D. California. November 22, 1889.)

EQUITY PLEADING—DEMURRER.

A demurrer to a bill, which goes to matter comprising a part of facts which constitute a good cause of action, as well as of facts which are insufficient to constitute a cause of action, is properly overruled.

In Equity. On motions to modify order overruling a demurrer, (39 Fed. Rep. 132,) and to file a second amended bill.

W. H. H. Miller, Atty. Gen., and Joseph H. Call, Special Asst. U. S. Atty.

Joseph D. Redding and Creed Haymond, for defendant the Southern Pacific Railroad Company.

Ross, J. Two motions have been made, argued, and submitted in this case,—one on behalf of the Southern Pacific Railroad Company, that the order made and entered on the 27th day of May, 1889, (39 Fed. Rep. 132,) overruling the demurrers theretofore filed to the amended bill of complaint, be so modified as to sustain the demurrer filed by said company to the said amended bill; and the other is a motion on behalf of the government to file a second amended bill in cases numbered 67, 68, and 69, respectively, which cases, subsequent to the submission of the aforesaid demurrers, were consolidated by an order entered by consent of all of the parties in interest. The ground of the first-mentioned motion is that the demurrer filed by the defendant railroad company only went to that portion of the amended bill as to which the court held no cause of action was stated. If that was all, undoubtedly the proper order, so far as that demurrer was concerned, would have been one sustaining it. But while the court held that the grant to the Atlantic & Pacific Railroad Company conferred upon that company no right of any nature to any particular piece of land within the indemnity limits of that grant prior to its selection, and, as a consequence, that the fact that lands were within such indemnity limits did not exclude them from the subsequent grant to the Southern Pacific Railroad Company, and that patents issued to the latter company were not for that reason invalid, yet, because the amended bill on its face showed that the lands in controversy were at the time of the grant to the defendant railroad company claimed to be within the limits of a certain named Mexican grant, which latter grant was then *sub judice*, and because of that provision of the grant to the Southern Pacific Company to the effect that if the route it was authorized to designate should be found to be upon the line of any other railroad route to aid in the construction of which lands had been theretofore granted by the United States, as far as the routes are upon the same general line, the amount of land theretofore granted should be deducted from the amount granted by the act in question, coupled with the alleged facts regarding the latter matter, the amended bill was con-

sidered by the court to state, in each of those respects, a good cause of action. A portion of the matter to which the demurrer of the defendant railroad company went was a material part of each of those causes of action, as well as of that as to which the bill was held insufficient, particularly the allegations in relation to the making of the grants, and for that reason all of the demurrers were properly overruled. The amendment to the amended bill was filed without objection, prior to the commencement of the argument on the demurrers, and the matter therein set up was argued orally and in the brief of one of the parties, and was therefore considered and passed upon by the court in its opinion. The motion to modify the order sustaining the demurrers is therefore denied. That on the part of the complainant for leave to file a second amended bill I think should be granted. As at present advised, the additional matter, as explained by counsel, does not seem to me to be material to the real questions involved; but I think it but fair that every fact deemed by counsel to be material should be allowed to reach the supreme court, in which tribunal, no doubt, the important questions at issue will receive their final solution. Motion for leave to file second amended bill granted.

BROCKWAY v. TOWNSHIP OF OSWEGO.

(Circuit Court, D. Kansas. November 25, 1889.)

1. DORMANT JUDGMENT—TOWNS.

Code Civil Proc. Kan. § 445, providing that "if execution shall not be sued out within five years from the date of any judgment" the judgment shall become dormant, applies to judgments against towns, as *mandamus* is equivalent to execution.

2. SAME—REVIVOR.

Under section 440, authorizing dormant judgments to be revived in the same manner as is prescribed for reviving actions before judgment, a judgment against a town which has become dormant may be revived in the manner prescribed.

3. SAME—LIMITATION—SUSPENSION OF PERIOD.

Section 428 provides that, unless the parties to an action which has abated, consent to a revivor, notice of application therefor must be served in the same manner as a summons. Section 21 provides that "if, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed." *Held*, that a period of time during which the town had no qualified officers on whom process could be served, and purposely refrained from qualifying them to avoid the judgment, should be omitted from the period of limitation for reviving the judgment, the creditor having exercised due diligence.

At Law.

Rossington, Smith & Dallas, for plaintiff.

Case & Glass, for defendant.

FOSTER, J. The plaintiff, on the 5th day of April, 1888, filed his action at law against the defendant municipality upon a judgment rendered on the 22d day of November, 1876, in favor of one A. A. Brockway, in the district court of Labette county, state of Kansas, wherein

the said A. A. Brockway recovered a judgment at law against the said defendant for the sum of \$2,678.90, together with \$6.30 costs; the plaintiff in this suit being the assignee of said A. A. Brockway. The plaintiff, in his petition, alleges that at or about the time of the rendition of the judgment in favor of the said A. A. Brockway there was formed a conspiracy by certain citizens of defendant township for the purpose of preventing and delaying the collection of any and all judgments that might be then existing against the township, or thereafter rendered against said township; and that, in pursuance of this conspiracy, and for the purpose of accomplishing the same, the citizens of said township, by various devices, caused such a state of affairs to exist that there were no officers in said township upon whom service of process could be made from the rendition of said judgment in favor of said A. A. Brockway up to and about the time of the filing of the petition in this suit. To this petition the said defendant filed a general denial, and pleads specially that the judgment sued upon became dormant on the 13th day of November, 1881; and that no proceedings have been taken to revive the same; and that any cause of action thereon is long since barred by the statute of limitations of the state of Kansas. To this answer there was filed a general reply. A jury being waived in writing, the case was submitted to the court for trial. The evidence introduced substantially established the allegations of the plaintiff's petition as to the conspiracy. It is further admitted by the defendant as follows: That during the years 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, and 1886 a full board of officers of said township was elected, but none of said officers so elected ever qualified or entered upon their offices. On July 12, 1887, township officers were appointed, who qualified on that date; and these were all of the appointments made, except as above set forth, as shown of record. That no officers were elected in said Oswego township, except as above, until November, 1887, when a full board was elected, and qualified on February 24, 1888. It appears that, on the 22d day of November, 1876, the said A. A. Brockway recovered a judgment in the state court for the sum of \$2,678.90 and costs; that no execution or *mandamus* proceeding was had upon said judgment; that on the 15th day of June, 1882, a motion was filed to revive said judgment as dormant, but, as there were no officers of the township, no service was ever made upon any person of this motion. On the 22d day of June, 1882, Brockway's attorneys filed an affidavit for service by publication of said notice of the above motion, and such notice was published for three consecutive weeks in the Parsons Sun. On the 13th day of November, 1882, a motion was filed to revive the judgment upon the notice attempted to be served by such publication notice, which motion was denied by the court on the 18th day of November, 1882. The township appeared specially, and excepted to any order of revivor; and a case was made and taken to the supreme court, and on the 13th day of June, 1884, the supreme court affirmed the decision of the trial court in refusing to revive said action upon notice by publication of said motion. 4 Pac. Rep. 79. At the February term, 1884, said application to revive said judgment was con-

tinued for service, said notice having been issued and returned not served, and so on, from term to term, during 1884, 1885, 1886, 1887; and on the 20th day of February, 1888, said application and motion were dismissed by said plaintiff's attorneys; and on the 5th day of April, 1888, this suit was instituted to recover upon said judgment.

There is really but one question presented. Is the plaintiff barred by the statute of limitation? Section 445, Code Civil Proc., reads as follows:

"If execution shall not be sued out within five years from the date of any judgment that now is, or may hereafter be, rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

It is urged by the plaintiff that this statute does not apply to judgments against municipalities, because no execution can be issued on such judgments. If such is the case, judgments against municipalities would never become dormant. On this question, in the case of *U. S. v. Oswego Tp.*, 28 Fed. Rep. 55, Judge BREWER, of this court, expressed a negative opinion, and held that the limitation of five years did apply to such judgments, and that a *mandamus* was equivalent to an execution. With these views of my Brother BREWER, this point may rest, although much might, perhaps, be said on the other side of the question. *Amy v. City of Galena*, 7 Fed. Rep. 163. It must, however, logically follow that, if judgments against municipalities and against individuals alike come under the rule of this statute, a failure to issue a *mandamus* for five years has the same effect as a failure to issue an execution; *i. e.*, the judgment simply becomes dormant. It must further follow that the judgment creditor, in either case, has a like period of time and like process in and by which he may revive his judgment. Section 440 of the Code of Civil Procedure reads as follows: "If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment." It has been held by the supreme court that a judgment creditor has one year after his judgment has become dormant to revive it, and that such revivor can be made on notice and motion, as contemplated by section 428 of the Code, or by an action at law. *Baker v. Hummer*, 31 Kan. 325; *Angell v. Martin*, 24 Kan. 334; *Gruble v. Wood*, 27 Kan. 535; *Kothman v. Skaggs*, 29 Kan. 5. So the judgment creditor in this case, having failed to take out a *mandamus* for five years, had one year thereafter in which to revive his judgment, as before stated. In order to have obtained such revivor by either mode, it was absolutely necessary that he should find the judgment debtor, in order to serve notice or summons on him. Section 428, Code Civil Proc. Suppose the judgment had been against an individual, and he had left the state, or concealed himself, or absconded. Could it be claimed the statute would run during such absence, concealment, etc.? I should say it could not. Section 21 of the Code reads as follows:

"If, when a cause of action accrues against a person, he be out of the state, or has absconded, or concealed himself, the period limited for the commence-

ment of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

It is true, the township of Oswego had not absconded, nor been absent or concealed; but all of its officers on whom any notice or process could be served were absent, absconded, or concealed during the whole of said period of time, and that with the express purpose of baffling and defeating the creditor in his attempts to revive his judgment. If it had been an ordinary case of vacancy in office, it might be urged that the creditor should have applied to the board of county commissioners to have the vacancies filled, under chapter 110, Gen. St. § 12; but in this case it would have been an idle and useless thing to do. The people of the township were united in their determination to defeat the judgments against it; and, even if the board of county commissioners should have named persons to fill the offices in said township, they could not have compelled them to qualify or serve. It seems to be a case somewhat analogous to a judgment debtor who conceals himself or absconds to prevent service of process; and I have no hesitation in saying that the action of the people of the defendant township, by keeping the offices vacant and thus preventing service of process, did not bar the judgment creditor from maintaining his action after the vacancies were filled. I have been unable to find a case exactly in point, but there are many cases holding that the existence of war suspends the statute of limitation as between citizens of the contending states. *Hanger v. Abbott*, 6 Wall. 532; *Braun v. Sauerewein*, 10 Wall. 222; *Devereaux v. Brownsville*, 29 Fed. Rep. 750; *Levy v. Stewart*, 11 Wall. 244. My attention has been especially called to the case of *Amy v. Watertown*, (No. 2,) 130 U. S. 320, 9 Sup. Ct. Rep. 537. That case, so far as the conspiracy by the defendant is concerned, for the purpose of defeating service of process, is quite similar to the case at bar. But, so far as diligence by the creditor to save his rights was concerned, the cases are not parallel, nor does the statute of Wisconsin contain the provisions of the Kansas statute suspending the operation of the limitations while the debtor is absconded or concealed. Judgment must go for the plaintiff.

CITY OF PHILADELPHIA v. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Pennsylvania. October 28, 1889.)

1. MUNICIPAL CORPORATIONS—TAXATION OF TELEGRAPH COMPANY.

The city of Philadelphia is not authorized to tax a telegraph company occupying its streets and could not, even if authorized, tax a company engaged in interstate commerce.

2. SAME—LICENSES—UNREASONABLE FEE.

An ordinance charging a corporation occupying the streets of a municipality license fees amounting, in all, to \$16,000 per annum where the cost of supervising

and controlling the corporation for the protection of property and person had for several years been only \$3,500 annually, levies a tax, and the ordinance is unreasonable and void.

8. SAME.

An ordinance charging license fees to an amount much greater than the cost of controlling and supervising the licensee cannot be sustained on the ground that demands might be made against the municipality on account of the licensee.

(*Syllabus by the Court.*)

At Law. Motion for judgment notwithstanding the verdict on point reserved.

Assumpsit against the Western Union Telegraph Company in common pleas No. 4 of city of Philadelphia, removed by defendant to United States circuit court for eastern district of Pennsylvania, to recover license fees for poles and wire privilege erected in Philadelphia by defendant corporation.

Chas. F. Warwick, City Sol., and *R. Alexander*, Asst. City Sol., for plaintiff, cited *City of Scranton v. Catterson*, 94 Pa. St. 202; Willc. Mun. Corp. 927; Ang. & A. Corp. 298-300.

Read & Pettit, for defendant.

BUTLER, J. On the trial defendant presented the following point: "Under the evidence in this case the license fee sought to be recovered by the plaintiff is much more than the cost of the regulation, and excessive—it is therefore unreasonable in law and void—and if you believe the evidence in the case, your verdict must be for the defendant." The point was reserved, and the court submitted the case to the jury under the following instructions: "The city of Philadelphia sues to recover license fees under the ordinance before you. Whether the ordinance is valid or not depends upon the question whether it is reasonable, as respects the amount required to be paid, by the defendant and other similar companies using lines of wire within the city. The city cannot tax these companies, and does not, as declared by counsel, seek to do so. Nor can it prohibit them from establishing and maintaining their lines but it can subject them to proper regulations and supervision, with a view to the protection of persons and property. It is the duty of the city to prescribe such regulations and conditions, and to exercise such supervision. If it failed in this it would be responsible to citizens who might be injured either in person or property. It is readily seen that the construction and maintenance of these lines subjects the city to serious responsibility, and considerable expenditure, and for this the city may demand indemnity and reimbursement. Thus you observe the question is, as before stated, is the ordinance reasonable? The city has power to enact such an ordinance if its exactions are not excessive. In passing upon the question of excessiveness, the city should not be subjected to a contracted or narrow view, but be treated with fair and reasonable liberality. Turning now to the evidence you must determine whether the ordinance is reasonable." The jury have found for the plaintiff, the point must now be disposed of. It embraces the entire case. The validity of the ordinance, judged by the testimony. The

facts were submitted to the jury, for reasons stated at the time—which need not be repeated here. Nor need we enlarge on the charge respecting the parties' rights. There is no controversy on the subject; nor is there room for controversy. The plaintiff cannot tax the defendant,—not only because it is not authorized to do so, but because the state is without power to confer such authority. The imposition of a tax would be an interference with interstate commerce and thus be an infraction of the federal constitution. The plaintiff may and is in duty bound, to subject the defendant, and other similar companies to such proper conditions, restrictions, and supervision, respecting lines within its limits, as are necessary to the public safety, and consequently to such charges as will enable it to perform its duty, without loss to itself. If the ordinance does no more than this it is reasonable, and therefore valid; otherwise it is not. Does it do more? The question in view if the evidence, (about which there is no disagreement,) is too narrow to admit of discussion. A statement of the facts disposes of it. The experience of several years shows that \$3,000 or at the most \$3,500 per year is sufficient to cover every expenditure the city is required to make on this account. The ordinance imposes the payment (in round numbers) of \$16,000 annually. This is five times the amount required. It seems to follow as a necessary consequence, that the ordinance is unreasonable. It compels a payment annually of about \$14,000 in excess of the amount necessary. This is a tax pure and simple. The city cannot collect and lay by a sum to insure itself against imaginary future demands, which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time, be subjected to expenditure in resisting unjust claims. This judged by the past, however, is not probable. A very trifling annual surplus would provide for it. But as the contingency is remote such provision may well be left until it occurs. The only embarrassment we have felt in reaching this conclusion arises from the fact that the state courts—the common pleas of this city and the supreme court—adopted a different one in previous suits under this ordinance. Our very great respect for these courts would impel us to give their judgments controlling weight, if we could find anything to support them in the testimony before us. Judgment must be entered for the defendant notwithstanding the verdict.

FRANCŒUR v. NEWHOUSE.

(Circuit Court, N. D. California. December 9, 1889.)

1. PUBLIC LANDS—GRANT TO CENTRAL PACIFIC RAILROAD COMPANY—GRANT IN PRÆSENTI.

The grant of lands to the Central Pacific Railroad Company to aid in the construction of its road, under the act of congress of July 1, 1862, and the amendatory act of 1864, is a grant *in præsent*, which can only be defeated by the failure to perform the conditions subsequent, and appropriate judicial proceedings to declare a forfeiture.

2. SAME—EJECTMENT BEFORE PATENT ISSUES.

The title which vests under the congressional grant, and the performance of the prescribed conditions, is a legal title, upon which an action of ejectment may be maintained before the patent issues.

3. SAME—OFFICE OF PATENT.

The patent issued under the congressional grant is only a convenient instrument of evidence that the conditions have been performed and the title vested.

4. SAME—FAILURE TO PAY EXPENSE OF SURVEY.

The failure to pay the expense of surveying, under section 21 of the act of 1864, only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant.

5. SAME—EXCEPTION OF MINERAL LANDS.

The exception of mineral lands from the grant to the Central Pacific Railroad Company, only extends to lands known to be mineral, or, apparently mineral, at the time when the grant attached; and a discovery of a gold mine in the lands after the title has vested by full performance of the conditions, does not defeat the title.

6. SAME—UNAUTHORIZED EXCEPTION IN PATENT.

An exception inserted in a patent, which is not authorized by the statute to be inserted, is void.

7. SAME—PATENT FOR LANDS ALREADY GRANTED—COLLATERAL ATTACK.

Where a patent is issued for land which has been before granted to other parties, and there is no interest left in the government to grant, the interior department acts without jurisdiction, there being nothing in the United States to grant, and the patent so issued is void, and may be collaterally impeached.

8. SAME—RIGHTS OF TRESPASSERS.

Where land has been granted to private parties, other parties have no right afterwards to enter upon the land and prospect for gold. No right can be initiated by a trespass upon private lands.

(Syllabus by the Court.)

At Law.

This is an action to recover possession of lot 52 of section 13, township 17 N. of range 11 E. Mt. Diablo meridian. The plaintiff claims title by conveyance from the Central Pacific Railroad Company. It is alleged in the complaint that the land is part of an odd-numbered section lying within the 10-mile limit of the grant made to the Central Pacific Railroad Company, to aid in the construction of a railroad, by the act of congress passed July 1, 1862, (12 St. 489;) that the said corporation filed its assent to said act, and a map designating the general route of said railroad, with the secretary of the interior within two months after the passage of the act; that on August 2, 1862, the secretary of the interior caused all the lands within 15 miles of said route, including the land in question, to be withdrawn from pre-emption, private entry, and sale; that the line of said road was definitely fixed, said road fully constructed and accepted by the president, from the western terminus, to

a point more than 25 miles east of the township in which said land is situated, prior to September 29, 1866; and the whole of said road was definitely located, constructed, accepted by the president, and in operation to the east line of the state prior to July 2, 1868; that in the year 1866 the secretary of the interior caused all the lands in said township 17 north to be surveyed, and on March 2, 1867, the United States surveyor general made return of the official plat of said survey, and filed the same in the general land-office at Washington, on June 2, 1867, and the same was soon after regularly filed in the local land-office at Marysville, that being the district in which said land was situated; "that by said survey the description of all lands in said township was ascertained, and the character thereof determined to be agricultural lands, and not mineral or swamp in character, nor covered by any governmental reservation; that the plats filed as aforesaid, so reported and showed the said lands; and that said determination, report, and showing have continually remained, and still remain, of full force and effect;" that said section 13, township 17, is within the limits of five miles of said railroad, along the line thereof, and, with other lands, was granted to said Central Pacific Railroad Company of California by said act of congress; that at the date of the passage of said act of congress, at the date when said line of said railroad was definitely fixed, and at the date when the said railroad was actually constructed through and beyond said township, all of said section 13 was returned as agricultural land, and no part of the same was known mineral land, or returned or denominated as mineral land, nor had any part of the same been sold, reserved, or otherwise disposed of by the United States, nor had any pre-emption or homestead claim attached to the same; nor was any part of said land within any exception from said grant; nor did the granting thereof to said company defeat or impair any pre-emption, homestead, or swamp, or other lawful claim to the same, or to any part thereof.

That during the year 1883 a vein or lode of quartz-bearing gold, in paying quantities was discovered within lot 53 of section 13, the premises in question; that on April 20, 1885, the Eagle Gold Mining Company filed in the proper office its application for a patent to said lot 53, from the United States, under the mining laws passed by congress; that on May 5, 1887, pursuant to said application, the land department issued to said Eagle Gold Mining Company a patent to said lot 53, as the Eagle Bird Quartz Mine. That said application was made and patent issued without authority of law, and said patent is void, and, that said defendant is in possession, claiming under said patent through mesne conveyances from said patentee.

That the Central Pacific Railroad Company has tendered to the treasury the amount of money required by the statute, and demanded a patent, but it has been refused, although all acts required by the law to entitle it to a patent have been fully performed, and the title to said premises has vested in it.

A. L. Hart and Geo. H. Francoeur, for plaintiff.

Reinstein & Eisner and James M. Sewell, for defendants.

Before SAWYER, Circuit Judge, and SABIN, J.

SAWYER, J., (*after stating the facts as above.*) It has been so often decided that the grant to the railroad company under this, and similar acts, is a grant *in presenti*, passing and vesting a present title, only to be defeated by a failure to perform the conditions subsequent, and suitable judicial proceedings on the part of the United States, to forfeit them, that it is only necessary to cite the authorities without further discussing the question. *Railroad Co. v. Railroad Co.*, 97 U. S. 496; *Schulenberg v. Harriman*, 21 Wall. 44; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336. "There be and is hereby granted" are words of absolute donation, and import a grant *in presenti*. This court has held that they can have no other meaning." *Railroad Co. v. U. S.*, 92 U. S. 741; *Wright v. Roseberry*, 121 U. S. 500, 7 Sup. Ct. Rep. 985; *Railroad Co. v. Orton*, and cases cited, 6 Sawy. 198; Mr. Justice FIELD went over the subject fully in *Denny v. Dodson*, 13 Sawy. —, 32, Fed. Rep. 899, in which he held that not merely the equitable title, but the legal title to the land passed by the legislative grant *in presenti*, in such sense that an action of ejectment could be maintained upon it—that the patent provided for, was not necessary to pass the title, but was only a convenient instrument of evidence, citing a passage from the opinion of the supreme court, in *Langdeau v. Hanes*, 21 Wall. 521, as follows:

"In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but, where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim, as justify its recognition, and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government." *Denny v. Dodson*, 32 Fed. Rep. 904.

The provision of section 21 of the act of 1864 requiring the railroad company to pay the expenses of surveys and conveyance, does not affect the question of the vesting of the title under the legislative grant. It only applies to the issue of a convenient instrument of evidence. But in this case the title had already vested and passed beyond the authority of congress, before the passage of the act of 1864, which could only amend the prior act so far as to effect its future operation as a law.

A title, therefore, vested by the grant, and performance of the conditions, upon which an action of ejectment can be maintained.

The next question is, did the land in question pass, by the grant of 1862 perfected in 1866-67 in which a gold mine was discovered in 1883, 21 years after the grant attached by the filing of a plat of the general route of the railroad, and the withdrawal of the lands in pursuance of the statute, by the secretary of the interior, and more than 17 years after the completion of the road, and its acceptance by the president, and more than 16 years after the final survey, and report of the lands, as agricultural, and not mineral? The parties to this grant, both the United States, and the grantee, must be presumed to have contemplated a grant

in view of the condition of the lands as they were known, or appeared to be, at the time the grant took effect. In the exception of "mineral lands" from the grant, congress must have meant not only lands mineral, in fact, but, lands known to be mineral, or, at most, such as were, apparently, mineral, and, generally, recognized as such. Congress could not have contemplated that the discovery of a paying mine, 15 or 20 years after the making of the grant, and the performance of all the conditions by the grantee, required to perfect the title, and render it irrevocable, should vitiate the grant. If so, then such a discovery 50, or 100 years after, would effect the same result. In granting the public lands, congress must be presumed to deal with them in view of the conditions as they are known, or supposed to be, at the time. Exceptions must be presumed to refer to matters that are readily apparent upon inspection. Any others would be altogether too indefinite to be valid. The conditions constituting the exception ought, certainly, to be ascertainable at the time the grant takes effect, or they ought not to be operative; otherwise the greatest confusion and inconvenience, public and private, must, necessarily, result.

The grant should point out what is granted, in such certain terms, that the grantee may be able to ascertain by inspection and know at the time the location is definitely fixed, and it becomes operative, what specific tracts of land are granted, and what are excepted from the grant. These lands soon after the grant, were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which, the road was constructed; and the proceeds of these sales are devoted by the trustees to the redemption of the bonds. Is this security to be impaired, or destroyed, by taking from the operation of the grant all lands in which at any future time gold or other valuable metals may be discovered? If so, all of the lands may sooner or later revert to the United States, and these bondholders, and those who, in good faith have purchased the lands of the company without being aware of the mines secluded in their lower depths, will be largely injured.

These words "mineral lands," used in the act, must be construed in a practical sense—as practical men would use them in contracting about them—must be construed with reference to their present known, or at least, obviously apparent condition.

I had occasion to express my views in a general way upon this subject in *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. Rep. 206. In that case it is said, "by the words 'mineral lands' must be understood lands known to be such, or which there is a satisfactory reason to believe are such, at the time of the grant, or patent." In that case, it was not necessary to go behind the date of the patent, which was issued to the company *in accordance with, and in pursuance of the grant, and not to a trespasser in opposition to the grant, as in this instance*. Those who make or take subsequent grants must see that there is something to grant. It is not enough to know, that the lands contain minerals, *at the date of the issue of the patent*, in order to grant them as mineral lands. It must be known, also, that there has been no prior divestment of title. I am satisfied that the

lands ought not, only, to be mineral, in fact, but, also, to be known as mineral, or there should be satisfactory reason to believe them to be such, at the date when the grant takes effect, in order to fall within the exception of mineral lands, in such sense, as to defeat the grant. And this is, evidently, the view of the supreme court, as there is no case, so far as I am aware, wherein, that court has sustained an exception, of "mineral lands," in these grants unless they were known to be mineral, at the time of the grant. This point is very fully considered by the court in *Coal Co. v. U. S.*, 123 U. S. 326, 327, 8 Sup. Ct. Rep. 131. Says the court in that case, quoting from a prior decision:

"We say 'land known at the time, to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands, that the term 'mineral,' in the sense of the statute is applicable. We, also, say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon, as suitable, only, for agricultural purposes, entered by the settler, and patented by the government, under the pre-emption laws, may be found years after the patent has been issued, to contain valuable minerals. Indeed this has, often, happened. We, therefore, use the term 'known to be valuable at the time of sale' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." 123 U. S. 327, 8 Sup. Ct. Rep. 141.

This was but affirming similar views before expressed in *Deffebach v. Hawke*, 115 U. S. 404, 6 Sup. Ct. Rep. 95. In this case, the supreme court also affirm the view of the circuit court expressed in *Cowell v. Lammers*, *supra*, that an exception inserted in a patent, in express terms, by the secretary of the interior, not required or authorized by the statutes, is void.

Now in this case, according to the allegations of the complaint, after the grant had been made, and all the conditions fully performed by the grantee, the road accepted by the president, and the title irrevocably vested in the grantee, and, before there was any authority at all to survey mineral lands, as in the case of *Cowell v. Lammers*, the township and section including the lands in question, were surveyed, as agricultural lands, and so returned and represented to the land-office; and they were so regarded until the discovery of gold-bearing quartz, many years afterward, in 1883, when a patent was refused the railroad company, and issued to defendant's grantor. This discovery, in our judgment, was too late. There was at the date of the legislative grant, and for many years afterwards, nothing appearing in the nature of a valid exception to take the premises in controversy out of the operation of the grant. The department, in issuing the patent to defendant's grantor, instead of to the railroad company, seems to have acted in view of the condition of things, as they appeared, after the discovery of the gold-bearing quartz, in 1883, and not as they appeared, and were known, at the time of the making

of the congressional grant; the performance of the conditions of the grant by the grantee; and the subsequent survey made by the government in 1866-67, as agricultural lands.

It is further objected, that the patent thus issued to defendant's grantor, cannot be, collaterally, attacked, in an action of ejectment—that it can only be impeached by a direct proceeding in equity to declare it void, or control whatever title passed by it for the benefit of the party equitably entitled. This, it appears to us, would have been the better course, and at first we were disposed to think it was the only course. But upon further consideration, and an examination of the authorities, we think the case does not fall within that rule. In recognizing the rule insisted upon in a proper case, the supreme court, in *Smelting Co. v. Kemp*, 104 U. S. 641, add:

“Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, *or had previously been disposed of*, or if congress had made no provision for their sale, or had reserved them, *the department would have no jurisdiction to transfer them*, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, *and goes to the existence of a subject upon which it was competent to act.*”

And in *Wright v. Roseberry*, 121 U. S. 519, 7 Sup. Ct. Rep. 985, the supreme court quote, and approve the foregoing, and further quote and approve another passage, as follows:

“A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, *or dedicated to special purposes, or had been previously transferred to others.* In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.”

They cite other authorities to sustain this view. Now those observations cover the case. The point was, also, directly decided in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228. These lands under the allegations of the complaint, “had previously been disposed of” by legislative grant, and the United States had no interest left to grant. There was no jurisdiction left to dispose of them to somebody else as there was nothing to dispose of. And the court says:

“A patent may be collaterally impeached in *any action*, and its operation as a conveyance defeated, by showing *that the department had no jurisdic-*

tion to dispose of the lands, * * * or that they had been previously transferred to others."

That is this case. Had the department issued a prior patent to the railroad company, and then one to the defendant's grantor, there can be no doubt that it would be the duty of the court in this case to determine which carried the title. If the first patent was valid, there would be nothing upon which the second could operate. So in this case, if the congressional grant was valid, and operative, there was nothing upon which the patent to the defendant's grantor could operate, and it is competent for the court in this case to ascertain which grant took the land.

Upon the views expressed, the demurrer must be overruled, and it is so ordered, upon the usual terms.

SABIN, J., (*concurring*.) I fully concur in the decision just read, but I desire to add a word in confirmation of it, or rather in regard to a matter connected therewith, that has often arisen before the court, and which is very liable to arise in the future. In the judgment just rendered it is decided that the grant by congress, under discussion, was a grant *in presenti*, and that upon compliance with the terms of the grant the title to the land vested in the railroad company. This matter has been so often before the court, and so often decided by this court, and the supreme court, that it is not worth while to mention it further. There seems in this matter, where the government has issued title to land, either to railroad companies or to the state, by way of its school lands, or to private parties, to be a misunderstanding on the part of many people that all these lands are still subject to exploration by outside parties for mines, or anything else, the same as though they were public lands of the United States. The act of congress which opens the public land to exploration for mines speaks only of public lands. Indeed, it is public land only that congress has authority to grant a license to go upon. I think, after the government has, as in this case, divested itself of the title to the land, that any man going upon the land to explore for mines, or anything else, is a mere trespasser. The lands are to that extent withdrawn from exploration for mines; and I am utterly at a loss to see how any one can assume that he can acquire a legal title to a mine upon my land, or on any one's land, the title of which has been divested from the government, or how he can assume to acquire any such title from any act of congress that I have any knowledge of. As I observed, these matters have incidentally come so often before the court for discussion that I think it worth while to call the attention of the profession to the fact that by the express terms of congress only public land is open for exploration for mineral. As said by the supreme court in the case of *Belk v. Meagher*, 104 U. S. 279, location confers no right of entry upon lands, unless the previous right to enter on that land to locate a mine, or for other purposes, pre-existed. Right of entry is the paramount thing. If a man has a right to enter upon the public land, or a right to enter upon my land, to explore for mines, then he may make a location; but, if he has not that right of entry in the first instance, then his location amounts to nothing, whatever

he may discover. I know of no law that gives any one a right to explore my land, or any companies' or corporations' land, for the purpose of making a location upon it. The supreme court has often held that no right of pre-emption or otherwise can be initiated by trespass.

BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON v. LOWNDES.

(Circuit Court, E. D. New York. November 19, 1889.)

1. WORDS AND PHRASES—"HAVEN" OR "HARBOR."

A body of water need not be land-locked in order to be a "haven" or "harbor."

2. PUBLIC LANDS—STATE TITLE—HUNTINGTON BAY.

Huntington bay, a body of water lying between Lloyd's neck and Eaton's neck, on the north side of Long Island, in the state of New York, is a "haven" or "harbor," within the meaning of the language contained in the colonial patents of 1666, 1688, and 1694, granting to the town of Huntington title to all lands south of Long Island sound, between certain fixed east and west bounds, including "all havens, harbors, waters," etc.

3. SAME—TITLE TO THE SOIL.

The title to the soil under said bay passed to the trustees of the town by virtue of said patents.

4. OYSTER-BEDS—TITLE BY USER—NON-RESIDENTS.

Whatever rights, if any, a citizen of the state of New York might have obtained under the common law by long possession and user of an oyster-bed in any of the common or public lands of the state, no such rights could be obtained by a non-resident of the state, nor retained by a former resident after he had removed from the state.

5. SAME.

The defendant, then a citizen of New York, having had possession of an oyster-bed in Huntington bay, in the state of New York, from 1867 to 1872, claiming that said oyster-bed was upon the common lands of the state, but claiming no title to the soil in himself, then removed to and thereafter resided in the state of Connecticut, but still continued to occupy the oyster-bed. *Held*, that when he removed from the state of New York, and gave up his citizenship, he at the same time yielded up whatever equitable right of ownership he had in the premises, if any, and his use and occupation thereafter was that of a trespasser only, which could not ripen by any lapse of time into either a title in fee or a right to continued occupation thereof.

(*Syllabus by the Court.*)

At Law. Action in ejectment.

The plaintiffs, the board of trustees of the town of Huntington, in the county of Suffolk, in the state of New York, sued the defendant, Theodore S. Lowndes, in the supreme court of the state of New York, under section 1502 of the Code of Civil Procedure, to recover possession of their lands under water in Huntington bay, claiming title thereto under three colonial patents or grants, to-wit, the Nicolls patent, of November 30, 1666, the Dongan patent, of August 2, 1688, and the Fletcher patent, of October 5, 1694. The cause was removed to the United States circuit court on application of the defendant by reason of his being a non-resident of the state of New York. The defendant, Lowndes, in 1867, being then a resident of New York, staked out and planted oysters on 130 acres of land under water in Huntington bay, upon which there were then growing no natural oysters, and continued thereafter, from time to time, to plant seed oysters thereon, which matured in from three to five

years, and which he removed at maturity, and continued so to occupy said lands for oyster cultivation up to the time of the trial of this action, claiming at the time of his original entry the right to such occupation as a citizen of the state of New York, and claiming that the title to said lands was in the state of New York, and not in the town of Huntington. The defendant asserted no title to the fee of these lands in himself. In 1872, he removed to the state of Connecticut, and thereafter continued to be a non-resident of the state of New York. He continued planting and taking up oysters from said bay after he had become a non-resident, changing the crop thereon every three or five years. He obtained no written lease, authority, title, or franchise from the state, or from the town. Prior to the commencement of this action, he was notified by the plaintiffs to remove his oysters from these grounds, and refused. In 1888, and prior to the commencement of this action, the legislature of the state of New York ceded to the plaintiffs all the right, title, and interest of the people of the state of New York, if any, of, in, and to the lands under water in Huntington bay, for the purpose of oyster cultivation, subject, however, to the legal rights, if any, of persons having oysters planted there. Laws N. Y. 1888, c. 279. While asserting no title to the fee of the said lands under water in himself, the defendant claimed that by reason of his occupation thereof since 1867 he had acquired a legal right, by prescription or otherwise, to hold said lands, and to continue to occupy the same for the purpose of oyster cultivation, irrespective of the ownership of the soil. The colonial patents granted to certain trustees therein named, for themselves and their associates, the freeholders and inhabitants of the said town, their heirs, successors, and assigns, forever, all lands within the limits and bounds therein expressed; that is to say, "from a certain river or creek on the west, commonly called by the Indians by the name of 'Neckoquatok,' and by the English the 'Cold Spring,' to stretch eastward to Nesaquack river; on the north to be bounded by the sound betwixt Long Island and the main, and on the south by the sea;" "as also all havens, harbors, creeks, quarries, woodland, meadows, pastures, marshes, waters, lakes, fishing, hawking, hunting and fowling, and all other profits, commodities, emoluments, and hereditaments to the said land and premises, within said limits and bounds belonging, or in any wise appertaining," etc. These patents or grants were confirmed by the colonial legislature and the first constitution of the state of New York. The plaintiffs were the successors of the trustees named in said patents. Laws N. Y. 1872, c. 492. The trustees of the town of Huntington always claimed under their patents title to the lands under the waters south of Long Island sound, between the east and west bounds mentioned in said patents, and had exercised acts of ownership thereon by making leases to various individuals for purposes of oyster cultivation, dock leases, gravel leases, etc., in Huntington bay. At their town-meetings the freeholders and inhabitants of the town had annually passed resolutions forbidding non-residents of the town from taking clams, oysters, or other shell-fish from any of the waters of said town under a penalty, as they were authorized to do under the

laws of the state of New York. In 1737 the colonial legislature of the colony of New York passed an act forbidding non-residents of the colony from gathering or taking oysters or shell-fish from any of the waters within the said colony. Liv. & S. Laws N. Y. c. 672, p. 265. The board of supervisors of the county of Suffolk also enacted a law, in 1875, forbidding non-residents of the county of Suffolk from planting or taking oysters from any of the waters within their jurisdiction, under authority of the laws of the state of New York conferring such powers upon boards of supervisors. Laws N. Y. 1849, c. 194; *Smith v. Levinus*, 8 N. Y. 472. In 1880 the legislature of the state of New York passed an act making it a misdemeanor for any non-resident of the state of New York to plant oysters in any of the waters of the state of New York without the consent of the owners of the same. Pen. Code N. Y. § 441. In 1887 the legislature of the state of New York also passed an act creating a state board of fish commissioners, which act also forbids the leasing of lands under water, within their jurisdiction, to non-residents of the state. Laws N. Y. 1887, c. 584. The states of New York and Connecticut, by commissioners duly appointed on the part of each of the said states, under and in pursuance of laws passed by the legislatures of each of said states in 1879 and 1880, (Laws N. Y. 1880, c. 213,) made an agreement to settle the question of the boundaries between said states through Long Island sound, which agreement was duly executed by the commissioners of said states respectively, and confirmed by the legislatures of said states respectively. This agreement, and the boundary line established in pursuance thereof, was ratified, approved, and consented to by the congress of the United States, February 26, 1881, (21 U. S. St. at Large, p. 351,) entitled "An act concerning settlement of boundary lines between New York and Connecticut." Huntington bay is situated south of said boundary line between the said states, as so established, and south of Long Island sound, and is wholly within the territorial limits of the state of New York. By acts of the legislature of each of said states passed thereafter, and before the commencement of this action, the lines of the respective towns and counties bordering upon Long Island sound in each of said states were extended to said boundary line so established. Laws N. Y. 1881, c. 695.

Henry C. Platt, counsel for plaintiffs, at the close of the testimony moved for a direction of a verdict for the plaintiffs, and cited:

Authority for towns making regulations for their common lands, Act. N. Y. March 7, 1788, c. 64, §§ 15, 16, (2 Jones & V. Laws N. Y. 337;) same continued, and now in force, 2 Rev. St. 881, or 2 Rev. St. pt. 1, c. 11, tit. 2, art. 1, § 10; such records evidence, 2 Rev. St. 885-900. Laws ratifying colonial grants to the town, Act Colonial Legislature, passed May 6, 1691; Liv. & S. Laws, c. 2, p. 2; first Const. N. Y. (April 20, 1777,) § 35, continues in force existing colonial laws; section 36 ratifies the colonial grants; section 1, 1 Jones & V. Laws N. Y. 12; or, same, 1 Rev. St. N. Y. 44; second Const. N. Y. (Nov. 10, 1821,) art. 7; 1 Rev. St. §§ 13, 14, p. 58; third and existing Const. N. Y., (Nov. 3, 1846,) and amendments, article 1, §§ 17, 18; 1 Rev. St. N. Y. 64, 84. Laws excluding non-residents of colony and state, etc.,

from taking or planting oysters within its jurisdiction, Act Colonial Assem. Dec. 6, 1787; Liv. & S. Laws, c. 672, p. 265; resolution board supervisors Suffolk county, passed 1875, pursuant to Laws 1849, c. 194, § 4, subd. 13, (2 Rev. St. 1025;) and also Laws 1875, c. 482, § 1, subd. 16, (2 Rev. St. 1039,) which laws were passed pursuant to the present constitution of the state of New York, article 3, § 23; Pen. Code, (1880,) § 441; oyster franchise act, excluding non-residents, Laws 1887, c. 584, §§ 4-9. As to validity, construction, and extent of patents, *Brookhaven v. Strong*, 60 N. Y. 56; *Robins v. Ackerly*, 91 N. Y. 98; *Hand v. Newton*, 92 N. Y. 88; *Roe v. Strong*, 107 N. Y. 358, 14 N. E. Rep. 294. The defendant by his occupation obtained no title to the soil, nor any right to the continued possession thereof, after notice to remove therefrom, as against the plaintiffs, the holder of the legal title, but at most only acquired property in his oysters. *Fleet v. Hege-man*, 14 Wend. 42; *McCarty v. Holman*, 22 Hun. 53; *Sutter v. Van Derceer*, 47 Hun. 366. The legal title to the land in dispute being in the town of Huntington, under its ancient grants, the occupation and use thereof by the defendant must be considered to have been permissive, and in subordination to the legal title, as he claimed no title thereto in himself at the time of taking possession, nor at any other time. His possession was not of that adverse character that would ripen into a title by adverse possession to the soil, nor one that would create an easement, or a right of continuous possession, as against the owner of the soil. *Ogden v. Jennings*, 66 Barb. 308; *Colvin v. Burnet*, 17 Wend. 564; *Howard v. Howard*, 17 Barb. 663-667; *Livingston v. Iron Co.*, 9 Wend. 511; *Harvey v. Tyler*, 2 Wall. 328; *Smith v. Burtis*, 9 Johns. 180; *Jackson v. Johnson*, 5 Cow. 74; *Jackson v. Frost*, Id. 846; *Hoyt v. Dillon*, 19 Barb. 651; *Robinson v. Kime*, 70 N. Y. 152; *Bliss v. Johnson*, 94 N. Y. 235; *Thompson v. Burhans*, 79 N. Y. 99; *Higinbotham v. Stoddard*, 72 N. Y. 94, 9 Hun. 1. He obtained no easement, and had no estate to which an easement or profit *a prendre* could attach. *Ward v. Warren*, 82 N. Y. 265; *Nicholls v. Wentworth*, 100 N. Y. 455, 3 N. E. Rep. 482; *Roe v. Strong*, 107 N. Y. 358, 14 N. E. Rep. 294; Washb. Easem. 565-570; *Cobb v. Davenport*, 33 N. J. Law, 223; *McFarlin v. Essex Co.*, 10 Cush. 310; *Pierce v. Keator*, 70 N. Y. 420; *Huntington v. Asher*, 96 N. Y. 604; *Hill v. Lord*, 48 Me. 99; *Huff v. McCauley*, 53 Pa. St. 209. If no title under patents, then the plaintiffs had title under the grant from the state in 1888. The state had power to make such a grant. *Post v. Kreischer*, 32 Hun. 49, 103 N. Y. 110, 8 N. E. Rep. 865, 1 N. Y. Crim. R. 501; *McCreedy v. Virginia*, 94 U. S. 391. The defendant had acquired no legal rights in the premises at the time of the grant from the state, except the right to a reasonable time to remove his personal property therefrom, to-wit, his oysters, after notice from the owner of the soil. His occupation thereof had not been continuous; and, if he had acquired any common-law right to the occupation or possession of the premises for purposes of oyster planting as a citizen of the state of New York, he abandoned and lost such right when he became a non-resident of the state, in 1872. *McCreedy v. Virginia*, *supra*. The language of the patents was broad enough to include the premises in question, which are two miles south of Long Island sound, and within Huntington bay proper. The body of water south of the headlands of Eaton's neck and Lloyd's neck has always been known as "Huntington Bay," as distinguished from "Long Island Sound." All the lands under water and above water south of the Sound passed to the town under their patents. These premises are concededly within the east and west bounds of the patents. It is immaterial whether such lands lie under the waters of a land-locked harbor or an arm of the sea, if they are included within the bounds of the patent. *Brookhaven v. Strong*, *supra*. Lands under water may be recovered by ejectment. *Peoples v. Mauran*, 5 Denio, 389; *Railroad Co. v. Valentine*, 19 Barb. 484.

N. S. Ackerty, C. R. Street, and H. C. Platt, for plaintiffs.

Martin J. Keogh, counsel for the defendant, contending that the defendant had a right to the continued possession of the premises in question, which he had acquired under the common law, cited the following cases: Loundes v. Dickerson, 34 Barb. 586; Martin v. Waddell, 16 Pet. 410; Corfield v. Coryell, 4 Wash. C. C. 379; Decker v. Fisher, 4 Barb. 592.

LACOMBE, J., (*orally.*) As to the construction of these ancient charters, touching the character of the estate they convey, this court will follow the rulings of the courts of this state.

The next question is as to the extent, territorially, of these patents. Ordinarily, a bay is spoken of as a distinct body of water, distinct from the sea, or from the arm of the sea, out of which it opens. Sounds and arms of the sea are said to flow into and out of the bays, and bays to open into sounds. In this particular case, there seems to be a measure of doubt as to the location of the line of the Sound, in the light cast upon it by some of these deeds which have been introduced. The boundary of Eaton's neck, as granted at about the time of this patent, makes it seem uncertain as to exactly where the Sound ended. These points were before Judge CULLEN, I see, in the case of *Ackerty v. Godfrey*, and he there sustained the plaintiff's view as to the boundary by the Sound. In this particular case, however, I do not think it necessary to determine precisely what would be the north and south limits of this patent, if we only had the words "by the Sound" and "by the sea." The use of the words "harbor" and "haven" seems to be sufficient to carry this particular body of water. I do not know that there is any rule of law, or any principle or practice of common speech, which requires that a harbor shall be land-locked, or that a haven shall be absolutely safe from every wind that blows. Grants from the sovereign, as well as acts of legislatures or documents generally, are to be interpreted by giving to the words which they contain, in the absence of anything to indicate a contrary meaning, the plain, ordinary meaning which they have in the educated speech of people by whom the language is employed. This particular body of water geographically indicates that it may be used as a haven or harbor, and the geographical appearance of the land is to be taken largely into consideration here; for these grants were made at a time when, I infer, the north shore of Long Island was not used to any particular extent for the purposes of navigation, it not being much settled at that time. The geographical appearance, then, of this body of water, bounded on three sides by land, would indicate its appropriateness as a harbor or haven, and experience—as to which we have been advised through the testimony of the witnesses, leaving out of view any points of dispute between them—goes to show that it has been used as a harbor or haven. It is not a perfectly safe harbor, nor an absolutely secure haven. It is a place which, when the wind is blowing, or is threatening to blow, from a northerly point, it is desirable, perhaps, to leave; but when the wind comes from the east or south or west it is a place which,

in those circumstances, will afford a reasonably secure place of harbor, and a reasonable haven for ships. It seems that under the language of these grants, then, the title to the land in controversy was given to the town of Huntington.

It only remains to consider the effect of defendant's use and occupation of the particular part of that land which he has used and occupied. With regard to this use and occupation, it is to be noted that it is not in character continuous. When he originally began to use the land, to occupy it by putting his personal property upon it, he claimed that he had a species of title to the land as a citizen of the state of New York; that he, in common with all his fellow-citizens, had an equitable title to those lands, the legal title being in the state, in trust for the common purposes of its citizens. Under the law of the state,—I do not mean the statute law,—under the law of the state, if the title were still in the state, he could, (in that territory as to which he, with others, had a common title,) by the performance of certain acts thereon, segregate, as it were, a portion of such territory, so that, as to that, it might be said that his occupation and use of the portion thus segregated might become exclusive. Now, even conceding that the legal title was still in the state, and that this right which he obtained by actual occupation and use might be considered an equitable property right which he had there, his occupation in assertion of such property right continued only for six years. In 1872 he moved out of the state of New York,—ceased to be a citizen of the state. When I was considering this case yesterday, I inclined to the opinion that the rights to the common lands held by the states were rights which, in the absence of anything to the contrary, were to be participated in by all the inhabitants of the Union. Since the argument yesterday, and after examining the subject more carefully, and giving it further thought, I am inclined to change that opinion. When the individual state succeeded to the sovereignty of England, and took the title to the property which theretofore the crown of England had held, each state held that property, that is, such of it as was held in common, in trust for its own citizens; and no property right whatever in the land so held by one state belonged to the citizens of an adjoining state. That being so, when the defendant removed from the state, and gave up his citizenship, he at the same time yielded up whatever equitable right of ownership he had in these premises. From and after that date, whatever occupation and use he had was the occupation and use of a trespasser only, which could not ripen by any lapse of time—certainly, could not ripen by the lapse of sixteen years—into either a title in fee or a right to continue the use. In this view which I take of the character of the occupation, I am inclined to the opinion that the defendant has not succeeded in establishing his right to continue to occupy this land as he has occupied it in the past. I shall therefore direct a verdict for the plaintiffs.

Verdict accordingly.

LOCKHART v. LITTLE ROCK & M. R. Co. *et al.*

(Circuit Court, W. D. Tennessee. May 25, 1889.)

1. RAILROAD COMPANIES—TRAFFIC ARRANGEMENT—INJURIES TO EMPLOYEES OF OTHER COMPANIES.

Where two railroads have a traffic interchange of cars, if one sets loaded cars on the track of the other at an unusual time of the night, and does not give notice, or put out danger signals of warning, whereby an employe of the other is killed by collision with the obstruction, it is liable in damages for the negligence.

2. SAME—INSTRUCTIONS.

It seems that both companies may be liable in such a case,—the deceased man's own company because it must furnish a clear track, or because the other company is *pro hac* its agent or servant in the matter; but where the court withheld a charge on that point this is not a discrimination by the court against the other company for which it is entitled to a new trial. A joint wrong-doer cannot complain that his companions in wrong escape liability as a ground for a new trial.

3. SAME—ORDINANCE LIMITING SPEED—RIGHTS OF EMPLOYEES.

A municipal ordinance limiting the speed of engines passing through a city is generally for the benefit of strangers using the streets, and it is doubtful if the railroad employes can have the benefit in cases of collisions between trains; but certainly, if the rate of speed does not cause the injury, it is immaterial, especially where the victim of the accident is in no way in control of the engine, and not responsible for the speed.

4. SAME—MANAGEMENT BY TRUSTEES UNDER MORTGAGE.

Where the management of the road was at the time of the accident jointly in the hands of trustees of the mortgage and the company purchasing from them, under a contract retaining possession as a security for the purchase money, but also providing that the trustees should be indemnified for losses by negligence pending the transfer of the property under the contract, both are liable, and the plaintiff may recover against either, the verdict and judgment being moulded, under the Tennessee Code, to suit the circumstances.

5. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence if a switchman ride on the front foot-board of the switch-engine to which he is attached while *en route* to the work he has to do. It is not contributory negligence to ride in one place merely because by the accident it may have been demonstrated that some other place would have been safe.

At Law. On motion for a new trial.

On the trial of this case there was a verdict of \$4,000 for the plaintiff. The court, in substance, charged the jury as follows: "If you find from the proof that the traffic agreements, usages, or customs between the railroad companies justified the Little Rock Company in delivering the cars on the main track of the Chesapeake Company at the time and place the cars were placed there, and without notice of the fact previously or at that time given to the Chesapeake Company, then the Little Rock defendants are not liable to this plaintiff, but the latter would certainly be liable to him, and you will so place your verdict. But if you find from the proof that the delivery was at a time and place and in a manner not authorized by the agreements, usages, or customs of dealing between the companies, then the Little Rock people alone are liable, and you will so place your verdict. Both would be liable if you find from the proof that by their agreements, customs, and usages in dealing about the transfer of cars to the tracks, or by their construction of such agreements, or by their neglect to make regulations that are reasonable and proper to prevent such delivery from obstructing this track, they caused this accident." The verdict was against the Little Rock Company and its trustees, but in favor of the Chesapeake Company.

Turley & Wright, for plaintiff.

W. G. Weatherford, for Little Rock & Memphis Railroad.

Holmes Cummins, for Chesapeake & Ohio Railroad.

HAMMOND, J., (*after stating the facts as above.*) This seems to me a very simple case in its main features, and so gross was the negligence of the defendant the Little Rock & Memphis Railroad Company, by which the plaintiff's intestate lost his life in a most shocking and horrible way, that its humane counsel scarcely has the heart to deny it or defend against it, zealously, earnestly, and ably, as he has struggled to find some way to relieve it against the consequences of that negligence by interposing other defenses than that of a denial of the negligence itself. The facts are that the Little Rock & Memphis Company—I speak now of the management, whichever of the defendants comprised that management, and without reference to that dispute—had a traffic arrangement—whether by contract, usage, or custom, or by a combination of all of these, is immaterial—with the other defendant company, the Chesapeake & Ohio Railroad, by which it delivered cars to the latter company and received cars from it. These interchanges of cars were generally made on a portion of their neighboring tracks called "The Hole," but at certain hours in the day-time, and under restrictions not material, perhaps, in this place, they might be made on the main tracks on our levee, close to and parallel with each other. The Little Rock people being crowded for room in "The Hole," delivered certain loaded cars, according to their usage, on the Chesapeake main track. They were returned, owing to some dispute between the respective clerks, to "The Hole," and again returned to the main track, and yet again to "The Hole," when at night, at a time not authorized by the contract, usage, or custom, or any of them, and at a time never before used for that purpose, the Little Rock yard-master, still pressed for room, set them on the main track of the Chesapeake road, giving no notice whatever of doing so to the Chesapeake people, and not putting out any danger signals. The night was dark and murky, and by a most unfortunate combination of circumstances a train of the Little Rock road, by chance, stopped on its own track a few feet away and parallel to the other, with the locomotive immediately over against these loaded cars that had been left on the Chesapeake track. The smoke from this locomotive in great clouds enveloped the obstructing cars, and completely obscured them. A switch-engine of the Chesapeake road came along on its regular run of business, running at a rate variously estimated at four, six, seven, nine, and ten miles per hour by the witnesses. On it, among others, was the plaintiff's intestate, a switchman, whose duty it was to accompany this engine, riding on the foot-board in front of the head-bar of the engine, placed there for the use of switchmen. The blaze of the head-light from the Little Rock locomotive further obscured the engineer's vision, and it ran into the loaded cars, mashing the intestate to death.

Was there ever a more hopeless case against a railroad company? I think not. The contributory negligence insisted on—and always the

company lays hold of any circumstance that may be at hand to suggest that defense—was that the intestate did not ride on that part of the foot-board at the rear of the engine, where he might have escaped. So he would have escaped if by some factitious circumstance he had not been on the engine at all, or if he had engaged in practicing law, and never had been a switchman at all. It is conceded that when throwing switches or otherwise engaged in front his duty called upon him and permitted him to ride on the front foot-board; but it is assumed that because the engine was *en route* to its work further down the track he should have ridden in rear while so *en route*; but by the same reasoning, if the collision through some other negligence of the defendant company had come from the rear, or if the engine in this very case had been running backwards, then the company would have said it was contributory negligence not to ride in front. Always, on this plan of constructing contributory negligence for a bulwark of defense, the unfortunate victim should have been in that place shown by the circumstances to have been the safe place. The court told the jury it need not consider the matter of contributory negligence, and this is clearly so, it seems to me. These switchmen accompanying a switch-engine may ride on it anywhere, and cannot, as every one knows, often tell what they may be required to do in emergencies that may arise. This man may have been wanted in front to couple to these very cars that brought him to his death, for all he might know, if the foreman had been going to drag them out of the way of trains, and he would have been so wanted if they had known they were there to endanger every life borne upon those rails until they were removed. How did he know that the foreman was not engaged in some such errand, *en route*, or on some other that would call him to the front? I should not dwell on this but for the desperation with which the contributory negligence was pressed at the trial, and the reference to the victim's being out of place, made in the brief on this motion.

Objection is made that the charge discriminates against the Little Rock Company as against the Chesapeake Company; but it does not seem to me amenable to that criticism. The court thought both of them were liable, and was almost willing to so direct a verdict, but, mindful of the cases, one of which counsel for defendant cites,—*O'Neill v. Railroad Co.*, 1 McCrary, 505, 507,—which invoke caution about doing this, even on undisputed facts, because sometimes negligence is an inference of fact, notwithstanding there is no dispute as to the circumstances, which the jury should make, and not the court, I concluded to submit the question to the jury, expecting that both companies would be convicted by the jury, and would now unhesitatingly support a verdict against both. The Chesapeake Company might have been held on the ground that, whatever cost or expense of inspection may be entailed, every railroad company owes to its passengers and employes whose lives are at stake a clear and unobstructed track for every train or car it puts in motion and orders on the rails with the assurance that there is a clear track; or, more certainly, perhaps, on the ground that by this traffic arrangement, whatever it be, for interchanging cars with another company, that other com-

pany is only its agent or servant in the use of the track and management of the business, the employes guilty of the negligent acts being *pro hac* its own employes; and the first company is therefore as much liable for the negligence of the employes of that other company as for that of any other of its own servants or agents. This does not relieve the servant or agent of his own liability, of course. Both are liable, just as the Little Rock Company's yard-master would be liable to plaintiff in this case as well as the Little Rock Company itself. Both are liable, all are liable, and ought to be, in such a case of gross negligence as this. But the court did not say this to the jury, and really that is the chief grievance of this motion for a new trial. The court did not so charge because plaintiff's counsel did not wish to embarrass, and, as he thought, somewhat imperil, his case with these, to him, very doubtful propositions. And inasmuch as the plaintiff could sue any one of those liable to him, and not sue any he chose to release, and might, if pressed to it, relieve himself of the embarrassment by dismissing as to the Chesapeake Company at the last moment; and inasmuch as none of the other defendants, and particularly the Little Rock Company, had the least concern about the liability or non-liability of the others,—I concluded that the plaintiff had the legal right to have his case against the Chesapeake Company put to the jury as he made it, and to decline to take a verdict, if one could be had, on these other grounds. It is a mere sentiment, growing out of the struggle of these two companies to throw the blame of this man's death on each other, to suppose that there was an unjust discrimination here. What concern is it to the Little Rock Company whether the Chesapeake Company is sued or not sued, held or not held? It does not in the least affect its own liability, does not mitigate it, or in any sense concern it. Therefore it has no right to complain, certainly no right to a new trial, because of the failure of justice against it as a joint trespasser. The only possible concern the court has felt has been lest this treatment might have prejudiced the *Little Rock Case*, and turned the jury against it; but it had a hopeless case anyway; the jury needed no turning or prejudice. The liability was clear, and not to be evaded. It was an indulgence to submit such a case to the jury. The Little Rock yard-master, on his own evidence in this case, ought to have been indicted and convicted of manslaughter; and if corporations were liable for such crimes, as they are for libel and the like, of their agents, then this corporation should have been punished for manslaughter.

The court does not comprehend how the question of excessive speed, so much argued on this motion, properly enters into the consideration of this case. It is quite plain that at any speed—whether the six miles allowed by the city ordinance, or less, or more—this man would have been killed. Whether running at six miles or less, the engineer could not have seen any better through the inwrapping smoke nor against the glare of the head-light, both caused by the Little Rock Company. These were not elements of its negligence, truly, but it estops them, somewhat at least, from insisting that the engineer of the switch-engine carrying the intestate to a certain death should have been able to see

through them. The speed did not in any legal or proper sense contribute to the death. And if it did, the speed was not under the control of the victim, and it was not his negligence, contributory or otherwise. It might make the Chesapeake Company liable to him, but does not relieve the Little Rock Company. It is not necessary, therefore, to consider—though I have carefully examined them—the cases on excessive speed, as tested by a municipal ordinance. All the cases except one are where the victims are strangers using the streets and highways, for whose benefit the ordinances are passed. Whether employes on the railroads, injured by collisions of trains with each other, can get any benefit of these ordinances is doubtful; but I do not go into that here, for the reasons stated.

Now, as to the various defendants representing the Little Rock Railroad and their respective liabilities, so much considered at the trial, before the trial on the pleas in abatement, and now again on this motion for a new trial, it may be said that these considerations seem quite immaterial. They constitute no defense that is anything other than a very barren technicality, on the facts here, however formidable they might be on other occasions. They remind one of the school game of "swapping jackets" to conceal the real culprit. It is always a difficult matter for the public or any one outside the management itself to tell who manages and controls a railroad on a particular day, if that company is operated by "trustees" or "receivers" or "bondholders," and the processes of reorganization and other like processes are going on in the courts, as was this company. Whether the "old company" or the "new company" or the "trustees" are in control is a perplexing problem, depending upon almost everything else than outward appearances. The tracks, equipments, trains, agents, officials, etc., are the same substantially, whether one or the other be in possession or control at the moment of the accident. Here there was resort had to introducing the "auditor" as a witness to show how he kept the books, as if it be a matter of book-keeping; and he could not tell. He kept his books in a certain way, as he was told, but at last the problem is to get at the respective interests, rights, contracts, etc. Is the representative of every man killed to hunt this up, and decide the complex questions of ownership, right of possession, and control involved in the very lawsuits brought to settle these questions? Sometimes he must do this, no doubt; but here he was relieved of it. He brought all the parties before the court, and it turns out that either of two or both are liable to him. Either the new company or the "trustees"—whether the latter individually or only as to trust property is again immaterial—are liable, and both may be. The precise fact is, perhaps, that the new company, under its contract of purchase from the "trustees," was in beneficial ownership and control, taking the earnings to itself, but all in the name of the trustees, who reserved or retained nominal and actual control of the management as a security that the new company would perform the stipulations of the contract, namely, deliver the bonds which constituted the purchase money, and indemnify the trustees against all debts like

this, incurred while the property was in this transition state. Now, it is true that we are not enforcing that indemnity at all, nor concerned with it as such; but the fact shows that these two owners were in joint possession and control at the moment of the accident, each according to his interest, whether as agents for each other or otherwise is immaterial here; for as to this plaintiff both are joint trespassers, and both or either are liable to him, and they can, *inter sese*, arrange to pay the judgment according to their contract, whichever satisfies it as to him. Why should the new company stipulate to indemnify the trustees against claims like this if they were not in control in fact? It is a fact showing that the beneficial ownership and management was with the new company, although the trustees remained in nominal possession, and this peculiarity of the situation can but make both or either of them liable to the plaintiff. Under our Tennessee Code the court and jury have statutory power to mould the verdict and judgment in just such cases according to the right of the case. Mill. & V. Code, §§ 3687, 3688; *Knott v. Cunningham*, 2 Sneed. 204; *Parris v. Brown*, 5 Yerg. 267. There is no difficulty under this practice in rendering a verdict against both, to be satisfied by either, and such is the judgment in this case. Overrule the motion.

UNITED STATES *v.* HUGGETT.

SAME *v.* DARKESS.

(Circuit Court, N. D. Ohio. July 1, 1889.)

1. CRIMINAL LAW—OBSCENE PUBLICATIONS—LETTERS.

Prior to the recent acts of congress, letters were not included in the inhibitions of Rev. St. § 3893, against the use of obscene language in matter deposited in the mails.

2. SAME—CONSTRUCTION OF STATUTES—REASONABLE DOUBT—PENAL ACTS.

The rule of reasonable doubt, in the construction of statutes, does not apply to discharge the accused, but the courts enforce a strict construction of penal statutes, confine them within the clearly expressed or necessarily implied meaning of the language used, and will not enlarge them to include conduct equally obnoxious because it is within the mischief to be remedied.

3. FEDERAL COURTS—STARE DECISIS—RANK OF JUDGES.

Upon distinctively federal questions, the decisions of the supreme court only are technically binding as authority on the inferior courts, and the relative rank of the judges sitting in the circuit courts does not add to the authority of the decisions made, but the value of the rule of *stare decisis* depends upon all alike yielding to the force of the first precedent established on the circuits. Until all the judges pay strict regard to this rule, uniformity under the existing system is impossible.

On Demurrer to Indictment.

Defendants were each indicted for sending through the mails letters which were sealed, but contained language confessedly indecent and obscene. There were demurrers upon the ground that the sending of such letters was not prohibited at the time of the mailing of these particular letters, which was before the passage by congress of the acts of June 18

and September 26, 1888, on that subject. The cases were heard together.

Robert S. Shields, Dist. Atty., and *Lee & Brown*, for Huggett.

A. Farquharson, for Darkess.

HAMMOND, J. These demurrers present the disputed question whether or not a message or communication in writing from one person to another, of the ordinary and conventional form and style known in common speech as "a letter," deposited in the mails, is within the inhibition of the Revised Statutes, § 3893, if it use language that is obscene within the meaning of that statute. The adjudicated cases being divided, the expressions of opinion are very conflicting, and a case is thought to be now pending in the supreme court requiring its decision of the question. The cases cited in the affirmative of the proposition, and sustaining the indictment, are *U. S. v. Gaylord*, 17 Fed. Rep. 438; *U. S. v. Hanover*, Id. 444; *U. S. v. Britton*, Id. 731; *U. S. v. Morris*, 18 Fed. Rep. 900; and *U. S. v. Thomas*, 27 Fed. Rep. 682. Those in the negative, and against the indictment, are *U. S. v. Williams*, 3 Fed. Rep. 484; *U. S. v. Loftis*, 12 Fed. Rep. 671; *U. S. v. Comerford*, 25 Fed. Rep. 902; and *U. S. v. Mathias*, 36 Fed. Rep. 892. No opinion was expressed in *U. S. v. Chase*, 27 Fed. Rep. 807, certified to the supreme court; and in *U. S. v. Foote*, 13 Blatchf. 418, the judgment proceeded upon a proper construction of the word "notice," as used in this section as it stood prior to the amendment of 1876, and as it may be found in the original edition of the Revised Statutes or the italic print of the second edition. It was there held that under that clause of the statute it was quite immaterial whether the "notice" mailed should be in the form of a letter or some other form. Any "notice" was especially interdicted. Standing so upon the authorities, it may well be held, as it plainly is, at least very doubtful how this disputed question should be decided; and the defendants first insist that, where there is a reasonable doubt, the construction should be in their favor. I am not quite prepared to hold that this rule of reasonable doubt, by analogy to the well-known principle which governs a jury in trying the facts, should exempt the defendants from that penalty which they have incurred if the statute be against them, for this would be to abrogate by judicial action every dubious or doubtful enactment; and the elasticity of language is such, and the carelessness of legislation is so fruitful of ambiguity in drawing statutes, that it would be a dangerous doctrine to establish by that broad expression of it. Nor do I find that the supreme court of the United States has so expressed it in the cases cited for it in *U. S. v. Whittier*, 5 Dill. 35; *U. S. v. Clayton*, 2 Dill. 219, 226, 12 Myer, Fed. Dec. § 345; and *U. S. v. Comerford*, *supra*. That court has undoubtedly enforced the rule of a strict, though reasonable, construction of penal statutes, confines them within the clearly expressed or necessarily implied meaning of the language used, and refuses to enlarge the words to include other conduct of like, equal, or greater atrocity, simply because it may be within the same mischief to be remedied, when it is not fairly included in the language

of the act; but I do not observe that it lays down any rule that a reasonable doubt as to the interpretation of a statute is to be resolved in favor of the accused. *U. S. v. Sheldon*, 2 Wheat. 119; *U. S. v. Wiltberger*, 5 Wheat. 76, 95; *U. S. v. Morris*, 14 Pet. 464, 475; *U. S. v. Hartwell*, 6 Wall. 385; *U. S. v. Reese*, 92 U. S. 214. Such a formulary of a rule for expounding statutes may be found elsewhere, perhaps, but not in these decisions, I think; and nowhere, it seems to me, can the doctrine mean more than they express. End. Interp. St. §§ 329, 330. Hence it becomes necessary to resolve the doubt according to the proper construction of the statute, however much the court might be inclined to mitigate the punishment, or withhold it altogether, perhaps, because of the ambiguous or misleading character of the language used; but the defendants cannot claim to be discharged because of a reasonable doubt about that construction. But I am of the opinion that the adjudications which have affirmed the validity of these indictments do fall into the very latitude of construction which was condemned by the supreme court of the United States in the above-cited cases; and that upon the somewhat gratuitous assumption that congress intended to purge the mails of all impurity whatever, and that because, forsooth, the use of obscene language in private letters is as impure there as elsewhere, is as offensive, to the addressee, and as much deserves punishment, they have too eagerly held that letters were included in the act. I say upon a gratuitous assumption, because the history of the legislation shows quite clearly, it seems to me, that, until the recent acts of congress, that body has never come up to the elevated plane of moral action suggested by these decisions, and to be implied from putting this restriction upon the absolute freedom of that form of correspondence, but has especially refused to do that thing. Acts 1888, c. 394, p. 187; *Id.* c. 1039, p. 496. And this reluctance to interfere with the freedom of private correspondence is readily explainable by the suggestion of Mr. Justice FIELD that congress felt the difficulty of accomplishing its purpose to protect the morals of the people by a wise use of its power over the postal establishment, "consistently with rights reserved to the people, of far greater importance than the transportation of the mail." *Ex parte Jackson*, 96 U. S. 727, 732. Free speech, and particularly free speech in private intercourse, and the aversion of our race of freemen to interference with it, stood somewhat in the way of this legislation, at least in the popular estimation; and this popular sensitiveness upon the subject found its expression in the reluctance of congress to place letters upon the list of expurgated mailable matter. It was akin to the action of a state, having larger jurisdiction and opportunities to protect morals, inhibiting the use of obscene or indecent language in private conversation or speech; and it was this sentiment that protected letters at first, and until congress concluded to take the advanced step. It may be that congress was oversensitive and overcareful; but that the legislation has gone through this process of development is an important consideration in the interpretation of this section of the Revised Statutes. As originally conceived, it was a mere trade regulation for the territory within the exclusive jurisdiction

of the United States, and exclusion from the mails was merely a method of aiding in its enforcement.

The notion that the intention ever was or is now to protect the mails and purify them, or to guard the postal officials from contamination, is, in my judgment, a barren sentimentality that deserves no place in the serious consideration of this statute. Postal officials are not supposed to examine or to appropriate to themselves the indulgences of reading that which goes into the mails in any form, but their duty is to handle and distribute it without doing that. They violate their duty when they so use any mail matter whatsoever, except for the purposes of such official inspection as may be authorized. Therefore it is that this sentiment seems a useless one. But the purpose was, as we have the authority of the supreme court for saying, to refuse the facilities of the postal establishment for the distribution of matter deemed injurious to the public morals. *Ex parte Jackson, supra.* At first, traders were not allowed to use the mails as an instrumentality for administering to depraved tastes, and now the prohibition has been likewise extended to include a purpose of refusing carriage of any message, even in a private letter, which in its language violates the common sense of decency.

Also, I think that in the discussion of this subject too much stress has been laid upon the sanctity of that sealing of mail matter, especially letters, which the postal laws guard so sedulously, as a guide to the proper interpretation of the statute. Judge DRUMMOND effectually disposes of that argument in his opinion by showing that the sealing and paying of letter postage on those articles confessedly inhibited does not remove the inhibition or protect the culprit. It may delay detection, but it does not make the matter mailable; but it does not follow from this that a letter sealed or unsealed is within this statute. No doubt that from the time when postal facilities were first provided in the world, and the governments were first charged with the duty of establishing them, this sealing of letters and documents carried in the mails was protected as a right of the highest importance, without which the postal establishments would become mere freighters; but the consideration of that matter in its relation to the subject we have in hand is fully covered by the suggestion already referred to, of a reluctance on the part of congress to restrict freedom of speech in private correspondence by letters; and except so far as this sanctity of the seal is included in that principle of freedom of private speech I do not deem it of much importance in interpreting this statute, and think it should not be exaggerated, as there is some danger of doing. It might not be an impossible construction of the statute, in my view of it, that a letter, or, as I prefer to express the idea, a written or printed message or communication in the form of epistolary private correspondence, containing obscene thoughts in language which happens to be expressed upon a sheet of paper displaying some obscene "pictures,"—no matter in what style of the art of making pictures, the "letter" and the "picture" having no bearing one upon the other or any other relation, near or remote, except the bare juxtaposition of the two,—I say it might not be impossible that such a "letter,"

being sealed and mailed, would be in violation of this statute as to the "picture," and yet not as to the "letter," unless, indeed, the whole would be excluded from the denunciations of the statute by a necessary implication upon the words of the act that it is only "every letter upon the envelope of which" the "picture" or other offending matter appears that is comprehended within the statute. And to satisfy hypercriticism "envelope" might be conceded to mean the outside surface of a letter not inclosed in a jacket or like covering known as "envelopes."

Once more, in this process of limiting, if not discarding, some of the seemingly misleading arguments which have gathered about this question, and that may be somewhat beside it, there appears to me at least to be but little of importance in the notion that the grievance of the addressee, whose sense of indignation is aroused, and whose feelings are injured, by such letters, is to be redressed by this statute. Perhaps it is not within the competency of congress to redress such grievances, but certainly I think it was not its intention to redress them even by these latest acts that do include letters within the prohibitions of the legislation. It may be that, until congress, exercising its power of postal regulation, takes another step in advance, and authorizes seals of letters to be broken, and contents inspected at the will or upon the suspicion of postal officials, this grievance of the addressee furnishes the only method of detection, accusation, and punishment, and the only guaranty for the enforcement of the statute; but *non constat* that congress intended by this legislation to provide a redress for such grievances, or that we should so view this statute in construing it.

The simple question is: What, upon a proper legal construction of this section, has been denied carriage in the mails; the denial being enforced by a penalty for the non-observance of the postal regulation? Or, more nearly to this case: Has this letter been excluded by the language of the act? A latitudinarian construction that shall include it because it is as hurtful to morals as other things that are excluded is denied to us by the supreme court, as already shown. The conclusive fact against including it is that from the beginning of the legislation to the recent acts, which do specifically include "letters," they have never been mentioned as such in the list of prohibited mail matter, nor referred to in the statute, except in a phrase which by fair implication shows that they were designedly left out of that list when congress says that there shall be included "every letter upon the envelope of which"—and it may be conceded that this means upon the outside surface of which—the obscene language, etc., appears. Now, from the earliest appearance in our civilization of postal carriage, whether by private or public establishment, the "letters" have been that class of "mail matter" with which and about which there has been most concern; so much so, that the idea of "a letter" and postal carriage are quite inseparable, when we have in mind the postal service and its regulation. It has become, in that relation, a technical word, a superior word, a word to represent a class of mail matter that is in every possible sense of so high a grade that all else becomes inferior in classification and in enumeration to it. It stands first in pos-

tal concerns, and nothing is even equal to it. Historically, in practical operation, and in popular knowledge and esteem, this is so, and the general rule of construction is that in legislative enumeration the inferior does not include the superior. *End. Interp. St.* § 412, p. 579. I have taken the trouble to examine with care the legislation concerning our postal affairs, and do not find a single instance where congress has ever used any other word to include "letters" than that word itself, except such expressions as "the mail," "mail-matter," "bag or mail of letters," etc. It is sometimes used generically to describe mail matter of other classes than "letters," as when the statutes speak of "letter-carriers," "letter-boxes," etc.; but whenever the legislation in hand requires specific classification or enumeration, I find no word ever substituted for "letters," to express that which is commonly known as letters in relation to the postal service. We have "letter and newspaper envelopes," "letter correspondence," "registered letters," "unclaimed letters," "dead letters," "request letters," "non-delivered letters," "all letters and other mail matter," "foreign letters," "letters or packets," "letters and packets," "letter postage," "letter mail," "letter and other mail matter," and such like, almost innumerable; and these I have taken quite at random from the Revised Statutes. Can it be possible that congress, then, wishing to include "letters" in any particular and accurate enumeration shall drop that word so imbedded in our postal laws and that of our ancestors beyond the sea, and adopt some unfamiliar, inferior, and in every sense ambiguous term to express the idea? It does violence to the intelligence of congress to think so. If letters were intended to be included in this statute, why resort to any enumeration at all such as it contains, when the generic term "mail matter," which has grown up in modern legislation as a substitute for the old-fashioned "letters and packets," was at hand to include everything? The truth is that our postal establishment has been so enormously extended in the direction of becoming a common carrier of goods and merchandise, and those articles or contrivances used to advertise, sell, and distribute them, particularly those of a literary character, that when congress goes to deal with such articles permitted in the mails it must adopt enumerations hitherto unknown to postal terminology; but the word "letters" always appears when it deals with the ordinary postal article known by that name. Its omission under such circumstances means its exclusion. Moreover, there are other statutes of a like character and purpose with this which do not omit specific references to "letters" in dealing with the prohibitions enforced, and why should they be omitted from this act, unless it were intended not to include them by such omission? For example, the very next section of the Revised Statutes to that which we are considering relates to a prohibition concerning lotteries and gift enterprises, and forcibly illustrates the argument we are attempting here by beginning its inhibition with the phrase "no letter or circular, etc., shall be carried in the mail;" registered letters are to be stamped "fraudulent," and returned when they concern these enterprises, (*Rev. St.* § 3929;) and money orders relating to them are to be refused payment, and remitted, but the officials are

not to open any letter, (Rev. St. § 4041.) Again, in protecting the people against the use of the mails as an instrumentality for working schemes intended for the purposes of fraud, congress uses the words "place any letter or packet," etc., and follows it with a general prohibition against "misusing the post-office establishment," and its "abuse" for such purposes. Rev. St. § 5480. And, in regulating the carriage of "letters and other mailable matter" by foreign vessels from the ports of the United States, the officials, under certain restrictions, may open and inspect any packages supposed to contain mailable matter, etc., but not "the letters" themselves, and detain them for postage; and "all letters or other mailable matter," except such "sealed letters," relating to the vessel or cargo, etc., shall be delivered by the master to the post-office, etc.; and these regulations for conveying "such letters or any letters intended to be conveyed," etc., are enforced by criminal penalties and punishments. Rev. St. §§ 4015, 4016. Section 3994 prefers the "letter mail" to "other mail matter" in the regulation of its carriage; and, in a word, scarcely any postal statute or regulation concerning the post-office establishment fails to exhibit this sedulous care for "letters" and the "letter mail" in every direction possible; and it is quite inconceivable that congress should in the act we are construing have departed from this legislative habit, and undertaken to regulate so important a matter as it concerns by the mere use of the nondescript and uncertain word "writing," when in the very statute itself and all other statutes the words "all letters, packets, and other mail matter," so constantly appear in this or some equivalent form. The word "letter" is found defined, as we define it here, by many adjudicated cases cited in the books and by the lexicographers, while its technical bearing in the language of the postal service is self-evident, and appears everywhere that conversation occurs among the people about the mails. Bouv. Dict. tit. "Letter;" Lawson, Conc. tit. "Letter;" Stim. Amer. St. Law, § 4074, p. 447; *U. S. v. Bromley*, 12 How. 88; *Deweese's Case*, Chase, Dec. 531; *Chouteau v. The St. Anthony*, 11 Mo. 227; *Dwight v. Brewster*, 1 Pick. 50. It is undoubtedly true that in a certain sense "a letter," even in the technical meaning of the term, as above described, is a "writing," and also it is true that a "book," or "pamphlet," or "paper," or "print" is in a certain sense a "writing," and it is not impossible that "a picture" might be held to be. Webst. Dict.; Bouv. Dict. tit. "Writing;" Lawson, Conc. tit. "Writing;" *Henshaw v. Foster*, 9 Pick. 312, where there is an extensive discussion of the word "written," in a state constitution, and it was held to include "printed" words. And by the statutory enactment of many states it is declared to include "printing," "engraving," "lithography," etc. Stim. Amer. St. Law, § 1023, p. 140. By the rule of *noscitur a sociis* it might be so limited here in this statute. Broom, Leg. Max. 588, 651; End. Interp. St. § 396 *et seq.*; Id. 400. But this rule, like all others, yields to the general intention clearly expressed, and is not always strictly enforced. Id.; *U. S. v. Lawrence*, 13 Blatchf. 211; *Wilkinson v. Leland*, 2 Pet. 628, 662; *U. S. v. Hartwell*, 6 Wall. 385; *Oates v. Bank*, 100 U. S. 239. Hence it may have a larger meaning than its associated words in this statute may imply, but not neces-

sarily its largest meaning; and for the reasons already stated should not include in such a statute as this the technical and always natural word "letters," when used to express the kind of "writing" we have involved in the case at bar. It may include any other "writings," perhaps, but not those known by a more familiar, natural, and, in postal rules and regulations, technical, term as "letters," unless, indeed, the statutory intention to so include them is far more clearly manifested than it can reasonably be said to be in this statute. It is conceded that they were not included in the original act, but it is contended that the insertion of this dubious word "writing" was intended to apply it to them by the amendment of 1876. The fact of insertion by amendment perceptibly increases the force of the rule of association; but it may be conceded that the intention was to include such writings, for example, as manuscripts going to the publisher or returning from him, pleadings or records in legal proceedings, documents of any kind in written form, or partly in writing and partly in print, and all the innumerable forms of conveying information or ideas that are obscene and indecent through the mails, whether sealed or unsealed, and yet not to include letters, whether sealed or unsealed.

I have not thought that the word "publication," as used in this statute, had the least reference to that term as we use it in legal parlance, in the law of slander and libel, for instance, or when we say a deposition is to be "published" or the like, but solely in the sense we use it when we speak of "publishing" books, pamphlets, circulars, papers, etc. And the insertion of the word "writing" by the amendment of 1876 does not necessarily apply the term "other publication" so as to limit the class of "writings" to those in some sense "published," as already intimated; but while this may be conceded, we need not concede, and I do not think it should be admitted as a proper construction, that the term "writing" should be extended to include all writings of every kind, including private letters, sealed or unsealed. Dubious words ought to be taken most strongly against the law-makers. *U. S. v. Helth*, 3 Cranch, 399, 413. One has only to examine the legislative proceedings attending the passage of the recent acts of congress to see that that body did not consider letters within the former statute. The act of June 18, 1888, c. 394, did not include them, while obviously prohibiting the display of offensive matter upon the envelopes and wrappers, including injurious reflections upon one's character, instigated as we all know by the use of the mails by money collecting agencies to compel by such threats, designs, and offensive epithets delinquent debtors to pay their delayed debts. It was not until September 26, 1888, (chapter 1039,) that congress reached the state of mind necessary to place within this legislation private letters. So considered, the existence of these recent acts shows that congress had not interpreted the former acts to include letters. *U. S. v. Freeman*, 3 How. 556.

The district attorney, in his brief, refers to the fact that some of the opinions are by circuit judges, and are said to have been approved by circuit justices, though they have no reported decisions on the subject,

and that these should have more influence as authority. Strictly and technically none of the decisions by any of the judges are of authority, and on the circuit I take it all the judges stand alike in this matter, supposed distinctions in rank not adding anything to the authoritative effect of judgment or opinions. Whichever judge holds the circuit court, it is the judgment of the court, and can be no more or less authoritative because of these distinctions. It would be intolerable if it were otherwise. Unfortunately, owing to our very absurd judicial system, it seems quite impossible to introduce into it the rule of *stare decisis*, as between the different circuits and in the courts inferior to the supreme court; the decisions of that tribunal alone being binding as authority upon all. If the first judicial decision of this question had been followed as a precedent, there would have been no conflict of authority, and "letters" would have been excluded from the operation of this act. But Judge DEADY's careful judgment was by him all too graciously, perhaps, made to yield to mere statements that other judges in his circuit thought differently, and without any published opinions from them. Other courts felt at liberty to disregard the first precedent, and so we have them all acting independently in judgment. This may be deplorable, but it is inevitable, unless all will yield to the first careful and intelligent decision as a precedent, strictly considered.

On this class of questions, altogether and absolutely within the federal jurisdiction, such a rule of judgment would be valuable, and I consider that in this case, substantially, we are following that rule, and that this judgment is fairly in the line of precedent. Demurrer sustained.

WATSON v. WILSON *et al.*

(Circuit Court, E. D. Pennsylvania. April 27, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—IRONING-MACHINES.

The combination set forth in the first three claims of patent No. 293,290 is infringed by a machine in which the table is held up against the iron by the pressure of the operator, and returned, upon the lowering of the foot-lever by a spring, operated by the lowering of the lever by the operator, when the table has reached the extent of its motion.

2. SAME—ANTICIPATION.

The combination set forth in the fourth and fifth claims is anticipated by a machine having the neck-clamp and tail-clamps unconnected, and the latter consisting of a split-roller, and not an extensible gripping mechanism, and not operating automatically, as shown in bosom-ironer No. 3, of the Troy Laundry-Machine Company.

In Equity. Hearing upon bill, answer, and proofs.

Bill by Lewis S. Watson against Edgar Wilson and John William Binder, trading as Watson & Binder, for infringement of plaintiff's shirt-ironing machine, patented February 12, 1884, No. 293,290. The claims involved were the following:

(1) In an ironing-machine, an iron and an ironing-table, in combination with mechanism substantially as described, operating to move the table for-

ward, in contact with the machine, lower the table at the end of its forward motion, and return the table to the limit of its backward stroke, without contact with the iron, substantially as set forth. (2) The combination of an ironing-table with mechanism, substantially as described, operating successively and automatically to move the table forward, lower the table at the end of its forward stroke, and return the table to its backward stroke, without contact with the iron, substantially as described. (3) The combination, substantially as described, of the iron and ironing-table with mechanism operating to reciprocate the table; an operating mechanism by which the table is brought up and held against the iron during its forward stroke, and mechanism connected with and actuated by the table at the end of the forward stroke of the latter, and operating to lower the table-lifting mechanism, whereby the table shall be automatically lowered at the end of each forward stroke and returned in a lower position, substantially as set forth. (4) In an ironing-machine, the ironing-table provided at one end with a clamp, operating to hold down the shirt bosom at the neck, and at its opposite end provided with an extensible gripping and stretching mechanism, substantially as described, whereby the shirt may be held at the tail portion thereof, and outward from one end of the table, in order to stretch the shirt thereon, substantially as described. (5) An ironing-table provided with means at one end for holding the neck end of a shirt; in combination with a combined shirt holder and stretcher at the opposite end, consisting of a clamp, mounted substantially as described, whereby it may be extended out from the end of the table, and comprising a set of jaws and a spring connected to the inner jaw, next to the table, to force the same against the face of the outer with a yielding, spring pressure, substantially as described.

Defendant introduced into evidence, as to fourth and fifth claims, letters patent No. 201,904, to R. Becker, April 2, 1878; 239,853, E. L. Schlotterback; and catalogues No. 1, 2, 3 of the Troy Laundry-Machine Company, known as the "Barkclay Catalogues," and the machine known as "Bosom-Ironer No. 3," of the Troy Laundry-Machine Company.

Wm. A. Redding, for plaintiff.

John F. Lewis, for defendant.

PER CURIAM. The complainant's patent is for "certain new and useful improvements in ironing-machines." The claims are 23 in number, of which with only 5, however, have we anything to do. The bill charges infringement of others; but the complainant limited his charge on the hearing to the first 5. The 1st, 2d, and 3d claims must be sustained as valid. We do not find anything in the art, so far as shown by the record, to justify us in holding them to be anticipated; nothing to overcome the presumption arising from the patent. The 4th and 5th are for the clamping and stretching devices. Upon careful examination of respondents' exhibit, "Bosom-Ironer No. 3," and comparison with the clamping and stretching devices there shown, we are unable to distinguish in any material respect, the complainant's devices, designed for that purpose, from these. Claims 4 and 5 are therefore, in our judgment, invalid. The respondents' machine is, we believe, an infringement of claims 1, 2, and 3; and for this infringement respondents must be held accountable. The bill is sustained to this extent, and a decree will be entered, accordingly, for an account.

GREENE *et al.* v. WOODHOUSE *et al.*

(Circuit Court, S. D. New York. December 12, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—BELT-FASTENERS.

Claim 2 of letters patent No. 282,258, issued July 3, 1883, to Henry Blake, is for "a belt stud having cross-heads and a bar or shank flattened approximately at right angles to said heads and bent near its end, so that said heads lie flat upon the belt." This device was meant to be an improvement over the G. W. Blake stud, covered by letters patent No. 31,859, which was simply punched out of sheet metal, and the actual improvement consisted (1) in a stronger shank, the strength being imparted by swaging, or by flattening and compressing in some way; and (2) in a shank curved at the ends. *Held*, that the claim was not infringed by a stud which was made by punching alone, and which has received no other flattening than such as is naturally produced by the punching process.

In Equity.

Benj. F. Lee and *W. H. L. Lee*, for complainants.

Antonio Knauth and *Arthur von Briesen*, for defendants.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of the second claim of letters patent No. 282,258, dated July 3, 1883, to Henry Blake, for a belt-fastener, for fastening together the meeting ends of leather belting. The state of the art at the date of the invention was as follows: The belt-fastener commonly in use was patented to G. W. Blake, by letters patent No. 31,859, and consisted of a straight bar, terminating at each end in a cross-piece at right angles to the shank. When the meeting ends of the belt were brought together, back to back, the fastener was inserted through a slit in each belt, and the cross-pieces were turned at right angles to the slits. The belt was then flattened out and the fastener was necessarily bent into a V shape. One of the defects of this fastener was that the heads of the cross-pieces caught and injured the hands of the workmen, when they had occasion to shift the belt. The D. M. Weston patent, No. 76,861, endeavored to remedy this defect by rounding off or beveling the head, which was also swaged so as to harden it; the straight shank being left malleable. The Henry Blake fastener was designed to obviate the disadvantage of the G. W. Blake stud, and is thus described in the specification of the patent: "The weakness of the old stud is found to be in the shank or bar, which is liable to be strained in the bending incident to applying the stud to a belt. In the improved stud, this weakness is removed by swaging the bar or shank. This may be done on two or on all four sides of the bar or shank; and the result is to toughen or harden the metal, and to flatten the bar or shank, preferably, in a plane at right angles to the heads. This shape is preferred because it brings the thickness of the bar or shank in the direction of the bend given to it in applying the stud to a belt; and, moreover, the flattening of the shank occasions a less displacement of the leather of the belt, thereby avoiding weakening thereof at the joint. Heretofore, the studs being bent after their application to the belt, and the heads being in the same plane with the bar or shank, the said heads project their full length above the surface of the belt, often occasioning their breakage, or checking the running of the pulleys, should they strike any fixed object, and sometimes injuring the workmen when, as is not uncommon, the belt is shifted by hand. In the improved stud the shank or

bar is slightly curved downward in the course of manufacture, when the bending can be done with much less liability to straining the metal than when it is performed after being placed in the belt; and the heads of the stud are bent downward, so that their under surface will lie flat upon the belt, instead of projecting above it, and a smooth and even joint be made. The studs, comprising a bar, *a*, and heads, *b*, having been formed by stamping or cutting from a sheet of metal, or otherwise, the bar or shank is hardened or stiffened by swaging; giving to said bar or shank the final shape shown in Fig. 1, or that shown in Fig. 2. As has been said, the former shape is deemed preferable, because not only does the bar possess the additional strength imparted by swaging, but, with the same weight of metal, the thickness of the stud is brought in the direction necessary to resist the strain of bending. In addition to this, by reason of the narrowness of the shank or bar, there is less strain upon the leather of the belt. Instead of, as heretofore, having the heads in the same line with the bar or shank, the latter is curved downward in the middle, and also bent slightly at the ends, (see Fig. 3,) so as to bring the under surface of the heads about in line with the top of the bar. The object is to make a smoother joint, by causing the heads to lie flat upon the belt as shown in Fig. 4. The previous bending of the stud to approximately the shape it will have when in use is very advantageous, because it can be done gradually, and with equal pressure upon all parts by means of die, and with much less liability of straining the metal. The article, when completed, possesses greater strength and durability than the old studs, and makes a joint with little or no unevenness, and no projecting edges."

The claims are as follows:

"(1) A belt stud having T heads and a bar or shank flattened approximately at right angles to said heads; said bar or shank being compressed by swaging, substantially as described. (2) A belt stud having cross-heads and a bar or shank flattened approximately at right angles to said heads, and bent near its end, so that said heads lie flat upon the belt, substantially as described."

In Henry Blake's original application for a patent, he asked for the following claims:

"(1) A belt stud of the character described, having the bar or shank swaged, substantially as described. (2) A belt stud of the character described, having a flat shank or bar swaged so as to flatten it in a plane at right angles to the heads of the stud, substantially as described. (3) A belt stud having the bar swaged, and the ends bent so that the heads of the stud will lie flat upon the belt, substantially as described."

The descriptive part of the specification contained in his application differed from that portion as allowed, principally, in saying that the results of the swaging was to "flatten the bar or shank either in the same plane with the heads or in a plane at right angles thereto," while in the patent it is said that the shank is flattened, "preferably, in a plane at right angles to the heads." The primary examiner rejected the claims because he said that "the only novelty in the case consists in a fastener with the body or shank in a vertical plane, and the T heads in a horizontal plane, or, in other words, having the heads and body at right angles with each other." Thereupon, and as the result of an oral interview between the examiner and the applicant's counsel, the application was amended by inserting the two claims which now appear in the patent in place of the claims which were originally applied for. The G. W. Blake

fastener was punched out of a sheet of brass, without additional swaging. The Henry Blake fasteners were punched, and then swaged between two opposing surfaces. The defendants' fasteners are made by punching alone, the brass being forced by the blow of the punch through the central curved aperture of the die, the aperture being of the same shape as the curved or bent fastener. The defendants' and the complainants' fasteners have substantially the same bent or curved shape in the shank, and the same bend towards the ends.

The only question in the case is whether the defendants' fasteners are flattened at right angles to the heads, in the sense in which that expression is used in the patent. I shall assume that, if there is any flattening in the defendants' shanks, it may fairly be considered to be at right angles to the heads, because, whatever flattening exists was produced by the metals being driven through a curved die, and the flattening is at the sides as well as at the top and bottom; and I do not now deem it necessary to inquire whether the flattening must be only in a vertical plane. It is contended by the learned expert for the complaint that the shanks of the defendants' fasteners have a "fish-bellied" shape at the center of the shank; that they are stronger; and that careful measurements show that they are thicker at the center than at the ends. Such measurements do show that the shanks are somewhat thicker at the center than at the angles at each end, where the cross-heads join the shank; and, although I have been in some doubt whether the thickening at the center was produced by a flattening process, or whether the thinness of the ends was produced by the operation of bending, I coincide with the belief or explanation of the expert that the thickness at the center was caused by flattening, because the natural effect of driving the metal through the die is to compress it. This conclusion is not, however, decisive of the case, because, in my opinion, the patent intended to describe the fastener which was flattened, not simply as an incident to the punching, which would be, so far as the flattening was concerned, the G. W. Blake stud, but was flattened by some positive means in addition to that which was used in the punching process. The G. W. Blake fastener was simply driven by a punch through the die, and had all the compression and flattening on either side which could be derived from that operation; and, undoubtedly, the tendency of the punch is to flatten and squeeze all sides of the metal as it is forced through the die. The actual improvement in the Henry Blake stud consisted—*First*, in a stronger shank, the strength being imparted by swaging, or by flattening and compressing it in some way; and, *second*, in a shank curved at the ends, so that the heads would lie flat upon the belt. To obtain the improved strength the fasteners, after having been punched out, were swaged. The weakness was obviated by an additional swaging operation. It cannot be successfully claimed that the defendants' studs, which are made by punching alone, and which can have received no other flattening than such as is naturally produced by the punching process, are the flattened fasteners of the Henry Blake patent, which declared itself to be an improvement upon its predecessor mainly because additional strength was

imparted to the shank by toughening and hardening it after it had been punched out. The second claim of the patent permits this additional strength to be imparted by flattening, rather than by swaging; but it cannot be that the proper interpretation of the patent includes a punched stud, not otherwise flattened, which has been curved by the use of a curved die. The bill is dismissed.

GILLINGHAM v. CHARLESTON TOW-BOAT & TRANSP. Co.

(District Court, D. South Carolina. December 17, 1889.)

1. SEAMEN—WAGES.

Where the master of a tug is a member of the corporation that owns her and is present at the meeting of stockholders when she is put out of commission and tied up, and he does not dissent, it appears that neither he nor the other corporators expected him to be paid during the time the tug was laid up, and he cannot recover wages for such time.

2. MARITIME LIENS—ADVANCES.

Nor can he recover, as advances, money paid to the engineer, who had been paid off and given a receipt in full, after the tug was so put out of commission.

3. COLLISION—LIABILITY OF MASTER TO OWNER.

Where a tug comes into collision with her tow and receives damages for which, at that time and afterwards, the master of the tug declares his intention to pay, such declaration is an admission that the damage was due to his act, and he being liable therefor, his promise to pay for the same is upon consideration, and is binding.

4. SAME—JUDGMENT—RES ADJUDICATA.

A judgment against the owners of a tug for damages arising from the negligence of the master, who is not a party to the suit, does not estop him from asserting that notwithstanding the judgment his negligence was not such as to render him liable to the owners, his employers.

In Admiralty. Libel for wages and advances

W. I. Gayer, for libellant.

L. N. Nathans, for respondent.

SIMONTON, J. The defendant, a corporation of nine persons, of whom libellant is one, owns the steam-tug *Henry Buck*. It has no other property. Libellant was the master of the tug. His wages were at the rate of \$100 per month. He now sues on an account for balance of wages for five months, January, February, March, April, and May, 1889, and for \$83.75, money advanced by him for the tug, in all \$583.75. The answer admits wages for the months of January and March and one-half of April; claims that libellant has already received \$129.25 on account; denies all knowledge of the advances; and for another defense avers that, owing to the negligence of libellant as master of the tug, she was cast in damages in a cause of *Stokes v. The Henry Buck*, 38 Fed. Rep. 611. in this court, in the sum of \$577.

It appears from the evidence that at a meeting of the stockholders held in the early part of February, 1889, it was determined to put the tug out of commission, and tie her up. In consequence all the crew were paid off on 4th February, and the boat placed in charge of a watch-

man. The master was not formally relieved. But during this month, on 13th, the corporators met and considered a proposal to charter the tug for Fernandina. At this meeting an election was gone into for a master, and libelant was elected. He was present, participated, and accepted the offer. The charter was not made. So, also, at a meeting on 13th April, libelant being present and voting, at least not dissenting, the tug was put out of commission, and was placed in charge of a watchman. Again, nothing was said about the discharge of the master. We are not discussing the relations between a tug-master and his owners, strangers to him. The libelant and the other eight corporators went into this adventure together. He was the only mariner among them, apparently, and took the place of master, as he says, without the formality of an election. They ran the business, and, from conversations detailed by himself and some of the other corporators, he evidently considered himself as sharing the fate of the enterprise. At the meeting in April, on being asked if he had any bill against the tug, he denied all claim. I conclude that neither he nor the others expected pay for him when the tug was laid up, and that he can charge for January, two days in February, March, and half of April.

One item is \$30 for Webb, the engineer, for the month of February. Webb was paid off on 4th February by the agent of the tug, and gave a receipt in full. The libelant employed him as engineer notwithstanding that the boat was out of commission, and was tied up by the action of the company, taken with his knowledge and consent. He could not bind his principal by this act, nor recover from it this money paid to Webb. Another item is \$50 paid Pregnell, a ship-carpenter. This was for repairs of the pilot-house. A few weeks after the purchase of the tug she came into collision with the fluke of the anchor of a schooner which she was engaged to tow, and carried away the pilot-house. Libelant at the time and afterwards declared his determination to pay for this damage himself. This was an admission that it was his act. If he was liable for it, his agreement to pay the damage was based on consideration, and binds him. The other items, \$3.75, are allowed. They were ordered by him in his capacity and with the authority of master. The credits have all been proved. Of these, \$29 was for repairs to pilot-house, for which, as we have seen, he made himself responsible.

The remaining question presents more difficulty. The respondent, as owner of the *Henry Buck*, was compelled to pay, in an action founded on libelant's negligence, \$577, (*Stokes v. The Henry Buck*, 38 Fed. Rep. 611;) and this is set up as a defense to this action. There is no doubt that, for loss or damage occurring to the principal by reason of the negligence of the agent in the course of his agency, the agent is responsible, and is bound to indemnify fully the principal. Story, Ag. § 217c. And if the principal sets up these damages in a suit by the agent, and the damages be parcel of the contract on which the suit is founded, or tend to prove it imperfectly fulfilled, or performed in such manner as to be injurious to the party sued, then admiralty will take cognizance of the set-off. *Willard v. Dorr*, 3 Mason, 161; *Snow v. Carruth*, 1 Spr.

324; *The Hudson*, Olcott, 400. And this even if no cross-libel be filed. *The Sapphire*, 18 Wall. 51; *The Dove*, 91 U. S. 383; *The Reuben Doud*, 9 Biss. 458. But, unless he file a cross-libel, he cannot recover against the libelant, except so much as will extinguish the claim of libelant. *Ebert v. The Reuben Doud*, 3 Fed. Rep. 520. The set-off in this libel is parcel of the contract on which suit is founded. It tends to prove it imperfectly fulfilled, and that it was performed in such manner as to be injurious to respondent. In order to sustain its defense, the respondent introduces the record in *Stokes v. The Henry Buck*, and rests. This was a proceeding *in rem*. The monition was served on libelant as master of the tug. He was the principal witness in the case, and was examined and cross-examined. The finding was based on his action as master. But is the case *res judicata* as to him? He was not a party to it, nor a privy. He was not in control of the case to which the owner of the tug appeared, made claim, and answered. The mere fact that he was a witness would not bind him. *Whaley v. Houser*, 18 S. C. 602. The proceeding was *in rem*, so it bound the *res* and every one interested in it. *Street v. Insurance Co.*, 12 Rich. Law, 16. Indeed, it bound the world, so far as the *res* and any interest in it were concerned. *The Mary Anne*, 1 Ware, 104. As a stockholder, libelant had an interest in the *res*, and is bound accordingly by the judgment *qua res*. But as master he had no lien upon and no interest whatever in the *res*. The case went off on his negligence towards the rafts. Suppose, however, that he did not go back to the rafts, or had left them because of other and paramount claims, orders, or contracts of his principal. This would have made him neglectful of the rafts, but would not make him responsible to his principal. So the judgment may be perfectly conclusive of negligence in the matter of the rafts, and yet not equally conclusive of negligence towards his principal. Whart. Ev. § 814, says "that the decree of a court of admiralty * * * is held in this country conclusive as to the essential facts on which the decree rests." But he limits this to cases of collision, prize, and forfeiture. In Wells, Res Adj. § 63, p. 57, the case of *Emery v. Fowler*, 39 Me. 331, discussing how far a principal is bound by a suit against his agent, uses these words: "In such cases the technical rule, that a judgment can only be admitted between the parties to the record and their privies, expands so far as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others." The text-writer, quoting this case, adds: "Hence judgment without satisfaction is conclusive, and a judgment for or against a principal avails for or against an agent, and *vice versa*."

But, as we have seen, the same question has not been decided in *Stokes v. The Henry Buck* which is to be decided here. In that case it was adjudged that there had been negligence as to certain rafts, shown by abandoning them in a certain place. The question now is, was there anything which can excuse the conduct of the master to his employer and principal? I am not prepared to say that the question is *res adjudicata*. The judgment in *Stokes v. The Henry Buck* can be used, however, to establish the fact of the judgment and its amount, and that it was based

on his negligence, not as concluding him absolutely or estopping him from denying his liability to his owner, but as *prima facie* putting the burden on him to show that notwithstanding that decree he is not liable to the present respondent. *Duffield v. Scott*, 3 Term R. 374; *Smith v. Moore*, 7 S. C. 220. As it is put in *Henderson v. Sevey*, 2 Greenl. 139: "It was the only admissible proof to show that a judgment had been obtained against plaintiff by Conner on the facts appearing on that record, and the amount of damages which had been recovered." The case, however, seems to be settled by *Chicago v. Robbins*, 2 Black, 418. In that case the principle is distinctly announced that when an action is brought against A. for a cause which gives him a remedy over against B., if he lose his suit, and B. has notice of the suit, and of the ground upon which it proceeds, the result will bind him. In that case one Woodbury was injured by an obstruction in the streets of Chicago caused by the negligence of Robbins. He sued the city and recovered judgment. The city then sued Robbins. The court says:

"The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrong-doer. If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it. An express notice to him to defend the suit was not necessary in order to charge his liability. He knew that the case was in court; was told of the day of trial; was applied to to assist in procuring testimony, and wrote to a witness; and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity." Pages 422, 423.

The case came up again in 4 Wall. 672, and was expressly confirmed on this very point. But in these cases it was held that Robbins was not estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened. 2 Black, 423. So in the present case the libellant is bound by the fact and the amount and cause of the judgment. But he is not estopped from showing that notwithstanding he is not liable to his owner, the respondent, either because his action towards the rafts was caused by paramount orders, or by necessary concern for other and superior interests of his principal. It is best, however, that the pleadings on this point be more full than they are. Let the cause be retained, and let respondent file a cross-libel, with leave to the libellant to answer the same if he be so advised.

THE FELICE B.¹BERTSCHMANN *et al.* v. THE FELICE B.

(District Court, E. D. New York. December 6, 1889.)

1. MARITIME LIENS—ITALIAN VESSEL—MASTER'S WAGES.

The master of an Italian ship has a lien on the vessel for his wages, which is recognized in this court.

2. SAME—MASTER'S ADVANCES—PRIORITY—BOTTOMRY BOND.

The lien for wages and advances of the master of an Italian vessel takes precedence of the lien of a bottomry bond, on which the master is not personally liable.

SAME—MATERIAL-MEN—PRIORITIES.

The lien of material-men, for the value of whose services the master is personally liable, is superior to a lien for the master's wages.

SAME.

The lien of material-men is superior to the lien of a bottomry bond when the services of the material-men have tended to make the ship more valuable, or when delay in enforcing the bottomry has tended to induce the services of the material-men.

SAME—ELECTION OF REMEDIES.

Where material-men have proceeded under the twelfth admiralty rule against the vessel instead of the master, such election does not destroy their right to proceed against the master for the same debts.

The Atna, ante, 269, distinguished.

In Admiralty. On application to determine the priority of liens.

Sidney Chubb, for Bertschmann.

Ulo & Ruebsamen, for material-men and seamen.

R. D. Benedict, (*E. G. Benedict*,) for the master.

Wing, Shoudy & Putnam, for Revere Copper Co.

Fredk. W. Hinrichs, for Empire Warehouse Co.

BENEDICT, J. The bark *Felice B.*, an Italian vessel, sailed from the port of Pensacola, Fla., bound for a port in England, with a cargo of lumber. While pursuing her voyage she met with disaster, and was compelled to put into the port of New York in distress, being then subject to bottomry for the sum of \$1,170.80 placed on her in Pensacola. Upon arriving in New York she was surveyed, and then repaired under the direction of the master. In some way not explained the cargo shipped in Pensacola was gotten rid of in New York. The voyage to England was then abandoned, and at the time of commencing these proceedings the vessel was about to load for Australia. Thereupon she was libeled by Bertschmann, the holder of the bottomry. No person intervening in her behalf, a decree by default was entered in favor of Bertschmann, and the vessel was sold by the marshal. The proceeds of the sale amounted to \$8,000. Subsequently the material-men who had repaired and supplied the vessel after her arrival in New York; also the agent who had attended to her business, and made certain advances for her in New York; also her crew, for wages; also the mate, for his wages and advances, and the master, for his wages and advances,—filed petitions to be paid out

¹Reported by Edward G. Benedict, Esq., of the New York bar.

of the proceeds. Proof having been made of the respective claims, each libel and petition being considered as an answer to all the other libels and petitions, all the claims are now before the court for a determination as to the rights of the parties in the fund in court. The claims in all, including costs, amount to about \$10,869.

I first consider the claim of the master of the vessel. This claim consists of two parts,—one for the master's wages; the other for sums advanced by him for the necessities of the vessel while under his command. As against this claim the bottomry holder contends that the master has no lien either for his wages or for his advances. But the bark was an Italian bark, and under the Italian law, which has been put in evidence, the master has a lien for his wages; and, not being personally liable for the bottomry bond, is entitled to priority in payment over the bottomry. In regard to the other part of the master's claim, viz., for sums advanced by him towards the necessities of the ship while under his command, this, also, is covered by the Italian law. The language of that law is, "wages and compensation" due the master, etc. Class 7, art. 675, Italian Code, cited in *The Olga*, 32 Fed. Rep. 329. The word "compensation" must be intended to cover such claims as the master's advances; otherwise there is no provision in the Italian Code for this most common claim against a vessel by the master. My conclusion in regard to the demand of the master is that he is entitled to be paid his wages and advances out of the proceeds of the sale of the vessel, and that as between him and the bottomry bond he is entitled to priority in payment.

As against the debts due material-men incurred by the master in New York, the master cannot claim priority in payment because of the fact that he is personally liable for the same debts. It has been insisted upon behalf of the master that the twelfth admiralty rule compels a material-man to elect between a proceeding *in rem* against the vessel, and a proceeding *in personam* against the master; and that inasmuch as in this case the material-men have proceeded against the vessel, no personal liability of the master for the demand remains. No authority is cited which supports this understanding of the effect of the twelfth admiralty rule, and I do not so understand the rule. Notwithstanding the rule, it is still open in my opinion to the material-men to bring an action at law or a suit in admiralty against the master for the same debts here in question. For this reason the master cannot here claim priority in payment over the material-men. *The Olga*, 32 Fed. Rep. 331.

The claim of the mate has not been objected to. He will therefore be paid prior to the bottomry bond.

As to the demand of the material-men, objection is made in behalf of the bottomry holder that he is entitled to priority in payment over any debts due the material-men for repairs and supplies, and for services rendered to the vessel subsequent to the breaking up of the voyage. In regard to these demands, which consist of actual repairs put upon the vessel, and which tended to increase her value, equity requires that such demands should be paid prior to the bottomry, for the reason that these

repairs have gone to enhance by so much the proceeds of the sale of the vessel now in court, and cannot with justice be applied to the payment of the bottomry.

As to the demands which consist of advances made by the ship's agent and the interpreter, the bottomry holder cannot claim preference, because his delay to enforce the bond tended to induce the incurring of these expenses. His bond became due, by its terms, on the arrival of the vessel in New York. He took no steps to enforce it until all the debts in question had been incurred. He should not be permitted to lie back in this way and allow expenses to be incurred, and then contend that his bond should be paid in preference to such expenses. As between the materialmen, the agent, and the interpreter, the question of priority must therefore be decided adversely to the bottomry bond. This leaves a deficiency greater than the sums in these respective bills which the bottomry holder has insisted carried no lien, and it becomes unnecessary, therefore, to decide the question of lien which has been raised on this occasion.

Reference has been made on the argument to the case of *The Aina*, ante, 269, lately decided in this court, and the point taken that the question of lien was not open to be contested by the bottomry holder; but the practice pursued in this case is different from the practice pursued in the case of *The Aina*. In this no interlocutory decree has been entered in favor of any party except Bertschmann, the bottomry holder, and all other demands are before the court as upon final hearing upon pleadings and proofs. It is open to the bottomry holder, therefore, to raise the question of lien as against any of the petitioners; but as already stated the disposition made of the question of priority renders a decision of the question of lien unnecessary at this stage of the case. If subsequently a decision upon those points should be desired, my attention can be called to it by the parties interested.

WELSH v. THE NORTH CAMBRIA.

(District Court, E. D. Pennsylvania. June 25, 1889.)

1. ADMIRALTY—JURISDICTION—STATE LAWS.

The admiralty system of laws is within the exclusive control of congress and the states have no power to legislate in regard to it.

2. SAME.

In some few instances the states may exercise powers vested in the federal government, but this doctrine is not to be extended beyond the subjects to which it has been applied.

3. MARITIME LIENS—DEATH BY WRONGFUL ACT.

The acts of assembly of Pennsylvania approved April 15, 1851, (P. L. 674,) and April 23, 1855, (P. L. 309,) do not by their terms create a lien for death by negligence upon the high seas, and as there is no jurisdiction outside of statutory provision none can be sustained.

(Syllabus by the Court.)

In Admiralty. Hearing on libel and answer.

Libel by Bridget Welsh, in her own behalf and that of her minor children, against the steam-ship North Cambria, under Acts Pa. April 15, 1851, and April 26, 1855, to recover for the death of her husband, Peter Welsh, who was killed on May 25, 1889, while employed as a laborer on said steam-ship, by the falling upon him of a tub of iron, through the negligence of employes not fellow-servants of deceased.

McKinley, *Driver & Coulston*, for libellant.

H. G. Ward and E. B. Convers, for respondents.

BUTLER, J. The question of jurisdiction is raised on this motion by consent. That the libel cannot be sustained independently of statutory provision, is settled by *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140. That the Pennsylvania statute, on which the case is put, does not create an admiralty lien, and thus authorize the seizure, seems entirely clear. There is nothing whatever in the statute indicative of a purpose to create such a lien; and if there was I would hold the statute to be inoperative in this respect. The states have no power to interfere with the admiralty system of laws; they can add nothing to it, nor take anything from it. The subject lies within the exclusive domain of congress. It is true that the supreme court has held that as respects pilotage and a few other subjects the states may exercise powers vested in the federal government until the latter assumes the assertion of its authority. The disfavor, however, with which this (apparently illogical) doctrine (born, doubtless, of the excessive tenderness which formerly existed respecting "state rights") is regarded to-day justifies a very confident belief that it will not be extended beyond the subjects to which it has been applied. To this doctrine must be ascribed the decision in *The Lottawanna*, 21 Wall. 580, that liens created by state statute for the repair of vessels, etc., in home ports within the state, may be enforced by admiralty. As this court held however in *The E. A. Barnard*, 2 Fed. Rep. 712, such statutes do not create an admiralty lien or ingraft any new provision upon the admiralty laws. The court in such case has jurisdiction, as the debt arises from an admiralty contract; and *The Lottawanna* decides no more than that the state may make this debt a lien for the purpose of securing, and regulating distribution between its own citizens in the absence of provision respecting it by congress. Even this is acknowledged to be anomalous and is put upon "long usage" rather than any well-defined principle. The views of this court on the subject generally, are stated in *The Barnard*, above cited. I will not repeat them. They are as applicable here as they were there. The decisions of the district courts respecting the subject are not harmonious. In *The Sylvan Glen*, 9 Fed. Rep. 335, and *The Manhasset*, 18 Fed. Rep. 918, the state statutes were denied effect in the admiralty. This view is also supported by the judgment in *The Vera Cruz*, L. R. 10 App. Cas. 59. In other instances the question has been decided differently. It has been so fully discussed in the cases cited that I will not enlarge upon it.

PERKINS v. HENDRYX *et al.*

(Circuit Court, D. Massachusetts. December 20, 1889.)

1. FEDERAL COURTS—JURISDICTION—NON-RESIDENTS—SERVICE OF PROCESS.

A federal court does not acquire jurisdiction of a suit removed from a state court by virtue of an attachment made in the state court, where there was no personal service of process on defendant, a resident of another state.

2. SAME—WAIVER OF OBJECTION—REMOVAL OF CAUSE.

Defendant does not, by appearing in the state court for the purpose of removing the case to the federal court, thereby waive any irregularity as to service of process.

On Motion to Dismiss for Want of Jurisdiction.

Plaintiff, pro se.

John L. S. Roberts and James E. Leach, for defendants.

COLT, J. This suit was originally brought in the state court, and was removed by the defendants to this court. The defendants are residents of the state of Connecticut, and no personal service was made upon them, but at the time the original writ was issued the property of the defendants in the hands of certain residents of Boston was attached. The defendants now move to dismiss the suit for want of jurisdiction.

The *first* question which arises is whether this court acquired jurisdiction by virtue of the attachment made in the state court. This question must be answered in the negative, because the law is settled that the United States courts have no jurisdiction in suits founded on foreign attachment, and without personal service of process. *Toland v. Sprague*, 12 Pet. 300; *Chittenden v. Darden*, 2 Woods, 437; *Sadlier v. Fallon*, 2 Curt. 579.

The *second* question which arises is whether the act of the defendants in appearing in the state court for the purpose of removing the case to this court constitutes a waiver of any irregularity as to service of process. This identical question has been several times before the federal courts for adjudication; and, so far as I have been able to examine the cases, it has been uniformly held that an appearance in the state court for the purposes of removal is not such a general appearance as to give the federal court jurisdiction. *Hendrickson v. Railway Co.*, 22 Fed. Rep. 569; *Small v. Montgomery*, 17 Fed. Rep. 865; *Atchison v. Morris*, 11 Fed. Rep. 582. In the last case, Judge DRUMMOND says:

"In fact, it may have been, among other reasons, for the very purpose of objecting to the service of summons, the defendant requested that the cause should be removed to the federal court, because, in a proper case, a party has the right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of the act of congress to hold that a party who has a right to remove a cause is foreclosed as to any question which the federal court can be called upon, under the law, to decide; and I have no doubt this is such a question."

I see no reason to doubt the soundness of the conclusion reached by the courts in the above cases on this question, and it follows that the suit must be dismissed. As the court has no jurisdiction, the defendants cannot recover costs. Suit dismissed, without costs.

HENNING v. WESTERN UNION TEL. Co.

(Circuit Court, D. South Carolina. December 19, 1889.)

1. REMOVAL OF CAUSES—RULES OF PRACTICE.

The rules of practice of a United States circuit court govern a cause brought there from a state court, under 25 St. at Large, 435, providing that "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court."

2. SAME—SECURITY FOR COSTS.

Where a cause is removed from a state to a United States circuit court, and the plaintiff amends his complaint, he puts himself within a rule of practice of the circuit court, allowing a defendant, "in all cases," to demand security for costs before answering, though the demand could not have been made in the state court where the action was commenced.

At Law. On motion for security for costs.

Buist & Buist and John Wingate, for plaintiff.

Barker, Gilliland & Fitzsimons, for defendant.

SIMONTON, J. This case was originally brought in the state court. It was removed into this court, plaintiff being a resident of the state of South Carolina, and the defendant being a foreign corporation. After its removal the plaintiff obtained leave to amend his complaint by inserting the appointment and the name of his guardian *ad litem*, and defendant had leave to answer the complaint when so amended. Thereupon defendant, under our seventy-fifth rule, served notice for security for costs. The plaintiff resists this motion, because he is a resident of the state of South Carolina, and as such not liable to security for costs in the state court, and therefore not so liable in this court, into which the case comes precisely in the same plight in which it left the state court. *Duncan v. Gegan*, 101 U. S. 812. This seems to be a new question. It must be decided under our own rule, which controls our practice. Rule 75 is in these words:

"In no case shall the defendant be compelled to plead or answer until the plaintiff shall have given security for costs, if notice be given to the plaintiff's attorney that such security will be required. The amount of such security, not exceeding fifty dollars, shall be fixed by the clerk. On application made to a judge on a rules-day, or to the court in term, such further security may be ordered as may be deemed necessary."

The rule is without qualification,—"*in no case.*" Is it affected by the fact that before the case came into this court the plaintiff was under no obligation whatever to give security for costs? The act of congress regulating the removal of causes provides that, when removed, "the cause

shall then proceed in the same manner as if it had been originally commenced in said circuit court." 25 St. at Large, 435. If the cause proceeds as if it began in this court, it is, of course, subject to the rules of the court governing causes begun therein, just as if the cause originally began here. *Clare v. Bank*, 14 Blatchf. 445. Besides this, the complaint has been amended in this court. The cause will be tried and decided upon the amended complaint, (Code S. C. 167;) that is to say, upon pleadings made up in this court, and governed by its rules only. The complaint has been amended in this court on the motion of the plaintiff, and to that complaint he requires an answer. The time and mode of putting in that answer depend upon our rules. One of our rules says that an answer need not be put in, if security for costs be demanded, until the demand is complied with. Plaintiff has put himself within this rule. Let the plaintiff enter into security for costs before the clerk, under rule 75, before the defendant be required to plead to the amended complaint.

HOLLANDER v. BAIZ, Consul General, etc.¹

(District Court, S. D. New York. December 4, 1889.)

DEPOSITIONS—COMMISSION TO FOREIGN COUNTRY—EXPULSION—SAFE CONDUCT.

In an action against the consul general of a foreign country, defendant moved for a commission to take testimony in such country. It appeared that the government of that country refused to allow plaintiff to enter its territory, and plaintiff furnished affidavits tending to show the nature of the investigation and the questions to be raised, and that the commission was not likely to be properly executed in the plaintiff's absence, with due provision for his own defense. *Held*, that the commission should issue only on condition that defendant obtain from his government, and furnish to plaintiff, a safe conduct, allowing him to enter the country and return, and be present on the execution of the commission.

At Law. On motion for commission to take testimony.

R. D. Benedict, for plaintiff

Billings & Cardozo, for defendant.

The plaintiff, an American citizen, was expelled from the republic of Guatemala as a "pernicious foreigner," and the Guatemalan government directed the defendant, who was the Guatemalan consul general at New York, to publish the decree of expulsion in New York. Defendant sent the decree to the Associated Press; and this action was thereupon brought against him for alleged libelous statements contained in said decree. Defendant thereafter moved for a commission to take testimony in Guatemala as to plaintiff's character and reputation. Plaintiff furnished affidavits to show that in his absence such commission could not be fairly conducted, nor his own witnesses procured and examined without his presence, and opposed the allowance of any commission, unless he should be allowed to enter Guatemala, and be present at the execution of the commission.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

The court, BROWN, J., said, that the taking of testimony on examination was in a certain sense a partial trial of the cause, and that the plaintiff, as between him and the defendant, or the Guatemalan government, as his principal, was entitled to be present thereat, if desired, where, as here, it appeared to be necessary to the protection of his legal rights. An order was accordingly entered that if the defendant, within a specified time, should furnish to plaintiff a safe conduct from the Guatemalan government, permitting him to go to Guatemala, and be present on the execution of the commission and to return without molestation, the motion for a commission should be granted, but, failing the production of such safe conduct, the motion should be denied.

SIEGFRIED *et al.* v. PHELPS, Collector.

(Circuit Court, N. D. California. December 16, 1889.)

1. CUSTOMS DUTIES—FREE GOODS—REQUIREMENT OF INVOICE.

Free goods not chargeable with duties, are not within the provisions of sections 2854 to 2857 requiring an invoice with a certain prescribed declaration of the shipper, and a certificate of the consul at the port of shipment, or the prescribed bond to be presented to the collector as a condition of entry of the goods.

2. SAME—AUTHORITY OF SECRETARY OF TREASURY.

The secretary of the treasury is not authorized to impose, by regulations, burdens on commerce, not imposed or authorized by the statute.

(*Syllabus by the Court.*)

At Law. On demurrer to complaint, on the ground that the facts stated do not constitute a cause of action.

John S. Mosby and A. P. Van Duzer, for plaintiffs.

J. T. Carey, U. S. Atty., for defendant.

Before SAWYER, Circuit Judge.

SAWYER, J. This is a suit to recover the value of a certain shipment of tea, at a port in China, to the port of San Francisco, arising out of a refusal of the collector to allow the tea to be entered without presenting to him an invoice having indorsed thereon the declaration required to be made before the consul at the port of shipment, and the consul's certificate required by sections 2854 and following of the Revised Statutes; or giving the bond to produce one at some future day, in pursuance of the provisions of section 2857.

The plaintiffs insist that the merchandise being tea, which pays no duty, does not fall within the provisions of the statute, which is intended to apply to dutiable goods only, and it appears to me that this position is correct. There is nothing at all, said about non-dutiable goods; and the provisions are adapted only, to dutiable goods, subject to either *ad valorem*, or *specific* duties. The declaration provided for, must state, that the invoice "contains, if the merchandise mentioned

therein is subject to *ad valorem* duty, and was obtained by purchase, a true and full statement of the time, when, and the place where, the same was purchased, and the *actual cost thereof, and of all charges thereon*; * * * and when obtained in any other manner than by purchase, the *actual market value thereof at the time, and place, when and where the same was procured, or manufactured*; and if subject to *specific duty, the actual quantity thereof*." This requirement was, manifestly, intended to enable the collector to determine the amount of duties to be collected, and a form of declaration is adopted by the statute, adapted to each mode of assessing duties, so that the collector can ascertain the value of the goods subject to *ad valorem*, and the quantity of those, subject to, specific, duties. But neither form is adapted to non-dutiable goods, and there is no occasion to know, for the purposes of the revenue, either the value or quantity. Non-dutiable goods are not mentioned, and no declaration is provided, adapted to that class of goods. Which of the forms should be adopted, when neither is prescribed, and neither would fit the subject-matter? So the bond provided for in section 2857, is to be in "*double the amount of duty apparently due, conditioned for the payment of the duty which shall be found to be actually due thereon*." As the invoice or the manifest, shows for itself what the goods are, and that they pay no duty, whatever, the conditions of the bond no more fit the case than do the matters prescribed in the statement to be made before the consul in the case of dutiable goods? Evidently the statute mentioned all the cases to which this declaration, certificate and bond were intended to be made applicable. To extend the requirement by loose construction, or inference, to goods that pay no duty, would be to impose, in the aggregate, large burdens upon commerce, without any corresponding benefit.

I do not think the secretary of the treasury is authorized by the statute to put any burdens upon commerce, in addition to those imposed by the statute itself. He is authorized to make regulations, "not inconsistent with law"—to regulate the imposition, and enforcement of the burdens provided for by law, but not to impose others. Burdens imposed upon commerce in addition to those imposed by statute would be "inconsistent with law," and unauthorized. See *Balfour v. Sullivan*, 8 Sawy. 649, 17 Fed. Rep. 231, and cases cited; *Merritt v. Welsh*, 104 U. S. 695-700; *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. Rep. 423.

The court of claims in *Mosby v. U. S.*¹ took this view, when it held that the consul was entitled to recover a considerable amount paid into the treasury under protest, for fees collected for such certificates, appended to invoices and statements of free goods, on the ground that these services performed, although in form official, were not official in fact, or in law; and the United States had no concern with them,—that it was a matter entirely between the owner of the goods, who voluntarily, without requirement of law, obtained, and paid for the services, and the consul, who, in his own individual private character, voluntarily, performed the service for the compensation received of the owner, so

¹Not reported.

paid of his own free will. The amount of the items recovered in that single instance,—\$2,095—will afford some indication of the extent of the burden in the aggregate, such a regulation by the secretary would impose on commerce.

In my judgment the collector unlawfully refused to allow the entry, and is liable. The demurrer to the complaint must be overruled, and it is so ordered.

LAZARD *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. December 13, 1889.)

1. CUSTOMS DUTIES—FREE LIST—SIMILITUDE CLAUSE.

The similitude described by that portion of Rev. St. U. S. § 2499, as amended by the tariff act of March 3, 1883, which provides that "non-enumerated articles, similar in material and quality and texture, and the use to which they may be applied, to articles on the free-list, and in the manufacture of which no dutiable materials are used, shall be free," is a similitude in all four of the particulars mentioned therein.

2. SAME—DRY EGG YOLK.

Dry egg yolk, being an article not enumerated in the tariff act of March 3, 1883, and assimilating to albumen, and also to eggs, articles on the free-list of that act, in two or more only of these four particulars, is not free of duty under that act by similitude to albumen or eggs; but is, in the absence of proof that it is not a manufactured article, subject to duty at the rate of 20 per centum *ad valorem* as a non-enumerated manufactured article, under the provision therefor contained in Rev. St. U. S. § 2513.

At Law. Action to recover back duties.

The plaintiffs in this suit, on the first day of September, 1887, imported from Dresden, Saxony, into the port of New York, a certain article invoiced as "egg yolk." This article was classified for duty by the defendant, as collector of customs at that port, as a non-enumerated manufactured article, under the provision therefor contained in section 2513 of the United States Revised Statutes, as amended by the act of March 3, 1883, and duty thereon at the rate of 20 per cent. *ad valorem* was exacted of the plaintiffs by the defendant, as such collector. Against this classification and this exaction the plaintiffs, within the time required by law, duly protested, claiming that, under that portion of section 2499 of the United States Revised Statutes, as amended by the act of March 3, 1883, which provides "that non-enumerated articles, similar in material and quality and texture, and the use to which they may be applied, to articles on the free-list, and in the manufacture of which no dutiable materials are used, shall be free," this article was free of duty, as assimilating to albumen, under the provision therefor contained in the free-list of the act of March 3, 1883, (Tariff Index, new, 496;) or, if not assimilating to albumen, then as assimilating to eggs, under the provision therefor contained in said free-list, (Id. 690;) or that, if this article assimilated neither to albumen nor to eggs, then it was dutiable at the rate of 10

per cent. *ad valorem*, as a non-enumerated raw or unmanufactured article, under the provision therefor contained in the aforesaid section 2513. Thereafter the plaintiffs, having duly made appeals, which were decided adversely to them, brought this suit to recover the amount of excessive duties exacted of them by the defendant as said collector, as claimed in their protest. Upon the trial of this suit, it appeared from samples of the article in suit that it was of the color of the yolk of the hen's egg, and that it had evidently been dried by natural or artificial heat, and afterwards ground, or subjected to some similar process. It appeared from the evidence of the plaintiffs' witnesses that these articles were sold to biscuit and cracker bakers, and used by them in making biscuits, crackers, and such things; that the original yolk of the hen's egg contains 51.49 per cent. of water, 15.76 per cent. of fat, 30.47 per cent. of albumenoids, about 0.55 per cent. of coloring matter, and about 1.73 per cent. of alcoholic extract and mineral matters; that the article in suit, as analyzed, contained 3.35 per cent. of moisture at 100 C., 54.15 per cent. of oil, 39.50 per cent. of organic matters, and 3 per cent. of mineral matter (ash); that the 39.50 per cent. of organic matter included albumen, caseine, and coloring matters; that there was no constituent in the article in suit not found in the white, or albumen, or the yolk of the egg; that the analysis of the original yolk, if dried, would be almost the same thing as the analysis of the article in suit, only varying therefrom, perhaps, if varying at all, through difference in treatment, or in composition of the egg from which it was taken; that the albumen in the article in suit, with the exception that the water had been almost entirely dried out, was precisely similar in constituents and chemical composition and properties to the albumen or white found in the egg; that the albumen or white found in the egg was reduced by drying to the solid or dried albumen of commerce, which contains from 92 to 95 per cent. of pure albumen; that the shell of the egg was composed chiefly of carbonate of lime, and some organic matter. But it did not appear from the evidence for which purpose albumen was used, or that the article in suit was not a manufactured article. At the close of the plaintiffs' case the defendant's counsel moved the court to direct the jury to find a verdict for the defendant, on the ground that the plaintiffs had not proven facts sufficient to entitle them to recover.

Edward Hartley, for plaintiffs.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) I shall dispose of this case without sending it to the jury. As to the question of the classification of this importation by assimilation under the proviso at the close of section 2499, which reads: "Provided, that non-enumerated articles, similar in material and quality and texture, and the use to which they may be applied, to articles on the free-list, and in the manufacture of which no dutiable materials are used, shall be free,"—it is to be observed, in the first place, that similarity in all four of these respects is required. Undoubtedly,

the article is similar in material, and apparently in texture, to the albumen of commerce which is imported here, and which is enumerated on the free-list; but there is no evidence as to the use to which the albumen so imported is applied, and, therefore, there is nothing from which to deduce a similarity in use, as between that article and this dried yolk. As to the claim that it is similar to eggs, which also are on the free-list, while there is proof of similarity of material, and perhaps of use, the texture seems to be entirely different. As to the claim made in the protest that this importation was an article not manufactured, the failure of the plaintiffs to offer any proof as to how it was made removes that question from the case. The collector has classified it as a manufactured article, and the presumption is that his decision was correct. There is no evidence to the contrary, and it cannot, therefore, be classified as unmanufactured. Verdict directed for defendant.

UNITED STATES v. BAYLE.

(District Court, E. D. Missouri, E. D. December 14, 1889.)

1. POST-OFFICE—NON-MAILABLE MATTER—THREATENING POSTAL-CARDS.

A postal-card demanding payment of a debt, and stating that "if it is not paid at once we shall place the same with our lawyer for collection," is non-mailable matter, within 25 St. U. S. 496, prohibiting the mailing of a postal-card, envelope, or wrapper, the outside of which contains language of a "threatening character," or language "calculated * * * and obviously intended to reflect injuriously upon the character or conduct" of the person to whom it is addressed.

2. SAME.

A postal-card containing the words, "Please call and settle account, which is long past due, and for which our collector has called several times, and oblige," is not within the prohibition, as the language cannot be said to be threatening or offensive to the person addressed, or such as to attract public notice.

On Demurrer to Indictment.

George D. Reynolds, U. S. Dist. Atty.

D. P. Dyer, for defendant.

THAYER, J. This is an indictment in three counts, under the act of September 26, 1888, (25 St. U. S. 496,) for depositing postal-cards of an alleged non-mailable character in the mails. The postal-cards in question were each addressed to John Greb, 2201 Franklin avenue, St. Louis, and are of the following tenor:

"ST. LOUIS, April 12th, 1889.

"Please call and settle account, which is long past due, and for which our collector has called several times, and oblige,

"Respectfully,

ST. LOUIS PRETZEL Co."

"ST. LOUIS, April 18th, 1889.

"You owe us \$1.80. We have called several times for same. If not paid at once, we shall place same with our law agency for collection.

"Respectfully,

ST. LOUIS PRETZEL Co."

"St. Louis, May 1st, 1889.

"You owe us \$1.80, long past due. We have called several times for the amount. If it is not paid at once, we shall place same with our lawyer for collection.

"Respectfully,

St. Louis Pretzel Co."

Section 1 of the act of September 26, 1888, provides "that all matter, otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal-card upon which, any delineations, epithets, terms, or language, of any indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display, and obviously intended, to reflect injuriously upon the character or conduct of another, may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails," etc. If the postal-cards in question are non-mailable, it is because they contain language of a "threatening character," within the meaning of the law, or because they contain language "calculated * * * and obviously intended to reflect injuriously upon the character or conduct" of the person to whom they were addressed. It is clear that they fall within no clause of the statute unless they are within the clauses last referred to. Two of the cards, as it will be observed, contain a demand for the payment of money alleged to be due, and a threat to place the demand in the hands of a lawyer for collection, if not paid at once. The question, therefore, arises whether congress intended to prohibit the mailing of postal-cards containing or on which are written threats of that kind. The language of the statute is very general, and certainly may be construed as a prohibition against mailing postal-cards which contain threats to bring suits if debts are not paid, as well as being a prohibition against mailing cards containing threats of personal violence or threats of any other character. It is most probable, I think, that congress intended the act should receive that construction. It is a well-known fact that prior to the passage of the law some persons had made a practice of enforcing the payment of debts by mailing postal-cards or letters bearing offensive, threatening, or abusive matter, which was open to the inspection of all persons through whose hands such postal-cards or letters happened to pass. In some quarters the practice alluded to of sending communications through the mail that were both calculated and intended to humiliate, and injure the persons addressed in public estimation, had become one of the recognized methods of compelling the payment of debts. Congress evidently intended by the act of September 26, 1888, to utterly suppress the practice in question. It has not only declared that libelous, scurrilous, and defamatory matter written on postal-cards, or on envelopes containing letters, shall not be disseminated through the mails, but that no matter of a "threatening character," or that is even "calculated * * * and * * * intended to reflect injuriously upon character or conduct," shall be so disseminated, if written on postal-cards, or on the envelopes of letters, and hence is open to public inspection. I conclude that a postal-card on which is written a

demand for the payment of a debt, and a threat to sue, or to place the demand in the hand of a lawyer for suit, if the debt is not paid, is now non-mailable matter. Henceforth persons writing such demands and threats must inclose them in sealed envelopes, or subject themselves to criminal prosecution. The demurrer to the second and third counts is not well taken, and is therefore overruled as to those counts.

The language employed in the postal-card described in the first count is not of a threatening character, and, in my opinion, no jury would be warranted in finding, in view of its contents, that it was obviously intended by the writer to reflect injuriously on the character or conduct of the person addressed, or to injure or degrade him in the eyes of the public. It is true that it contains a demand for the payment of a debt, and says that it is long past due, and that a collector has called several times; but it is couched in respectful terms, and no intent is apparent to put it in such form as to attract public notice, or to make it offensive to the person addressed. Congress has not declared that postal-cards shall not be used to make such demands, and a construction of the act ought not to be adopted that will unnecessarily restrict their use for business purposes. The card in question cannot be held to be non-mailable, without being overcritical and extremely punctilious in the choice of language which men may lawfully use in their daily transactions. The demurrer is accordingly sustained as to the first count.

EDISON ELECTRIC LIGHT Co. v. WESTINGHOUSE *et al.*

(Circuit Court, D. New Jersey. October 1, 1889.)

PATENTS FOR INVENTION—DURATION.

Under Rev. St. U. S. § 4987, providing that every patent for an invention previously patented in a foreign country shall be so limited as to expire when the foreign patent does, not to exceed 17 years in any event, where a complaint, in a bill for infringing a patent for an invention previously patented in a foreign country, alleges that the foreign patent is still in full force, and the answer alleges that it had expired before suit brought, the duration of the patent is a matter to be adjudicated by the courts on evidence *in pais*.

In Equity. Bill for infringement of letters patent.

John C. Tomlinson and C. A. Seward, for complainant.

Wm. Bakewell and Samuel A. Duncan, for defendants.

Before McKENNAN and WALES, JJ.

PER CURIAM. The bill filed in this case is for an infringement of letters patent No. 264,642, dated September 19, 1882, granted to the complainant, as assignee of Thomas A. Edison, who was the original applicant therefor,—inventor of the improvement therein described. The defendant has pleaded that a patent for the same invention had been issued to the said Thomas A. Edison by the Austro-Hungarian

government on the 3d day of February, 1881, for the term of one year, and that a subsequent grant was made extending the term of the last-mentioned patent for a new term of one year, which expired on the 3d day of February, 1883; that this extended Austro-Hungarian patent was existing and unexpired when the patent in suit was granted, and that the term thereof expired on the 3d day of February, 1883, and before the commencement of this suit, and thereby the said Austro-Hungarian patent then expired, within the meaning of section 4887 of the Revised Statutes; and that, by reason of the premises, the patent sued on had expired by operation of law prior to the bringing of this suit; and that this court has no jurisdiction, and ought not to entertain jurisdiction, of this suit, the plaintiff having a complete and adequate remedy at law. This is the substance of the plea, and it has been set down for argument by the plaintiff. The bill alleges that the Austro-Hungarian patent has not expired; that it was granted for the term of 15 years from its date, and is now in full force and effect. The question thus presented covers the proper meaning and construction of section 4887 of the Revised Statutes, and has recently been decided by the supreme court of the United States in the case of *Refrigerating Co. v. Hammond*, 129 U. S. 151, 9 Sup. Ct. Rep. 225, where the court held that "under section 4887, although, in the case provided for by it, the United States patent may on its face run for seventeen years from its date, it is to be so limited by the courts, as a matter to be adjudicated on evidence *in pais*, as to expire at the same time with the foreign patent, not running in any case more than the seventeen years; but, subject to the latter limitation, it is to be in force as long as the foreign patent is in force." This is decisive against the sufficiency of the defendants' plea in this case. Hence it must be ordered that the defendants' plea stand as an answer, or part of an answer, to the plaintiff's bill.

DUNHAM v. DENNISON MANUF'G Co.

(Circuit Court, S. D. New York. December 20, 1889.)

1. PATENTS FOR INVENTIONS—REISSUE OF LETTERS—EXPANSION OF CLAIMS.

In letters patent No. 277,245, granted May 8, 1883, to Joseph T. Dunham, the first claim is for "a combined tag and envelope, made substantially as herein shown and described, and consisting of an envelope having at one end a flap of sufficient size to cover one side of the envelope;" in such patent, as reissued, No. 10,488, June 10, 1884, the first and second claims are respectively for "a combined tag and envelope, * * * wherein the flap which closes the mouth of the envelope is fastened," etc., and for "a combined tag and envelope, * * * the flap having an eyelet hole, which, when the flap is folded down on the envelope, coincides with an eyelet hole in the envelope," etc. Held that, the latter claims, being so expanded as to be no longer limited to a flap of sufficient size to cover the envelope, as was the case in the original patent, are invalid, as including structures and improvements neither described nor claimed in the original.

2. NAME—EXTENT OF CLAIM—PRIOR STATE OF THE ART.

In letters patent No. 331,118, granted November 24, 1885, to Joseph T. Dunham, the first and second claims are, respectively, for "an envelope having a flap pro-

vided with a reinforced hole, and having a similar hole in the front ply of its body, the said holes constructed to register and coincide when the flap is folded down, whereby the end of the back ply of the envelope body, which extends entirely across the latter, is clamped and removably secured;" and for "a mailing tag and envelope having a flap folded over on and secured to the inner face of the front ply of the body, the said flap being also constructed to take over the free end of the back ply of the body, as shown, whereby the mouth of the envelope covered by the said flap is secured against accidental opening." *Held*, that in view of the prior state of the art, as shown by patent No. 81,926, granted September 8, 1868, to Sigmund Ullman, and other prior structures, the claims must be restricted to the form of envelope described in the patent, which is so constructed that the flap can be opened and the contents inspected without tearing the envelope or breaking the fastenings.

In Equity. Bill for infringement of patent.

Walter S. Poor, for complainant.

W. W. Swan, for defendant.

COXE, J. This is an equity action founded upon two letters patent granted to the complainant. The first, a reissued patent, No. 10,488, dated June 10, 1884, is for a combined tag and envelope, and the second, No. 331,118, dated November 24, 1885, is for an improvement in envelopes. The reissued patent will be first considered. The defenses are lack of novelty and invention, non-infringement, and that the reissue is void because of an unwarrantable expansion of its claims. The original patent, No. 277,245, was dated May 8, 1883. The application for the reissue was filed March 18, 1884,—10 months and 10 days thereafter. The invention of the original was limited, as clearly as the drawings and the language of the description and claims could limit it, to an envelope having at one end a flap of sufficient size to cover one side of the envelope. The inventor says: "The object of the invention is to form an envelope with an end flap covering its side, as hereinafter described. * * * An envelope, A, preferably made of strong waterproof paper, is provided with an end flap, B, of sufficient size to cover the entire envelope. An eyelet, C, is secured in that end of the envelope opposite to the one to which the flap, B, is attached, and the flap, B, is provided on its free end with an eyelet, D, which, when the flap, B, is folded over the envelope, rests upon the eyelet, C." He then describes the manner in which the name of the consignee is concealed by writing it on the inside of the flap, so that dealers, engaged in the same business, cannot ascertain the names of their rivals' customers. The name of the consignor is printed on the outer surface of the flap, where also appears the name of the city or town to which the goods are destined, and a notice to carriers that the full name of the consignee may be found on the inner surface. It is evident that the patentee considered this peculiar form of flap the main feature of his invention. It is also clear that an envelope which does not include a flap large enough to cover its side does not infringe the claims, which are as follows:

"(1) A combined tag and envelope made substantially as herein shown and described, and consisting of an envelope having at one end a flap of sufficient size to cover one side of the envelope, as set forth. (2) In a combined tag and envelope, the combination, with an envelope, A, having a flap, B, at one end, of the eyelet, D, in the free end of the flap, and the eyelet, C, in that end of

the envelope opposite the one to which the flap is attached, substantially as herein shown and described, and for the purpose set forth."

The specification is perfectly plain. There is no ambiguity about the description, and the claims, in language equally clear, cover what is said to be the invention, and the whole thereof.

Soon after the patent was granted, the defendant, in the summer of 1883, commenced manufacturing tag envelopes which the complainant insists are infringements of the reissue, but frankly admits that they do not infringe the original patent, for the reason that they do not have the flap, B. The reason for the reissue is thus stated in the complainant's brief:

"Soon after putting the patented article on the market, complainant was informed that defendant, a corporation that had for some time manufactured, in Boston, and made extensive sales throughout the country of a shipping tag, was manufacturing and selling a tag envelope similar to complainant's. Complainant immediately applied to counsel for the purpose of commencing suit against defendant, and was advised by such counsel, after an examination of his letters patent, and a statement of his invention and application, that his patent was defective, indefinite, and ambiguous in its claims, so as to render it practically inoperative, and that he had better apply for a reissue."

The patentee himself states that the alleged infringing envelope of the defendant was one of the forms "invented by him but not shown in his patent," and he, therefore, sought a reissue which would cover it.

Turning now to the reissue, it is manifest that the effort was to discard the flap, B, as an element of the invention and expand the claims sufficiently to cover an envelope, no matter what the size or shape of its flap. The invention no longer consists in "an envelope with an end flap covering its side," as in the original, but "in a tag provided with means for attaching it to the merchandise and with an envelope or pocket to receive a bill or invoice of the merchandise." The drawings are referred to as showing the invention "in its preferred form." The end flap is no longer "of sufficient size to cover the entire envelope," but it must cover it "substantially." The claims of the reissue are as follows:

"(1) A combined tag and envelope, substantially as described, wherein the flap which closes the mouth of the envelope is fastened down by the cord or other device which secures the tag to the merchandise, as set forth. (2) A combined tag and envelope, substantially as described, the flap having an eyelet hole which, when the flap is folded down on the envelope, coincides with an eyelet hole in the envelope, whereby the cord or hook for attaching the tag may be passed through both holes, substantially as set forth. (3) In a combined tag and envelope, the combination, with an envelope, A, having a flap, B, at one end, of the eyelet, D, in the free end of the flap, and the eyelet, C, in that end of the envelope opposite the one to which the flap is attached, substantially as herein shown and described, and for the purpose set forth."

The third claim of the reissue is the same as the second of the original, but it is not contended that this claim is infringed. Claims 1 and 2 of the reissue are unquestionably broadened. They are no longer limited to a flap of sufficient size to cover the entire envelope. Should the court hold that they are so limited it is admitted that they are not infringed. It is thought that these expanded claims cannot escape the force of the

repeated decisions of the supreme court relating to reissued patents. The patentee made no move until the defendant had produced its envelope, which could be sold without infringing the original patent. If he had been the first inventor of this new and improved form he might have described and claimed it in the original patent. He did neither. He now seeks by the reissue to include structures and improvements which were neither described nor claimed in the original. This he cannot do. The defendant has acquired valuable rights which cannot be trampled upon in this manner. The law upon the subject is too well settled to require a citation of authorities, but the case of *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. Rep. 537, seems peculiarly applicable and controlling. Substitute the nomenclature pertaining to envelopes for that relating to collars and the opinion in *Coon v. Wilson* is as applicable to this controversy as if written for the purposes of this action only:

"Although this reissue was applied for a little over *ten* months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent, by repeating that claim and adding others; where no mistake or inadvertence is shown, so far as the *extended flap* is concerned; where the patentee waited until the defendant produced *its short-flapped envelope*, and then applied for such enlarged claims as to embrace the defendant's *envelope*, which was not covered by the claim of the original patent; and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original. As the rule is expressed in the recent case of *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174, a patent 'cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted.' But a clear mistake, inadvertently committed in the wording of the claim, is necessary, without reference to the length of time. In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering *an envelope not provided with the flap, B.*"

The second patent in controversy, No. 331,118, dated November 24, 1885, is for an improvement in envelopes intended for mailing samples, and similar matter, and for use as tags for marking goods to be shipped. The defenses are abandonment, lack of novelty and invention and non-infringement. The principal object of the invention, as stated in the specification, was to obviate the difficulty which existed in prior devices which were so constructed, that, in order to get at the contents of the envelope, it was necessary to untie the string or remove the fastening which secured the flap. The envelope of the patent is so constructed that the flap can be opened when desired and the contents inspected without tearing the envelope, or removing, or breaking the fastenings. The claims are as follows:

"(1) An envelope having a flap, C, provided with a reinforced hole, *c'*, and having a similar hole, *c*, in the front ply of its body, and the said holes constructed to register or coincide when the flap, C, is folded down, whereby the end of the back ply, *b*, of the envelope body, which extends entirely across the latter, is clamped and removably secured, substantially as shown and described. (2) A mailing and tag envelope having a flap, C, folded over on

and secured down to the inner face of the front ply of the body, the said flap being also constructed to take over the free end of the back ply of the body as shown, whereby the mouth of the envelope covered by the said flap, C, is secured against accidental opening, substantially as and for the purposes set forth."

In view of what was known when the patent was applied for a broad construction of these claims is out of the question. A construction which would include the defendant's envelope would render the claims void for lack of novelty, for the general features of the patented envelope are shown in the patent, No. 81,962, September 8, 1868, to Sigmund Ullman, and in other prior structures. If the claims are limited to the peculiar construction shown in the specification and drawings the defendant does not infringe. In the defendant's envelope one eyelet is used, which aids the gum in fastening the flap down permanently upon the back ply of the envelope. A large number of exhibits have been introduced showing the defendant's envelope. These have been changed and mutilated by the witnesses in illustrating opposing theories. But both sides, apparently, agree that the envelopes made by the defendant since the date of this patent are constructed with the eyeletted flap securely fastened. The complainant's brief contains this statement:

"After defendant put its tag envelope on the market it changed the construction several times, until it finally adopted the form introduced in evidence as the infringing specimen. See complainant's Exhibit 'Taylor and Mayo,' which was received in 1883, and also has the eyelet holes, with washers, only; also complainant's Exhibit 'John S. Smith,' which was received in 1884, and has the washers reinforced with a short metallic eyelet, with the eyeletted end tightly gummed down. Also, Exhibit 'Alonzo B. Smith,' received in 1886, with printed advertisement on front, which had the eyeletted end tightly gummed, with washers reinforced by short metallic eyelets."

Evidently, it is not intended that the defendant's envelope shall be opened and the contents removed at the end thus securely fastened. The bill or invoice is inserted at the opposite end; the flap at that end is then fastened down, in the well-known manner, by moistening the gum with which it is provided, or the flap may be tucked in between the plies. In other words, the defendant takes an ordinary envelope with the opening at one end, and at the other end, which is never intended to be opened, he puts an eyelet reinforced by washers through the front ply, a portion of the back ply, and the flap of the envelope. The sole object of the eyelet is to provide a suitable hole into which the cord or hook, which fastens the envelope to the merchandise, may be introduced. The effect of the eyelet and washers is to prevent the back ply from being left free at this end. The defendant has not the object of the patent in view and does not adopt the patented device. In complainant's envelope, according to the theory of his expert witness, "the leading idea or principle of the invention is the holding down of the back ply of the envelope by the overlapping of the flap thereon, and the omission of any permanent or secure attachment of the flap to said back ply. * * * The claims are limited to this end of the back ply being left free." This feature is entirely wanting in defendant's envelope. Instead of omitting

the secure attachment he has added the metallic eyelet and washers to the gum of the ordinary envelope. The claims must be restricted to the form and description of the patent, and thus construed they are not infringed.

It is unnecessary to examine the other defenses presented. The bill is dismissed.

PERKINS v. EATON *et al.*

(Circuit Court, W. D. Michigan, S. D. December 24, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Letters patent No. 228,779, issued to Willis J. Perkins, June 15, 1880, for improvements in mechanical movements, being a device involving a combination of mechanical parts, which in operation produce, by a peculiar method, the rocking of a shaft, with an adjustment for limiting the amount of the rocking movement, and which consists of a roller or its equivalent, moving freely on a slotted arm with varying tension, is not infringed by the rocking movement used in the Remington type-writer, which movement is, in an essential degree, produced by the hand of the operator.

In Equity. On bill for an injunction.

Taggart & Denison, for complainant.

Thomas Richardson, for defendants.

SEVERENS, J. The complainant seeks in this cause to restrain the defendants from infringing the rights secured to him by letters patent No. 228,779, issued to him on June 15, 1880, for improvements in mechanical movements. His invention was of a device involving a combination of mechanical parts, which in operation produced, by a peculiar method, the rocking of a shaft, with an adjustment for limiting the amount of the rocking movement. The mechanical movement was intended by him to provide, as he says in his specification, for changing a reciprocating movement into "a variable oscillating one; *second*, to insure a determined amount of movement in a variable oscillating movement; *third*, to produce an equal or variable strain or tension on the opposite strokes of an oscillating or reciprocating movement; *fourth*, to furnish a motive power to change a valve or similar device on engines of all classes,—electrical, steam, and hydraulic; *fifth*, to furnish a motive power whereby a spring or similar device is acted upon by the engine or machine with its full power, until the power stored up is sufficient to instantly change the valve without further drawing upon the power of the engine."

According to his specification, his improvements consist:

"*First*. In the combination, with a shaft provided with a slotted device, of a movable device fitted in said slot, and a spring which exerts force upon said movable device. *Second*. In the combination, with a shaft provided with a slotted arm, of a device adapted to be moved in the slot, and a spring which operates upon said movable device. *Third*. In the combination, with a rock-shaft provided with a slotted arm, of a movable device fitted in the slot, and

a spring which draws upon said movable device. *Fourth.* In the combination, with a shaft provided with a slotted arm, of a roller fitted in the slot, and a spring connected to said roller. *Fifth.* In the combination, with a rock-shaft provided with a slotted arm and a grooved roller fitted in the slot, of a spring connected to the bearings of said roller. *Sixth.* In the combination, with a rock-shaft provided with a slotted arm and a grooved roller fitted in the slot, of a bifurcated bearing, in which the roller is journaled, and a spring connected to said bearing. *Seventh.* In the combination, with a rock-shaft provided with a slotted arm and a movable device fitted in the slot, of a spring connected to said movable device, and adjusting mechanism which limits the rocking movement of the shaft. *Eighth.* In the combination, with a rock-shaft provided with a slotted arm and a movable device fitted in the slot, of a spring connected to said device, and set-screws adapted to engage with an arm of the shaft to limit the rocking movement of the latter. *Ninth.* In the combination, with a rock-shaft provided with a slotted arm and a movable device fitted to the slot, of a spring connected to said movable device, and handle to actuate the latter. *Tenth.* In the combination, with a rock-shaft provided with a slotted arm and a movable device fitted in the slot, of a spring connected to said movable device, and a handle-arm secured to the rock-shaft."

The claims under his letters are in substantially the same language as in the description of his improvements just stated; indeed, are almost literally the same, and are numbered accordingly. The invention is claimed to be applicable to mechanism for operating parts in a shingle-machine, a steam-engine, pump, and many other machines. It is alleged that the defendants, Eaton, Lyon & Co., are engaged in selling the Remington type-writer, in which, as the complainant avers, is embodied a device for producing mechanical movement which is substantially his invention.

Several defenses are set up, the principal of which are—*First*, that the complainant was not the original inventor; and, *second*, that the defendants have not infringed.

I do not think that the evidence sustains the objection that this patentee had been anticipated in his invention. In my opinion, there is little similarity in the mechanism and devices illustrated by the machines and contrivances shown by the defendants' exhibits and proofs to the devices covered by the patent in question.

But, in my opinion, the claim of the complainant that the device employed in the type-writer is an infringement upon his patent is not made out. It is true that there is much of similar mechanism in it. There is a rock-shaft, and its rocking movement is limited by a similar arm and stops to those of complainant's. There is also a similar loop. This in the type-writer is attached, not at the end of the shaft, but between the bearings thereof; and it is attached so that in its length it extends transversely across the lower side of the shaft, the latter being in the middle of the upper side of the loop. A spiral spring extends from a fixed position below to the loop, and attaches to it by a hook. There are notches on the upper side of the lower portion of the loop at each end for the hook to rest in, and to prevent its slipping, and for the same purpose the lower portion of the loop arches towards the middle from either end. And, if the hook were to take the place of the movable device in the loop

in the complainant's specification, the two constructions, at rest, would look strikingly similar. But in operation they do not perform the same function, nor do they perform their functions in the same way. In the type-writer there is at one end of the key-board a "lower-case" key, and at the other an "upper-case" key, each of which is attached to the forward end of a lever. The levers are each pivoted, and at their further ends are each attached to a perpendicular rod. These rods are attached to the ends of arms on the opposite sides of the rock-shaft. By pressing the keys alternately, the shaft is rocked, and by other attachments to the shaft the platen is held over the type, either capital or smaller, (upper or lower case,) as the operator desires. If the hook on the end of the spiral spring is at the end of the loop or slotted arm, so as to hold the shaft rocked to the right direction for printing the lower case, the operator, by pressing the upper-case key, (against the power of the spring,) can rock the shaft the other way, and hold it so while he prints the upper-case type. And this is the method of use while printing the upper-case, if that is only wanted temporarily. But, if a permanent change is desired, the hook on the end of the spring is transferred, usually by the thumb and finger, but never automatically, to the other end of the slotted arm. This relieves the operator from longer pressing that key, and the machine is now permanently printing the new types. Precisely the same method is employed to change to the other case of type, either temporarily or permanently, as desired.

Thus it will be seen that a very important part of the plaintiff's device, namely, a roller or its equivalent, moving freely through the slotted arm, with a varying tension during its movement, (though equal in reciprocation,) and accelerating the latter part of the movement, is entirely wanting. (1) There is no free movement, but the reverse; (2) there is no tension operating on the slotted arm while the movement is taking place; (3) there is no automatic movement of the movable device while the shaft is being rocked. This third peculiarly distinguishes it from the plaintiff's invention, as illustrated by his Figs. 1 and 2, but perhaps does not from his Figs. 3 and 4, in which the movable device is pulled or pushed through the slot in the arm by a rod attached to the device, and moved by hand or other power. In the type-writer the spring creates an unvarying tension simply, at the one end of the slotted arm or the other, the shaft being rocked by other means. The hand of the operator, and the hook on the end of the spring which the hand lifts and moves through the slotted arm, are not an equivalent for the plaintiff's device moving through the arm automatically, or freely, but under tension which modifies that movement, and gives it its peculiar effect. The complainant's patent is for a combination of elements, and, in order to constitute an infringement, the trespassing machine must embody all the elements material to the complainant's device. The elements need not be identical, but they must be equivalent in their nature. *Refinery v. Matthiessen*, 2 Fish. Pat. Cas. 602; *Walk. Pat. § 349*; *Curt. Pat. § 308*; *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819; *Fornbrook v. Root*, 127 U. S. 176, 8 Sup. Ct. Rep. 1247. And the accused machine must

perform substantially the same function, and in the same way, and with like results, or there is no infringement. See the above authorities. Applying these principles to the facts in the present case, it follows that the bill must be dismissed.

JOHNSON *et al.* v. ALDRICH *et al.*

(Circuit Court, N. D. New York. December 23, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction to restrain the manufacture of an alleged infringement of a patent will not be granted when the patent has never been adjudicated, and there is inadequate proof of public acquiescence, and the infringement is denied; and defendants have been engaged in the manufacture for a long time without opposition, and have an extensive business, while the complainants have owned the patent for only three months, and defendants are not shown to be peculiarly irresponsible; and the effect of an agreement not to manufacture the patented article, signed by one of defendants, is doubtful at least as to the other defendants.

In Equity. Motion for a preliminary injunction.

The complainants are the owners of letters patent No. 226,668, granted to Nicholas A. Menaar, April 20, 1880, for an improvement in tea-kettles. The patent was assigned to the complainant in the autumn of the present year. The action is founded upon the patent, and also upon an agreement made by the defendant, Schuyler Aldrich, in the spring of 1884, in which is the following covenant: "I will not at any time hereafter within the life of the said letters patent, without the license of the owners of the said letters patent, manufacture and sell tea-kettles which are covered and claimed in the claims of the said letters patent." The complainants insist that this agreement estops the defendants from contesting the validity of the patent. The kettle now complained of as an infringement, which the defendants have made since 1886, is of a somewhat different construction from the one manufactured by the defendant Schuyler Aldrich, prior to the agreement. The defendants contend that the present construction does not infringe. The patentee, Menaar, was employed by the defendants during the time these kettles were being manufactured. The bill alleges that the defendants have been engaged in infringing upon the patent since the spring of 1884. The defenses, as foreshadowed in the affidavits, are that the patent is anticipated and void for want of novelty and invention; that the defendants do not infringe; that the defendant Schuyler Aldrich was induced to enter into the agreement referred to by fraudulent representations; and, finally, that the court has no jurisdiction of the action, which is, in reality, a suit upon the covenant, and not upon the patent.

James A. Allen and George Wing, for complainants.

Antonio Knauth, for defendants.

COXE, J., (after stating the facts as above.) An injunction should not issue at this stage of the litigation, for the following reasons: *First.* The

patent has never been adjudicated, and the proof of public acquiescence is inadequate. *Second.* There is a controversy upon the question of infringement. *Third.* The structures complained of have been made by the defendants since 1886, without opposition from the owners of the patent. *Fourth.* The complainants have owned the patent for about three months only. It is hardly possible, therefore, that they have built up an extensive business under it. *Fifth.* The defendants have been for years in the business, and will be seriously injured by an injunction. *Sixth.* There is no proof that the defendants are pecuniarily irresponsible. *Seventh.* The instrument of which an estoppel is predicated was executed by one of the defendants only, and it is, at least, doubtful whether the other defendants, who did not sign it, can be bound by its provisions. The motion is denied.

COLUMBIA MILL Co. v. ALCORN.

(Otroutt Court, E. D. Pennsylvania. October 29, 1889.)

1. TRADE-MARKS—GENERAL USE OF WORD "COLUMBIA."

Plaintiff claimed as a trade-mark for flour barrels the word "Columbia," which had been for years in common use for many purposes as a trade-mark. *Held* that, as the defendant's testimony, though not very full, seemed to show such a use for flour barrels, and as the plaintiff had not rebutted it, his claim to the word could not be sustained.

2. SAME—INFRINGEMENT.

Where trade-marks on a certain merchandise contained in the same form of package are very numerous and similar, the rule is that some care must be exercised to distinguish one trade-mark from another; and if, this care being exercised, the difference is easily distinguishable, the second trade-mark does not infringe.

(*Syllabus by the Court.*)

Bill for Injunction and Account for Infringement of Trade-Mark.

P. H. Gunkel and Strawbridge & Taylor, for plaintiff.

James A. Alcorn and John G. Johnson, for defendant.

Before McKENNAN and BUTLER, JJ.

BUTLER, J. The plaintiff claims an exclusive right to the word "Columbia" in brands for flour barrels; and charges the defendant with violating this right, and also with imitating his brands in which the word is used.

We do not think he is sustained by the proofs. The exclusive right claimed is not satisfactorily shown. The word "Columbia" is popular, and in common use for many purposes. That it should have been adopted long ago in branding flour barrels is quite probable; and the testimony seems to show that it was, both in the eastern and western sections of this country. If it be said the defendant's testimony in this respect, is not as full as it might be, the same may be said of the plaintiff's. The defendant went far enough to put the plaintiff to further proof. No more need be said respecting this branch of the case.

Flour brands are so numerous (nearly every miller and dealer having his own) and the general shape and style so similar, in consequence of their use on similar packages (barrels) that purchasers must necessarily observe them with some care to distinguish one from another. A passing glance cannot be relied upon; and we must suppose is not. In this respect the case differs from those in which trade-marks are ordinarily involved. Looking at the plaintiff's, and that of the defendant's which is said to resemble it, with the attention necessary to discriminate between the thousands of flour brands in common use, the difference must be seen immediately, even by the most inattentive buyer. The two or three witnesses who say they were misled must have been especially unobservant.

The bill must be dismissed with costs.

McKENNAN, J., concurs.

THE MADRID.¹

MENGE *et al.* v. THE MADRID.

AHERN v. SAME.

(Circuit Court, E. D. Louisiana. December 23, 1889.)

1. STARE DECISIS.

"*Stare decisis*" means that when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases; but precedents may be departed from when necessary to vindicate plain and obvious principles of law, or to remedy a continued injustice.

2. SAME—FEDERAL COURTS.

The decisions of the circuit courts, not being uniform as to the relative priority of statutory and strict maritime liens, have not become a rule of property, within the doctrine of *stare decisis*.

3. MARITIME LIENS—STATE STATUTE—ADMIRALTY JURISDICTION.

Contracts for supplies to a vessel at her home port are maritime in their nature, and liens therefor created by state statutes are within the admiralty jurisdiction, and enforceable by proceedings *in rem* only in the federal courts.

4. SAME—BASIS OF LIEN.

In admiralty the rule is that the greater advancement of the safety and preservation of the vessel forms the basis of priority of lien, thus often reversing the common-law principle of priority according to time.

5. SAME—MORTGAGE FOR PURCHASE MONEY.

A mortgage to secure the purchase money of a vessel is not a maritime debt, and does not import a maritime lien.

6. SAME—EFFECT OF RECORDING.

Rev. St. § 4192, is simply a registry statute, and does not give a maritime lien to a mortgage.

7. SAME—STATE STATUTES—PRIORITIES.

Supplies to a vessel by a material-man in her home port, under a state statute, have the same rank and lien as supplies furnished in a foreign port. *The Guiding Star*, 18 Fed. Rep. 263, followed.

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

8. SAME.

Supplies furnished a vessel in her home port under a state statute are to be paid in priority to a duly-recorded mortgage. *The John T. Moore*, 8 Woods, 61, and *Baldwin v. The Bradish Johnson*, Id. 582, overruled.

In Admiralty. On appeal from district court.

O. B. Sansome, F. M. Butler, and Rice & Armstrong, for appellant.

R. H. Browne, for appellee.

Before LAMAR, Justice, and PARDEE, J.

LAMAR, Justice. There is no controversy but that the claims of the material-men, intervenors in this case, are valid, and that, under the local law of Louisiana, they are entitled to a lien upon the steam-ship Madrid for the amount of those claims, which is enforceable by process *in rem*. The contracts under which the materials, repairs, and other necessities were furnished are maritime, within the rule laid down by the supreme court of the United States in *Insurance Co. v. Dunham*, 11 Wall. 1, and are therefore under the jurisdiction of the admiralty.

The question in this case, upon the foregoing facts, is, does this lien given by the local law stand on an equal footing with the lien given by the general maritime law to material-men who furnish supplies and other necessities to a ship in other than her home port, and therefore take precedence over the claim of the mortgagees? The general question here involved has never been directly before the supreme court of the United States for consideration. It has arisen, however, in nearly all of the circuits, and the decisions upon it have not been uniform. In this circuit the rule, as announced by the late Mr. Justice Woods in *The John T. Moore*, and *Baldwin v. The Bradish Johnson*, 3 Woods, 61, 582, respectively, has been, that a mortgage on a vessel, duly recorded according to section 4192, Rev. St., is inferior to all strictly maritime liens, but is superior to any subsequent lien given by the state law for supplies furnished in the home port. Other cases holding the same doctrine are: *The De Smet*, 10 Fed. Rep. 483, in this circuit; and *The Grace Greenwood*, 2 Biss. 131, and *The Kate Hinchman*, 7 Biss. 239, in the seventh circuit. A leading case holding the reverse of this rule, namely, that liens given to material-men by the state statutes, for supplies furnished a vessel in her home port, are of equal rank with strictly maritime liens, and therefore take precedence over mortgages of the vessel, is *The Guiding Star*, decided by the late Mr. Justice MATTHEWS in the circuit court of the United States for the southern district of Ohio. 18 Fed. Rep. 263. To the same effect, see *The J. W. Tucker*, 20 Fed. Rep. 129; *The Arctic*, 22 Fed. Rep. 126; *The Amos D. Carver*, 35 Fed. Rep. 665, in the second circuit; *The Venture*, 26 Fed. Rep. 285, in the third circuit; *The Wyoming*, 35 Fed. Rep. 548, and *The Menominee*, 36 Fed. Rep. 197, in the eighth circuit; *Clyde v. Transportation Co.*, Id. 501, in the fourth circuit; *The General Burnside*, 3 Fed. Rep. 228, and *The Rapid Transit*, 11 Fed. Rep. 322, in the sixth circuit.

Counsel for the mortgagees rely mainly upon the doctrine of *stare decisis* to support the claim of their clients. Their contention is, that the

rule of law heretofore announced in this circuit should stand, because, as they assert, rights of property have been acquired under it, and vested rights will be disturbed by any change. On the other hand, it is strenuously insisted by counsel for the material-men that the decisions of this circuit upon the general question under consideration are erroneous, and should not be followed. It is claimed that the lien given by the state statutes for supplies, etc., furnished a domestic vessel stands on an equality with those liens arising under the general maritime law for supplies, etc., furnished a foreign vessel. The rule of *stare decisis* means, in general, that when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases. It expresses "the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations." Abb. Law Dict. 497; *Gee's Admr v. Williamson*, 27 Amer. Dec. 631, note. This rule should, in the main, be strictly adhered to. An adherence to it is necessary to preserve the certainty, the stability and the symmetry of our jurisprudence. Nevertheless, there are occasions when a departure from it is rendered necessary in order to vindicate plain and obvious principles of law, and to remedy a continued injustice. These are the two grounds of justification in departing from a decision which has become a precedent. Wells, Res Adj. § 598. The decisions of the circuit courts of the United States not being uniform upon the general question at issue in this case, it can hardly be said that any of them has become a rule of property, within the principle of the doctrine of *stare decisis*. The learned justice who preceded me upon this circuit, were he alive and holding court here, could certainly exercise the right to change his mind upon the question, and make his opinion accord with that of some of the other courts of equal authority, which, in the light of later discussions, have adopted a different view. Nothing short of a conviction which would induce him to do so could constrain me to depart from a ruling made by a predecessor whose high character as a jurist receives from me a deference fully equal in force to that which the principle of *stare decisis* exacts. I act the more readily upon the conclusion reached by me, after a careful examination of the adjudged cases, because of the vital importance of uniformity in the administration of admiralty law by the courts of the United States, which uniformity can itself be permanently assured only by settling the rule on correct principles of law.

Under the general maritime law, necessary supplies furnished a vessel in other than her home port constitute a maritime lien, the presumption being that such supplies are furnished upon the credit of the vessel itself. No lien, however, is given by the general maritime law to material-men for supplies furnished a vessel in her home port, because, in that case, according to the generally accepted theory, the presumption is, that credit is given to the owner or master, and not to the ship itself. This rule of the admiralty law induced many of the states bordering upon the sea or the navigable inland waters to pass statutes giving to material-men a lien upon a vessel for necessary supplies furnished in her home port. All contracts of this kind, being maritime in their nature, are within the

jurisdiction of the admiralty, and therefore, under the constitution of the United States, these statutory liens can be enforced by proceedings *in rem* only in the federal courts.

In pursuance of the acts of congress which authorized it to adopt rules of practice in the courts of the United States in causes of admiralty and maritime jurisdiction, the supreme court of the United States, in 1844, adopted the following rule of practice:

Rule 12. "In all suits by material-men for supplies, repairs, or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs, or other necessities."

The various state laws giving liens, the constructions put on them by the state courts, and the proceedings *in rem* authorized by this rule, were found, after experience, to be productive of much confusion under our mixed form of government; and the federal courts were somewhat embarrassed at times in enforcing those liens in accordance with the principles and rules of the Maritime Code. *The St. Lawrence*, 1 Black, 522. Accordingly, this twelfth rule was changed, in 1859, so as to read as follows:

Rule 12. "In all suits by material-men for supplies or repairs, or other necessities, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessities."

This new rule, however, was found to work injustice in a great many cases; for the material-man who furnished necessary supplies to a vessel in her home port, although given a lien on such vessel, under the statute, as a security for such supplies, was without remedy to enforce his lien. He could not enforce it *in rem* in the state courts; for, his contract being maritime, such courts, though having jurisdiction, were restricted to common-law remedies. He could not enforce it in the federal courts, for, although those courts had exclusive jurisdiction of all cases of admiralty and maritime contracts, they were not allowed, under this new rule, to proceed *in rem* against the vessel. Accordingly, in 1872, a third twelfth rule was adopted by the supreme court, which reads as follows:

"In all suits by material-men for supplies or repairs, or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

In *The Lottawanna*, 21 Wall. 558, it was held that the effect of this last amendment of rule 12 was simply to restore it as it existed from 1844 to 1859, or, rather, to render it "general in its terms, giving to material-men in all cases their option to proceed either *in rem* or *in personam*. Of course, this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel." And in another part of the opinion it is said:

"As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure."

There would seem to be no reason, on principle, why the lien created by the local statute should not rank with the lien given by the general maritime law. They each have as a basis the furnishing of necessary supplies to the ship, upon the credit of the ship itself. In each instance the contract is maritime. The proceedings by which the lien, in each instance, is enforced are identical. And the same reason which makes the lien given by the general maritime law take precedence over ordinary mortgage debts, and other claims not maritime, is applicable in the case of liens given by the local law. The rule as to priority is not the same in courts of admiralty as in courts of common law and equity. In the latter courts the rule of priority of liens is expressed by the maxim, *qui prior est tempore, potior est jure*. But in admiralty the reverse of this rule is more often true than otherwise. There the rule is, that those things which in the highest degree contribute to the safety and preservation of the vessel—the thing which is the subject of all the liens—form the basis of the lien entitled to priority. It would seem, therefore, that this lien given by the local statute, based, as it is, upon the same sort of necessities as constitute a lien under the maritime law, (the contract for furnishing these supplies being maritime, and capable of enforcement by proceedings *in rem* only in the admiralty courts of the United States, under the same rules and proceedings as the general maritime lien,) is itself in the nature of a maritime lien—at least, in a much greater degree than an ordinary vendor's mortgage debt; for a mortgage of this kind is not a maritime lien. *The Lottawanna*, *supra*; *Bogart v. The John Jay*, 17 How. 399. It is not a maritime contract; and the mortgagee cannot bring a libel in admiralty on the mortgage, and subject the vessel to the payment of his claim by process *in rem*. If he gets into admiralty at all, he must do so under the forty-third admiralty rule. See authorities last cited. The reason of the admiralty law, as regards priority of maritime liens, would seem, therefore, to be conclusive in favor of giving the material-men in this case priority over the mortgagees, as regards their respective claims; for the repairs, materials, and other necessary supplies furnished the vessel in the port at New Orleans all contributed to the safety, the usefulness, and the preservation of the vessel itself, and served to protect it so that it might be made available, not only for the satisfaction of the claims thus arising, but for all other valid claims, including the mortgage debt. These supplies having been furnished for the security and protection of the vessel, were for the benefit of the mortgagees as well as of the original owner. The mortgagees should not be placed on a higher plane than the original owner of the vessel; and it goes without saying that, as to the latter, the claims of the material-men are valid and binding, and the liens, of which they form the basis, capable of enforcement in admiralty by process *in*

rem. Furthermore, section 4192 of the Revised Statutes is simply a registry statute. It does not give a maritime lien to the mortgagee; for the contract of mortgage, as we have shown, is not a maritime contract. As stated by Mr. Justice MATTHEWS in *The Guiding Star*, *supra*, with whose views on this matter I heartily concur:

"That provision (section 4192, Rev. St.) merely requires registration of mortgages or other conveyances of vessels as essential to their validity, except as against the grantors or other persons having actual notice thereof, and leaves all questions as to the priority of the incumbrances as they were before. The mortgage is but a conveyance of the title of the grantor, and can pass only what at the time he had, subject to every lien that had already become vested. More than this, the mortgagee is owner, and the vessel continues liable to become subject, while his title subsists, to whatever liens, by subsequent transactions, the law imposes, precisely as though there had been no change of title or ownership. The mortgagee, as creditor, has no higher rank than any other alienee."

Again, the rule preferring a foreign to a domestic material-man seems to me to discriminate unjustly against the latter. For instance, a material-man of Mobile, furnishing necessary supplies to a vessel whose home port is New Orleans, would be preferred to a material-man at New Orleans, furnishing the same class of supplies to the vessel. That is to say, this court, sitting at New Orleans, on the trial of such a conflict, would be bound to exclude its own citizens for the benefit of citizens of another state. It would seem that if, in reason, any distinction should be made by a court in a conflict between citizens of different states having claims of equal merit, in the abstract, the duty of the court ought to be to take care of, at least not to discriminate against, the citizens of the state in which the court is holden. But in this case all that is adjudged is, that they should be placed on an equality, as to their respective claims of the same nature.

The circuit judge concurs with Mr. Justice LAMAR in the foregoing opinion, referring, on the main question involved, to the views expressed in *The De Smet*, 10 Fed. Rep. 483.

THE BORDENTOWN.

THE WINNIE.

THE WILLIE.

(District Court, S. D. New York. December 24, 1889.)

1. TOWAGE—NEGLIGENCE.

The tugs Willie, Winnie, and B., all under the control of the latter, and all belonging to the same owners, took in charge a fleet of canal-boats, loaded with coal, to be towed from South Amboy, through the Kills, to New York. The wind was N. E. at the start, increased afterwards, and was nearly a gale when the tugs reached the mouth of the Kills. They proceeded on, however, and the canal-boats were after-

wards mostly lost in the upper bay, through the heavy sea, the sinking of some, the pounding of others, and the general breaking up of the tow. *Held*, that it was negligence to leave the Kills and to attempt to cross the bay in such weather; that the tugs ought to have ascertained the facts as to the weather before leaving the shelter of the Kills and going into the bay, or to have turned about, as they might have done, near the mouth of the Kills, and have taken refuge at Port J., in the Kills; and that the owners of the tugs were liable for the loss of the tow.

2. SAME—LIMITATION OF LIABILITY OF OWNER.

In section 4283 of the Revised Statutes the words "such vessel" include all the tugs belonging to the same owner engaged in the work of towing at the time when the fault is committed by the common captain or head of all the tugs; and all such must be surrendered, as a condition of the limitation of the owner's liability. In this case, *held*, that both the B. and Winnie must be surrendered, but not the Willie, inasmuch as she had been previously detached, and was no part of the moving force at the time when the negligence arose that caused the loss.

3. SAME—DEVIATION—PARTIAL SURRENDER—DAMAGES—PROXIMATE CAUSE.

The Willie had been ordered to detach the canal-boat C. from the rest of the above tow, to be taken to Newark, and not out into New York bay. The Willie negligently omitted to detach the C., and she was taken by the B., with the rest of the tow, into New York bay, and lost. *Held* a wrongful deviation, upon an unauthorized trip, as respects the C., arising through the Willie's negligence, and such a wrongful act and breach of contract as would make the Willie's owners responsible for the C.'s subsequent loss, even if it had arisen from subsequent additional negligence on the part of tugs belonging to different owners; and that the owners of the Willie, being liable for the full amount of the C.'s loss, could not limit their liability under the statute, as respects the C. and her cargo, except on the surrender of the Willie to that extent.

(Syllabus by the Court.)

In Admiralty. Petition for limitation of liability.

Biddle & Ward, for the Pennsylvania Railroad Company, petitioner.

Wilcox, Adams & Macklin, for five of the canal-boats, and others.

Carpenter & Mosher, for the Western Insurance Company, and others.

Wing, Shoudy & Putnam and *Mr. Burlingham*, for the Lehigh Coal & Navigation Company, and others.

Clark & Bull, for the China Mutual Insurance Company, and others.

Hyland & Zabriskie, for the Cahill.

William J. Kelly, for the Philadelphia & Reading Railroad Company.

T. C. Campbell, for the Hanagan.

BROWN, J. On the night of November 24 to 25, 1888, the steam-tug Bordentown, assisted by the Winnie, having in tow a fleet of about 20 canal-boats, bound from South Amboy, through the Kills, to the sea fence, Brooklyn, encountered, on leaving the Kills, a heavy north-east gale, in which all but two of the boats were lost. Large claims for damages having been presented against the Pennsylvania Railroad Company, the petitioners, as owners of the tugs, charging that the loss was occasioned through negligence, a libel and petition were filed in this court to limit the liability of the company for the alleged losses, in case they were held answerable at all, to the value of the Bordentown, the Winnie, and the Willie, or one or more of them, as might be adjudged. The libel further denied that the disaster was caused through any negligence of the tugs, and alleged that, if it was so caused, it was without the privity of the petitioners. The evidence taken is voluminous. It is not necessary to state more than the leading facts that I deem pertinent to the conclusions reached.

The tow left South Amboy between 5 and 6 o'clock of the evening of November 24th, in charge of the Willie and the Winnie, and had at that time two or three additional tiers of boats, which, just below the Baltimore & Ohio bridge, were detached by the Willie, and afterwards landed by her safely at the Standard Oil Company docks, near Port Johnson, in the Kills, and did not proceed further. The Bordentown, a large and powerful tug, but old, out of date, and expensive to run, took charge of the fleet soon after it left South Amboy. The Winnie acted as a helper throughout, running ahead, upon a hawser attached to the Bordentown. The wind had been north-east for two or three days previous. When the tow left South Amboy the wind was already somewhat fresh, and there was some rough water in crossing the bay at that point. In passing Newark bay at about midnight, the wind was strong from the north-east, and the water was so rough as to wash up on the decks of the boats on the port side, some of which took in water enough to make them careen. This was partly rectified by the men on board shifting the cargo. The canal-boat Cahill was attached, as an extra boat, outside of the line of the port boats of the tow, and was designed and ordered to be left at Newark bay. She was not left there, but was taken out into the bay, and was subsequently lost. After passing Newark bay, owing to the shelter from the land, no rough water, or other difficulty, was experienced until the mouth of the Kills was reached, about a mile to the westward of Robbins' Reef light, where the water was found to be rough, and the wind blowing strong from the north-east. The Bordentown and her helper, however, kept on, intending to go up and across the bay, about four miles, to the sea fence, Brooklyn. Many of the men on board the canal-boats made signals, by swinging lanterns, shouting, and blowing horns, to indicate that they were having trouble, and were taking in water from the heavy sea. Some of the boats had covered decks, or hatches with the covers fastened down, which, though washed by the sea, experienced no immediate injury therefrom. Most of the boats, however, had open decks, or their hatch-covers were off. The signals from the tow were either not seen or not heeded on board the tugs; but, after going out a little beyond Robbins' Reef light, the Bordentown turned the tow about under a starboard wheel, and, as her witnesses testify, directed her course towards the American docks, about a quarter of a mile below the landing at St. George's ferry. This was done, according to their testimony, on account of the alleged change of the wind to the westward, which would make it unsafe to moor the tow at the sea fence. At this time it was ebb-tide at the mouth of the Kills, and slack water on the westward side of the bay. After proceeding perhaps a half mile towards the American docks, the wind being observed, as the petitioners' witnesses testify, to have hauled again to north-east, which would make the American docks unsafe, the tow was turned to the north-west, towards the Kills, under a port wheel, but had not proceeded far on that course when she was met by the Willie, whose captain had come down from Port Johnson, or from the Standard Oil docks, after having landed his detachment of the tow at that point, to render any assistance to the Bor-

dentown that might be needed. He testifies that he reported to the pilot of the Bordentown that the water was very rough up at the mouth of the Kills, but did not give any advice. The pilot of the Bordentown testifies that he stated that the water was too rough to go in that direction. The pilot of the Bordentown, accordingly, determined to try again to go to the sea fence, and again turned to cross the bay. He had proceeded for a time upon this course, drifting somewhat downwards, and, when about a mile to the south-east of the bell buoy, the canal-boat Hughes, the hawser boat on the port side, became so full of water that she sank head downwards, and parted the hawser. The result was that the whole tow got loose from the tugs, became kinked up, and pounded each other in the heavy sea, and the open-deck boats, one after another, rapidly filled and sank. The Winnie rescued one boat, and took her to a place of safety; the Willie, two others. The Bordentown was difficult to steer; and, in approaching and lying alongside of some of the other boats, she broke one of the links of her rudder backing-chain, which partially disabled her. In consequence of this accident, the Bordentown's pilot deemed it imprudent to attempt anything further than to rescue the lives of the men on board the canal-boats, who were accordingly all taken on the Bordentown, and safely landed upon a dock in the vicinity of Fort Hamilton. The rest of the tow that had not sunk were left adrift, and mostly lost.

The immediate cause of this misfortune was the sinking of the Hughes, the port hawser boat. She had an open deck, supplied with 18 hatch-covers, but her cargo of coal was so full that the covers could not be fastened down when need for it was found. Had a safer boat been in the place of the Hughes, and the Bordentown kept on, as at first, without turning, it is not impossible that she might have crossed without the loss of any of the boats. There can be no doubt, however, that from the time the mouth of the Kills was reached, there was a strong gale, and a very rough sea. It was at that time nearly 2 o'clock, and the evidence of the Staten Island Ferry pilots furnishes outside proof of the violence of the gale at that time. In judging of the prudence of the Bordentown in attempting to cross the bay in such a gale and such a sea, regard must be had to the condition and make-up of the tow she had in charge; and, considering that so many of them were deeply loaded, had open decks, and that the port hawser boat was of that kind, and was so loaded that her hatch-covers could not be put down, I can have no hesitation in finding that it was imprudent and unjustifiable to attempt to come out of the Kills, in the face of such a wind and sea. It is urged that, as the tide in the Kills was at that time ebb, the tow had no alternative but to keep on, because there was no room to turn in the Kills. This is not a sufficient justification. The evidence taken on the part of the respondents satisfies me that there was room to turn this tow before going into the rough water; and, even if it were a fact that there was not room, that would not furnish a justification, but only throw the fault further back, in not ascertaining whether the wind and weather were proper to proceed, before going so far as to make escape

from destruction impossible. Under the present means of communication and observation, it is very easy to learn the state of the weather at the mouth of the Kills before passing Port Johnson, and reasonable prudence would plainly require that it should be done. If no telegraphic communication was established or was available, there was nothing to prevent the Winnie from steaming ahead, ascertaining the facts, and reporting. I think the petitioners are, therefore, liable for the imprudent and negligent navigation of their employes in taking the tow out into the bay under circumstances which the tow was wholly unfit to encounter. *The M. M. Caleb*, 10 Blatchf. 471. It is not necessary to express any opinion as to the subsequent management in the various turns that were made, in the endeavors to rescue the tow from a situation which was found to be dangerous. Under such circumstances, much must be left to the judgment of the person in command of the tug. There is considerable conflict in the testimony as to the condition of the water at the time the tow made her last turn to cross the bay. I think that the weight of testimony is that the sea was still rough and dangerous; and, considering that the distance to the smooth water of the Kills was far less than the distance to the sea fence, it seems to me that a great mistake, at least, was made in the last attempt to cross the bay. The situation, however, was somewhat analogous to a situation *in extremis*. The real fault was in bringing the tow into that situation.

2. While finding the petitioners liable for the loss, I must further find that they are also entitled to a limitation of their liability, under the act of 1851, (Rev. St. § 4283;) because I cannot, upon the evidence of the respondents, come to the conclusion that there was any negligence in the dispatch of the tow from South Amboy at the time it was sent out, or any insufficiency of the tugs for the purposes of an ordinary trip to New York. The tugs were not dispatched under any peremptory directions to make the trip through without regard to the weather. On the contrary, it is plain that the management of the tow was under the direction of the pilot of the Bordentown; that he had the entire authority, and that it was his legal duty to take the tow with reasonable prudence, and to proceed, or to lay up at any point on the route, as the weather might require. The Willie laid up her detachment near Port Johnson. Another Amboy tow, on the same evening, did the same. The imprudence that caused the loss was simply the imprudence of the pilot of the Bordentown in proceeding into the bay under circumstances when he ought to have stopped short of it. His relation to the petitioners was in this respect, therefore, no different from the relation of the master of any vessel who brings responsibility upon her owners through his negligence or misconduct. The owners, the principals, are entitled to a limitation of liability, where they have no personal privity with the immediate cause of the loss. That is plainly the case here. It is not necessary, therefore, to inquire what grade of officers, in the case of a corporation, it must be to make their knowledge or privity the knowledge or privity of the corporation. Even if the corporation would be chargeable for the running of an unfit boat by the direction of its sub-

ordinates, I cannot find that the Bordentown was unfit, by reason of her age or of any other cause, to be dispatched with a tow to New York, in any weather that was suitable for the tow to enter the bay. It was wholly the improper course of the master of the tow in going out into the bay which brought about the disaster; and, as against this imprudence, the corporation is entitled to a limitation of its liability.

3. As regards the vessels required by the statute to be surrendered in a case like the present, there can be no doubt that the Bordentown is one of them. The master of the tow was all the time on board of her, directing the navigation of all. I have no doubt that the Winnie, also, must be included. At the time when the master's fault arose, the Winnie was as much a part of the moving power as the Bordentown, and was equally under the same direction. She belonged to the same owners; and from the beginning to the end she was engaged, in the owners' behalf, in the work of towing the other boats, precisely as the Bordentown was engaged. It was immaterial on board which tug the master, for the time being, was, or from which boat his orders were given. Both as related to the owners of the tugs and as related to the owners of the boats in tow, the Bordentown and the Winnie, in taking the tow through to Kills, were in effect one vessel. In the case of *The Connecticut* and *The S. A. Stevens*, 103 U. S. 710, where those two vessels were towing a third, which came in collision with the *Othello*, the *Stevens*, which was the helper of the *Connecticut*, was exempted from liability, though the *Connecticut* was held for not signaling her movements. But that duty rested upon the *Connecticut* alone. An examination of the record in that case shows that the *Stevens* did not belong to the owners of the *Connecticut*, but was an independent tug, hired for the occasion, simply to supply additional motive power, as a helper, and that she had done so, without any fault on her part. Had the *Stevens* been owned by the same owners as the *Connecticut*, and engaged in the same work, under a single directing master, the case would have been analogous to the present. Where all the tugs employed belong to the same owner, and are under one common direction, and are engaged in the service at the time when the fault is committed, they are in the same situation, as it seems to me, as a single vessel, as respects responsibility for the negligence of the common head. The words "such vessel," in section 4283, embraces all such tugs. Rev. St. § 3; *The Arturo*, 6 Fed. Rep. 308. And all such must respond for the damages in proceedings for limitation of liability. An additional reason for holding the Winnie in this case is that she was needed to supply the poor steerage power of the Bordentown, and, I have no doubt, was in part retained for that purpose. Acting as a rudder for the Bordentown, she was in a special sense a part of the moving power. As respects the tug Willie, I think there is not sufficient to hold her; because, at the time when the real fault in the case was committed, viz., when going out into the bay, she was no part of the moving power, but was several miles distant, engaged in taking care of a separate detachment of the tow. After securing their safety, she came out of the Kills, for the purpose of giving help to the Bordentown, if

needed, and met her, attempting to come back into the Kills with the tow. If it were certain that the tow would have been saved by keeping on into the Kills, or that the Willie had caused, by any independent act of her own, the master of the Bordentown to turn again and attempt to cross the bay, doubtless the Willie would be chargeable. But there is not sufficient evidence of the latter, and there is no certainty as respects the former. It should be observed that all the witnesses who speak of the comparative smoothness of the water on the return, while going towards the Kills, were on the lee side. The witnesses on the weather side testify that it was becoming rougher as they went towards the Kills, against the tide. The most proper view, as it seems to me, to take of the situation when the Willie reached the Bordentown is that the tow was already in a desperate situation, through the Bordentown's previous fault; that the Willie came and offered, as it was her duty to do, all the assistance she could render, subject to the direction of the master of the Bordentown, as to any course he thought fit to pursue under the circumstances. As before stated, the situation was one that called particularly for the exercise of the master's judgment upon the spot; and, though it now would seem to have been a great mistake to turn back again to the eastward, I do not feel authorized to adjudge it a legal fault and negligence, rather than an error of judgment. If this view is correct, the Willie ought not to be held. Since no legal fault is deemed committed while she was a part of the moving power, she cannot be required to be surrendered simply for going to the rescue of boats in a desperate situation. The result is that the petitioners are entitled to a limitation of liability on accounting for the value of the Bordentown and the Winnie, with interest from the time of the loss.

Though the Willie is not held for the general loss of the tow, she must be held for the loss of the Cahill and her cargo, because she had specific instructions to leave that boat at Newark bay. These instructions constituted an appropriation of the Willie to perform the general contract, previously entered into by the petitioners, to tow the Cahill to Newark. That boat, as above stated, was placed on the port side, towards the forward part of the tow, for the purpose of being detached and left, as ordered. Contrary to these instructions, and without reason, so far as it appears, the Cahill was carried out into the bay, and lost. It was the Willie's duty to perform her specific instructions; and, as nothing prevented her doing so, she must be held answerable for the loss of the Cahill in these proceedings. It is urged that, though the Willie was negligent, her negligence was neither the proximate nor the natural cause of the subsequent loss; but that this loss arose from a new and independent cause, not to be anticipated, viz., the negligence of the Bordentown, as the court holds, in going out into the bay. I cannot sustain this contention. If the Bordentown, from the time when the Willie was detached, were regarded as an independent tug, belonging to different owners, still the petitioners, as owners of the Willie, which had taken the contract to deliver the boat at Newark, or to leave her at a suitable place therefor, would be personally responsible for the failure to do so.

This failure is a breach of their contract. The loss to the owners of the Cahill from this breach of contract is a total loss; and the petitioners could not set up, in diminution of damages, the negligence of the Willie, their own servant, in wrongfully permitting another tug to take the Cahill away upon an unauthorized trip. This exposed her to new sea perils, and to additional risks of negligence on the part of those having charge of her. These new risks were the direct and necessary result of the Willie's negligence; and from these risks the Cahill was, in fact, lost. The owners of the Willie must therefore answer personally for the loss, as the direct consequence of their negligence. As between them and the owners of the Cahill, the loss was the direct consequence of the Willie's negligence. The owners of the Cahill could not be turned over to their remedy against the Bordentown and her owners, merely because there was also an independent act of negligence on the part of the Bordentown. If goods are stolen from a negligent warehouseman, the immediate cause of the loss is the act of the thief, nor is theft the necessary result of such negligence; but the warehouseman is liable for the loss, for his breach of contract, and neglect to keep with proper care, because he negligently exposed the goods to a natural liability to loss. It is the same with the Willie and her owners, as respects their duty to have detached the Cahill at the proper place to go to Newark. Having negligently omitted to do that, and having wrongfully suffered her to go on with the rest of the tow, and become exposed to wholly new risks, the owners of the Willie, and not the owners of the Cahill, must bear all those subsequent risks that naturally attended their unauthorized acts. The maritime law is the same. A vessel deviating on her voyage must bear all the risks of subsequent accidents. The same rule is applied to forwarders, who are not under the obligations of common carriers. 1 Pars. Shipp. & Adm. 171, note 4, and cases cited; *Goodrich v. Thompson*, 4 Rob. (N. Y.) 75, 85, affirmed 44 N. Y. 324; *Bazin v. Steam-Ship Co.*, 3 Wall. Jr. 229; *Goddard v. Mallory*, 52 Barb. 87; *Marx v. Steam-Ship Co.*, 22 Fed. Rep. 680; *Phillips v. The Sarah*, 38 Fed. Rep. 252. This is not a loss by the act of God, as in *Railroad Co. v. Reeves*, 10 Wall. 176; but the loss arose by a continuous and natural sequence of events set in motion, not by any new intervening agencies, but directly by the Willie's own tortious act, as in *Railway Co. v. Kellogg*, 94 U. S. 469, 476. The agency of the Bordentown was an agency to which the Willie directly and wrongfully committed the Cahill; and I know of no principle or authority that, under circumstances like these, would exonerate the petitioners from responsibility for the consequent loss. The petitioners, being, therefore, responsible for the loss of the Cahill and her cargo by reason of the Willie's negligence, can only be exonerated from this liability under the statute by the surrender of the Willie, so far as necessary to pay that demand. Otherwise the Willie is free. A decree may be prepared in accordance with this decision.

THE FRED H. RICE.¹CLOSE *et al.* v. THE FRED H. RICE.

(District Court, S. D. New York. December 18, 1889.)

SHIPPING—DAMAGE TO CARGO—STRANDING.

A schooner, bound from Mattawan to New York, took the more difficult course through the Kills, instead of going outside and through the Narrows. While beating through the Kill van Kull she was overtaken and passed by a tow, to avoid which she luffed, lost her headway, and was carried by the eddy tide on the rocks, and damaged her cargo. In an action by the cargo owner to recover for such damage, *held*, that the schooner took the additional risks to be expected in the passage of the Kills; and, as the channel where she went ashore was wide enough for her to have kept off the rocks, notwithstanding the presence of a passing tow, and as the tide and the eddy were well known, the stranding was not unavoidable, and the schooner was answerable for the damage.

In Admiralty. Action for damage to cargo, by alleged negligent stranding.

Halcyon M. Close, for libelants.

A. B. Stewart, for claimant.

BROWN, J. The libel is filed to recover damages to a cargo of brick loaded on the schooner *F. H. Rice*, through the stranding of the schooner near Constable point, while coming out of the Kills, in November, 1888. The schooner had sailed from Mattawan, and, as the libelants contend, should have taken the outside passage, through the Narrows, instead of coming through the Kills, where the passage is more hazardous, through the narrowness of the channel and the greater liability to obstruction by long tows. The weather was good, and there is evidence that in such weather the passage by the Narrows is the most usual course. The master's testimony is to the effect that the wind was northeast, and that in beating out of the Kills he was overtaken by a tug, having a tow upon a hawser, in all some seven or eight hundred feet long; that he had passed in front of the tow upon several tacks, going on his last tack to the north-west, about 100 yards in front of the tug; that when he afterwards tacked towards the south-east he was unable to proceed without running into the tow, and therefore luffed, and, losing his headway, dropped anchor, but was carried by the eddy tide on the rocks on the north shore. I cannot accept this account as sufficient to throw upon the cargo the damage occasioned by stranding. In selecting the more hazardous passage of the Kills, instead of going by the Narrows, the master took the additional risks to be expected in the Kills. He had full notice of the course of the tow; and, if the tow was so far on the northerly side of the channel as to leave insufficient room to navigate the schooner, he should not have crossed the tug's course on the previous tack, but have kept on the southerly side. The channel there, as shown both by the chart and in cases often before me, was wide enough

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

to keep the vessel off the rocks on either side, notwithstanding the presence of a passing tow. The course of the tide and the eddy were also well known, and it was the business of the schooner, at her peril, to navigate with reference to them. There is no probability that there was any material change in the course of the tug to the northward, to the prejudice of the schooner. The tug's proper course, for quite a distance beyond the point of stranding, was nearly in the center of the channel, in order to pass to the southward of the buoy at Robbins Reef light. The mistake of the schooner was—*First*, in unnecessarily taking the greater risk of a passage by the Kills; *second*, in crossing the tug's course to the northward, if the tow was on the northerly side of the channel; or, *third*, if the tow was not on the northerly side of the channel, in running so far into the eddy tide and not luffing, and in not dropping anchor sooner, and lowering her sails before getting near the rocks. There is no fault on the part of the cargo. I cannot find the stranding unavoidable, and the schooner must therefore answer for the damage.

THE DAN.

STEAM-SHIP CO. CARL v. HAGEMEYER.

HAGEMEYER *et al.* v. STEAM-SHIP CO. CARL.

(District Court, S. D. New York. December 20, 1889.)

1. SHIPPING—DAMAGE TO CARGO—CHARTERED VESSEL—COMMON CARRIER.

A vessel chartered to transport a specific cargo only is not a common carrier, and hence is not an insurer of the safe delivery of the cargo, and can be held for damage to cargo only on proof of negligence.

2. SAME—NEGLIGENT STOWAGE—FOREIGN VESSEL.

A vessel loaded in a foreign port cannot be charged with negligence in stowing cargo, if she has employed all the known and usual precautions to insure safe transportation which the nature of the cargo requires, having reference to the usages of the foreign country, and the practice and state of knowledge as to loading there prevailing.

3. SAME.

The steam-ship D. delivered a cargo of grain which she had been specially chartered to transport, and part of which was damaged through contact with an iron bulk-head between the cargo and the engine-room. The evidence showed that the construction of the ship was not unusual at Copenhagen; that the grain was stowed in accordance with the custom of Copenhagen, where this cargo was loaded; and that a practice of sheathing the iron bulk-head with wood, the lack of which in this case was the negligence complained of, is not in use in Denmark, and only to a limited extent in New York. *Held*, that the vessel was liable only for negligence, under the circumstances of her employment, and that no negligence was proved, the shippers apparently acquiescing in the stowage; but, on the meager evidence as to usage at Copenhagen, the libellant for damage to cargo was allowed to discontinue without prejudice, and the vessel was held entitled to her freight in full.

In Admiralty. Cross-suits for freight and damage to cargo.

Wing, Shoudy & Putnam, (C. C. Burlingham, of counsel,) for the steam-ship company.

H. D. Hotchkiss, for cargo.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. The above are cross-libs,—the first to recover freight on a cargo of barley shipped on the steam-ship *Dan*, at Copenhagen, in February, 1888, to be delivered in New York; the second, for damages to the barley, through alleged negligence in stowing it against an iron bulk-head abaft the engine-room, whereby it became injured through heat. As the *Dan* was chartered to transport this specific cargo only, she was not a common carrier. *Sumner v. Caswell*, 20 Fed. Rep. 249. She was therefore not an insurer of the safe delivery of the cargo, and can be held only upon proof of negligence. The negligence alleged is that she was not properly fitted for the voyage, and that she did not cause some additional wooden sheathing, or other suitable protection against heat, to be interposed between the grain and the iron bulk-head that separated it from the engine-room. On arrival, that portion of the grain which was against the iron bulk-head was found heated and caked, remaining, as described by some of the witnesses, in a perpendicular wall when the other grain was removed. Over the line of the keel there was a chamber and tunnel inclosing the shaft running aft from the engine-room, and communicating with the latter by an open door. Along and around this chamber and tunnel the barley showed the same heated and caked condition much further aft, extending in all some 14 feet. These circumstances satisfy me, notwithstanding the testimony of the witnesses for the ship of their belief to the contrary, that the caked condition of the barley arose in part from the heat received through the engine-room and bulk-head. Whether there was not also some dampness of the barley, that made it especially susceptible to a moderate degree of heat, it is impossible to determine, though that seems probable. There is testimony, however, that the general condition of the barley was good.

The *Dan* had been for some time previous engaged in transporting grain, mainly in the Baltic and Black sea trade. She was thoroughly equipped for this purpose. Her voyages were of from five to ten days. She was accustomed to stow her load as in the present case, and had never had her cargo damaged before. She had not previously brought barley or other grain across the Atlantic. Her present voyage occupied 21 days, 2 of which were consumed in putting into Plymouth for coal, as she was allowed to do by her charter. She had no partition separating her boilers from the engine-room, but they were 14 feet forward of the iron bulk-head in question, and the room was well ventilated by airshafts and an upward draught over the boilers. This construction was not improper or unusual in Danish ships. Vessels of the Thingvalla Line were constructed in the same way, and have been accustomed to carry grain from the United States to Havre, stowed as the barley upon the *Dan* was stowed, without injury.

The question is wholly a question of stowage. There is no doubt of the general good construction and fitness of the *Dan*; and in stowing she cannot be charged with negligence, if she employs all the known and usual precautions to insure safe transportation, having reference to the nature of the cargo. *The Titania*, 19 Fed. Rep. 107, 108; *Clark v. Barnwell*, 12 How. 283; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*,

1 Spr. 343. This rule, as respects a vessel chartered in a foreign country and loaded there, must be applied with reference to the usages of that country, and the practice as to loading there prevailing. In this port, in consequence of some cases of damage to grain stowed against an iron bulk-head on European voyages, a practice has arisen within the last three or four years on the vessels of the Wilson Line, and on some others, to separate the grain from the iron bulk-head by some temporary sheathing; but the evidence on the part of the Dan shows that that practice even here is quite limited, and not general, or amounting to anything like a usage, and that, in the absence of such additional protection on vessels constructed similarly to the Dan, no damage upon European voyages has been commonly experienced. The inference from these facts is, it seems to me, very strong that, in the few cases in which such damage has arisen, it has come from some inferior condition of the grain itself; such perhaps as slight dampness, or lack of thorough curing, not perhaps noticeable to ordinary inspection, but sufficient, when combined with slight local heat, to result in damage; and I think such was the fact in this case. The custom in Copenhagen, as respects the loading and stowing of chartered vessels, is different from our own. The proof shows that there are official persons who supervise and determine the proper stowage; that these persons are usually called on by the merchants for that purpose, and may be called by the ship's officers; that in this case two such persons approved the stowage of the Dan; and that the stowage was in accordance with the usual custom of that country. There is no evidence to the contrary, nor any indication that any such additional sheathing or protection had ever been in use in Denmark, or was known to be used, or required, as a reasonable precaution for the safety of grain cargoes of any kind. In New York, where the shipment of grain cargoes is much more frequent, such a practice as above stated is quite limited, and even to this extent has sprung up only within the last three or four years. Under such circumstances, to hold this vessel liable for negligence in stowage will, it seems to me, be holding her to a degree of responsibility greater than in any reported case other than cases of common carriers, and beyond that with which she is fairly chargeable. *Baxter v. Leland, supra*. The practice at Copenhagen, also, whereby the merchant shippers seem to exercise as much care and control as to stowage as the ship herself, would seem to debar them equitably from setting up such a claim against the ship; since they had an equal power over the stowage, and virtually acquiesced in the mode adopted in this case. The evidence on this subject is possibly imperfect, and I may be mistaken in my interpretation of it. The question of stowage could doubtless be tried much more satisfactorily in Copenhagen than here; and, in view of the meager evidence upon this subject in the present case, I think it right to allow the cargo-owners to discontinue their present suit, if they choose to do so, without prejudice to any action in Copenhagen for the same cause which they may be advised to bring. In the libel for freight the libelants are entitled to the balance of the amount unpaid, with interest and costs.

THE QUEEN.

In re EVERETT et al.

(District Court, S. D. New York. December 11, 1889.)

1. COLLISION—INJURIES TO PASSENGERS AND SEAMEN—LIBEL—PARTIES.

Seamen and passengers sustaining injuries by collision may be made co-libelants with the owners of the vessel, even after an interlocutory decree, no sufficient reason to the contrary appearing.

2. SAME—FELLOW-SERVANTS.

Seamen and officers are fellow-servants, as respects the details of navigation on board ship. Each takes the risk of the other's negligence, and has no claim for damage against his own ship or her owners for collisions occasioned thereby. On collision by the faults of both vessels, when both are before the court, the damages must be apportioned between them; and the seamen on board one vessel can recover only half their damages against the other, because they are disabled by their relation to their own ship and her owners from any recovery against the latter, directly or indirectly.

3. SAME—MEASURE OF DAMAGE TO PASSENGER.

Passengers recover full damages, the one-half of which is deducted from the amount payable to the other vessel for her own loss.

4. SAME—MEASURE OF DAMAGE TO SEAMEN.

On claims of seamen for personal injuries for being thrown into the water by collision, only the actual damage from physical injury, or consequent loss of employment, should be allowed.

In Admiralty.

Geo. A. Black, for petitioners.

R. D. Benedict, for respondent.

BROWN, J. The petitioners, of whom five were seamen, and two others government inspectors on the dredge *Queen*, applied to the court after an interlocutory decree holding the *City of Alexandria* and the *Queen* both in fault for the collision between them, (31 Fed. Rep. 427,) to be made co-libelants, in order to recover for their loss of personal effects and for personal injuries. No sufficient reason to the contrary appearing, the application was granted.

1. Personal Effects. Two of the petitioners have given no evidence as to their claims. The others I find lost personal effects of the values following, there being little strict proof, beyond estimates, of actual present value:

Edgar Everett,	-	-	-	-	-	-	-	\$ 70 00
Webster Brown,	-	-	-	-	-	-	-	60 00
Clifford Kelsey,	-	-	-	-	-	-	-	100 00
Norman Chisam,	-	-	-	-	-	-	-	15 00
A. P. Sherrick,	-	-	-	-	-	-	-	110 00
James Dorrell,	-	-	-	-	-	-	-	45 00
James Godwin,	-	-	-	-	-	-	-	80 00
Daniel N. Cozzens,	-	-	-	-	-	-	-	150 00

2. Personal Injuries. Without proof of some substantial harm, some incapacity for their ordinary work, or some expense incurred, no damages for alleged personal injuries should be awarded to seamen. Without this, the allowance of damages for being thrown into the water, and for alleged fright, would in this class of cases, I think, be specially impolitic

and dangerous. Cozzens, one of the government inspectors, was not on board at the collision. The evidence does not show that Chisam or Godwin received any material injuries. The following sums are believed to be a fair compensation for the actual loss or damage to the other seamen, respectively, having reference to the actual damage caused them, or incapacity for work, which as to most of them was, as the evidence shows, very slight:

To Dorrell,	-	-	-	-	-	-	-	-	\$100 00
Brown,	-	-	-	-	-	-	-	-	50 00
Sherrick,	-	-	-	-	-	-	-	-	30 00
Everett,	-	-	-	-	-	-	-	-	20 00
To Kelsey, the other government inspector, who had no duties on board as a seamen, and was not in the employ of the owners of the dredge,	-	-	-	-	-	-	-	-	250 00

3. The two government inspectors are entitled to judgment for the full sums above awarded them. A recovery of the full amount is also claimed for the other petitioners, who were seamen, as against the City of Alexandria, although the Queen, on which the petitioners were employed, was also held in fault. Such, doubtless, would be the rule in a common-law action against the City of Alexandria alone, because the common law does not recognize any right of contribution as between wrong-doers. *The Bernina*, L. R. 12 Prob. Div. 58, 83, 93, L. R. 13 App. Cas. 1, was adjudged as a common-law action, and on that ground. But the rule in this country is otherwise in admiralty causes when both vessels are before the court. The damage must then be apportioned between the two vessels in fault, *The Alabama*, 92 U. S. 695; *The Hudson*, 15 Fed. Rep. 164. Here both vessels are before the court; the Queen, in the person of the libelant company, which, as the owner, is recovering a large sum for half of her damages. If full damages were recoverable by the seamen, as co-libelants, against the City of Alexandria, the latter vessel, upon the authority of many cases, would be entitled to offset one-half that sum against the amount recoverable by the libelant company, as owner of the Queen. The sum payable to the petitioners would be treated just as sums paid by the City of Alexandria for cargo belonging to third persons on board either vessel would be treated. Half that damage would be charged against the Queen, and that would by so much diminish the amount recoverable by the owners of the Queen against the City of Alexandria. *The Eleonora*, 17 Blatchf. 88, 105; *Leonard v. Whitwill*, 10 Ben. 658; *The Farnley*, 8 Fed. Rep. 629; *The Bristol*, 29 Fed. Rep. 875. If, therefore, the relation of the seamen on the Queen to her owners is such that they have no legal claim for damages against her owners, those owners cannot be required to account for half that claim to the City of Alexandria; nor is the latter vessel on that account to be charged with either more or less than she would otherwise be charged with, viz., one-half the petitioner's damages; and the petitioners must lose what they are legally disabled from claiming against the Queen or her owners. *Bank v. Navigation Co.*, L. R. 10 Q. B. Div. 521, 538, 546. Such is the rule that was applied by this court in the case of *The City of*

New York, 25 Fed. Rep. 149, where the point was considered at some length. The same rule was followed also in the case of *The Columbia* and *The Alaska*, 27 Fed. Rep. 704. That judgment was affirmed in the circuit court, (33 Fed. Rep. 107,) and afterwards in the supreme court, (130 U.S. 201, 9 Sup. Ct. Rep. 461.) It has also been applied in other cases, as in *Leonard v. Whitwill*, 19 Fed. Rep. 547, where the amount of personal effects was considerable; and in *The Saratoga*, 37 Fed. Rep. 119, which was also affirmed in the circuit court. The remarks made by me in the limited liability case of *Briggs v. Day*, 21 Fed. Rep. 730, are not followed here.

It does not appear by whose individual fault the Queen became chargeable. The negligence for which she was held was in having too long a hawser in a dense fog, in a fair-way, and in not giving any whistle or other signal to indicate her presence in a very dangerous place. These faults arose in the details of navigation,—a work for which all the ship's company were alike employed, in their several grades. As to such details the seamen, as fellow-servants, took the risk of each other's negligence. The case of *Railroad v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, was not intended, I think, to apply to cases like this. The railroad company was then held liable to the engineer because the conductor in determining the running of the train, and time of starting with reference to other trains on the same road, (in directing which the negligence arose,) was held to be acting as the representative of the owner, and not merely as a fellow-servant. But in the case of *Quinn v. Lighterage Co.*, 23 Fed. Rep. 363, the latest maritime case in which the question of negligence in fellow-servants has been discussed in the circuit court of this district, the owners were held not liable, although the negligence by which the libellant was injured was the immediate act of the master of the ship, viz., his premature order in setting the winch in motion; because that act was not one that he had done in his character as the representative of the defendant, but was an act that any other co-servant in the same employment might have performed. "The true inquiry," says WALLACE, J., "is whether the character of the act of the captain was one which it was incumbent upon the defendant [the owners] to see properly performed." The same view is reaffirmed in *Railroad Co. v. Herbert*, 116 U. S. 642, 647, 6 Sup. Ct. Rep. 590.

Applying those cases to the present, the owners of the Queen are not answerable for the seamen's losses. It would be absurd to say that the owners owed a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. These details belong to the ordinary work of navigation, and to the men employed to conduct it. As to this work, the owners owe no duty to the officers or seamen to see it properly performed. The duty lies the other way, viz., from the ship's company to the owners. None of such acts, moreover, belong to the master to do as the *alter ego* or special representative of the owner, as in the *Ross Case*. They may be all performed, and for the most part usually are directed and performed, by others than the master. Though there are many acts in the care and

management of the ship, and of the voyage, in which the master acts as the representative of the owners, and performs the duties and functions of the owners, such as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, freighting the ship, arranging her voyages, her times and places of sailing and stopping, and the discharge of all the general duties and legal obligations of the ship to the seamen, for which acts, if negligently performed, the owners are responsible to the seamen injured, they are not responsible for negligence in the mere details of the ordinary work of navigation on board the ship; because these acts are not at all duties of the master as the *alter ego* or representative of the owner, nor are they acts as to which the owner owes any duty to the seamen. As to third persons, all the ship's company represent the owner in the work assigned them, and their negligence makes the owner liable. As between themselves, no one more than another, in the ordinary work of navigation, represents the owner, or performs an owner's duty, and therefore each takes the risk of the other's negligence. In the case of *The Bernina*, both in the court of appeal and in the house of lords, it is said that no recovery could be had by the seaman against his own vessel. Per Lord BRAMWELL, L. R. 13 App. Cas. 14; and per Lord ESHER, L. R. 12 Prob. Div. 83. Such, as above stated, has been the practice of this court in numerous instances, and should be followed until some different rule is prescribed in the appellate courts. The judgment will therefore provide that the city of Alexandria pay to the petitioners, the master and seamen, the one-half only of the sums respectively assessed and allowed to them as their damages; and to the two inspectors the whole amount, respectively, allowed to them; the one-half of the latter amounts to be offset and deducted from the amount recoverable by the owners of the Queen for the loss of the dredge.

THE CITY OF ALEXANDRIA.

DEEP-SEA HYDRAULIC DREDGING Co. v. THE CITY OF ALEXANDRIA.

(District Court, S. D. New York. November 25, 1889.)

1. COLLISION—DAMAGES—COST OF VESSEL.

In assessing damages on total loss by collision, though the cost of construction is competent evidence where no market value is ascertainable, the whole cost should not be given as damage where the vessel could be duplicated for a less sum, and the cost testified to includes various changes and improvements.

2. SAME—LOSS OF PROFITS—PERSONAL CONTRACT.

Upon a total loss, though compensation is allowed for the profits which would have been realized upon an existing charter of the vessel, because the charter is itself thereby lost, this rule does not apply to profits on a personal contract, in which any other fit vessel might be used.

3. SAME.

The libellant used three dredges in carrying out a contract with the government for excavating "320,000, more or less, cubic yards of material" in Gedney's channel; and, after one dredge was sunk, continued the work for 60 days thereafter, when they were stopped by the government upon the excavation of 304,000 cubic yards.

Held, that the libellant was entitled to recover only the value of the dredge from the time of the loss, with interest; that it could not recover for any loss of profits, (1) because there was no such charter of the dredge lost as prevented the substitution of another dredge; (2) because the contract was substantially fulfilled, within the discretion of the government, and the libellant had therefore no certain right to excavate more than it did.

4. SAME—COST OF RAISING WRECKED VESSEL—EVIDENCE.

The libellant employed wreckers to raise its vessel, to be paid a proportion of her value if raised, upon a written contract executed the day before work was commenced. The wreckers testified to a parol modification that they were to be paid the value of their services up to \$7,500, if the same could be recovered from the defendant vessel; but no reference was made to the existing contract, and the libellant did not confirm the same. *Held*, that evidence of the change of contract was insufficient, and that the written contract should prevail.

Exceptions to Report on Damages.

Geo. A. Black, for libellant.

R. D. Benedict, for respondent.

BROWN, J. Both vessels were found in fault for the collision in the above case, (31 Fed. Rep. 427,) and both parties have filed exceptions to the report of the commissioner on damages.

1. *Value of the Queen.* The *Queen*, having been sunk, proved to be a total loss, as her value when raised was less than the cost of raising. She was a dredge of peculiar construction; and, there being no such market as to establish a market price for such a structure, the valuation reported was based upon the cost of construction. Her hull was formerly a scow, bought in 1885 for \$15,180, and she was completed by the addition of much machinery, wood-work, and appliances of many kinds for working certain patents, through various experiments, changes and improvements, down to March, 1886, when she commenced dredging in the vicinity of Gedney's channel, where she was sunk on the 6th of the following September. While evidence of cost of construction was in this case admissible, (*Leonard v. Whitwill*, 19 Fed. Rep. 547,) the cost plainly is not of itself proof of her actual value at the time she was sunk. The ordinary and natural result of all such experimental building is that the final structure can be duplicated at a price far less than the cost of the original, built in that way. Full compensation for the loss, therefore, so far as respects the vessel, is not to be measured by what the dredge cost to build in that way, but by what it would cost to replace her. There is no direct testimony to this point, although one witness said her hull could be replaced for \$10,000 or \$12,000; but the cross-examination showed that this estimate omitted some parts of the hull, and was not reliable. One of the libellant's chief representatives, familiar with the facts, stated, when visiting the vessel with a view to raising her, that she was worth about \$40,000, and this estimate stands uncontradicted. It is repeated in the salvage record. The vouchers produced for her whole cost and outfit, including all changes, aggregate only about \$44,000. The item of \$16,180 for hull (Exhibit F.) should be, according to the bill of sale and check, \$15,180. The libellant's witnesses did not testify what the vessel could be duplicated for, and, on being pressed to state her value, stated it only, "in connection with their business," at \$50,000. Upon this evidence I think that, for a vessel built in the way the *Queen* was built, no higher value

should be adopted than \$40,000, the value put upon her at the time of the loss. There is no reasonable probability, I think, that that estimate would be too low, or that the dredge could not have been duplicated for that sum.

2. *Loss of Profits.* The libelant claims additional damages to the amount of \$16,583, for loss of profits under its dredging contract, which profits it claims might have been realized by the use of the Queen from September 6th to November 5th, *i. e.*, 57 days, at the rate of \$292 per day. The testimony shows, however, that her profits during the whole 172 days that she was at work dredging were but about \$142 per day, or less than half the sum claimed. No part of this claim, however, can, I think, be allowed, either upon precedent or upon principle; for the reason (1) that the Queen was not under any charter at the time of the loss, but was simply in use by the libelant, as any other fit vessel might have been used, in the execution of the dredging contract; and (2) because the dredging contract was not lost upon the loss of the Queen, but, so far as appears, was continued up to the point where the government had the right to treat the contract as completed, and there is no evidence that the work would not have been terminated by the government at the same point, had the Queen been kept at work; in other words, no profits are proved to have been lost.

Upon a total loss by collision, the ordinary rule of damages is the value of the vessel with her net freight upon the pending voyage, and interest from the time of its probable termination, had the loss not occurred. The net freight is allowed, because that loss is certain and reasonably ascertainable, and because it is the immediate result of the collision, and its necessary result, inasmuch as no other vessel could be had to supply the place of the vessel lost, and thus earn her freight by completing her voyage. If the vessel is only damaged, the amount allowed for demurrage or detention during necessary repairs is the value of the use. That value depends on the business in which she is engaged; and an existing charter is therefore competent evidence in determining the value of her use, or of the amount of the loss, if the charter be lost by the detention. Such a loss is not only certain and reasonably ascertainable in amount, but it is also a natural result of the collision, as distinguished from what is special or exceptional; since the chartering of vessels for a pending voyage, or for a subsequent one, is in the ordinary course of the shipping business. *The Gorgas*, 10 Ben. 666; *The Belgenland*, 36 Fed. Rep. 504; *The Argentino*, L. R. 13 Prob. Div. 61, 191, 197.

Compensation for the loss of a verbal charter for the season, embracing many subsequent trips, was indeed allowed by LOWELL, J., in the case of *The Freddie L. Porter*, 8 Fed. Rep. 170, affirming 5 Fed. Rep. 822. No other similar case in this country or in England is found. It was stated by LOWELL, J., to be "an advance upon the decisions." If such time charters are not special and exceptional, and not unusual in the ordinary course of business, then a loss of that kind would be "such a consequence as in the ordinary course of things would flow from the tortious act," and be therefore allowable on principle, if not too contin-

gent; other wise not. Mayne, Dam. (4th Ed.) 44; 2 Greenl. Ev. § 256; *The Argento*, L. R. 13 Prob. Div. 197; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. R-p. 39. But, however that may be, there was in that case, at least, a charter of the particular vessel; and with the loss of the vessel the charter and its profits were necessarily lost, because no other vessel could be legally imposed on the charterer in order to complete the contract. Here there was no charter. Any fit vessel might have been supplied to take the place of the Queen. The work was in fact continued by the other two dredges for nearly two months after the Queen was sunk; and still other dredges might have been employed, so far as appears, in continuing work under the libellant's contract, had that been desired. This case does not differ in principle from the ordinary case of the loss of something for which the owner had useful and profitable employment, and there only the value is allowed; future earnings are not given. If the hirer of a horse negligently causes its death, the owner recovers only the value of the horse, not the future profits that might have been realized by letting him out, however regular and ascertainable such profits might be. The value is the equivalent of another horse, which the owner may buy and let out in place of the one lost. See *Cutler v. James Gould Co.*, 43 Hun, 516. It is the same with the Queen. The supreme court in the case of *The Amiable Nancy*, 3 Wheat. 546, 560, expressly rejected such profits in a maritime cause, allowing only the value, with interest. STORY, J., there says: "This rule may not secure a complete indemnity for all possible injuries, but it has certainty and general applicability to recommend it, and in almost all cases will give a fair and just recompense."

Again, there is no proof that on this contract the libellant lost anything to which it had any certain right. To be allowed, in any case, the profit claimed must be based upon some fixed and certain right, and not rest upon any mere discretion or contingency. The libellant's contract was "to deepen Gedney's channel by the excavation of 320,000 more or less cubic yards." After excavating about 304,000 cubic yards, and reaching a uniform depth of 26 feet, the government stopped the libellant's work. The contract did not give any legal right to excavate the exact amount of 320,000 yards; and the termination of the contract by the government when nineteen-twentieths of that amount were excavated, and a uniform depth reached, amounted to a substantial fulfillment of the contract. The gross sum payable for the remaining 16,000 cubic yards, even had the contract given the right to excavate that exact number of yards, would have amounted to but \$8,640, and the average profit, according to the testimony, to about half that sum. Had the Queen been at work, there is no evidence, and no legitimate inference, that the work would not have been stopped and the contract terminated by the government at the same point. And on the other hand, had the libellant wished to proceed faster with the work after the loss of the Queen, nothing prevented the hiring of additional dredges in her place.

3. A further question arises as to the expense of raising the Queen. She was in Gedney's channel, and an obstruction to navigation, and

therefore required to be removed, and it was justifiable to attempt raising her with a view to repair. She was raised and removed by Messrs. Baxter & Chapman. Had the libelant necessarily incurred any legal charges in this work, it would be included in the damages. But I find that Messrs. Baxter & Chapman did their work of raising and removal upon a written contract, which provided, in substance, that they would raise the Queen if practicable, and bring her to a dock, "for a proportion of her value, to be agreed on between them and the libelant," or, if they were unable to raise her, to be paid "such sum for their services as might be recovered therefor by the libelant from the city of Alexandria." The Queen was raised, brought to a dock, and found unfit for repair; and, on being libeled for the salvage services, all her net proceeds were paid over to Baxter & Chapman. So far as this contract goes, it is evident that the libelant has incurred no liability or damage in the raising, and therefore can recover none. Baxter & Chapman contracted to look to the vessel alone for their pay, if they could raise her, which they did.

It is claimed, however, that after the written contract was signed it was modified by a verbal agreement that the libelant should pay \$7,500 at all events. But this statement was afterwards changed by the witness so as to mean only in case that sum was recovered from the city of Alexandria. Both the Brainerds, with whom this modification was alleged to have been made, neither testify upon the subject, nor admit the alleged modification. They keep silence, and let Baxter & Chapman establish that claim if they can. But the other circumstances are such as to compel me to find against the alleged modification as extremely improbable and insufficiently proved. The written contract leaves no possible doubt that the controlling idea of the Messrs. Brainerd was to incur no further personal liability for the raising of the boat, and that Baxter & Chapman, for their pay, must look to the boat alone, if she could be raised; or, if not raised, then only to the city of Alexandria, and what could be got from her.

The work of raising was begun on the morning of September 12th. The contract is dated the 11th September, in the handwriting of the counsel employed, and the circumstances show that it could only have been concluded after 4 o'clock in the afternoon of the 11th, and after the return of all parties from visiting the wreck. The modification is alleged to have been made before the work was begun, *i. e.*, before the 12th; so that this modification, if made at all, must have been made within two or three hours after the written contract was dated, signed, and delivered,—a modification, too, that directly reversed, as to responsibility, the whole object and scope of the written contract; and that without any further writing, or any recall or cancellation of the agreement just signed, or even any allusion to it. If the Brainerds had on oath confirmed this remarkable transaction it would have been difficult enough to believe it; to do so while they keep silence, even in their own suit, and in no way commit themselves to any such modification, or to any existing liability on their part, is impossible. Written evidence, moreover, would be of little value, if it could be avoided like this upon one-sided testimony,

and under such circumstances. I do not find any voucher showing payment by the libellant to Baxter & Chapman, beyond the proceeds of the Queen herself.

The record of the salvage suit in New Jersey, by increasing the inconsistencies in the evidence, and by its failure to show that the Brainerds ever agreed to incur any individual liability to Baxter & Chapman for raising the Queen, confirms my disbelief of any such modification of the written contract. In the absence of more convincing proof, the written contract should stand. The testimony as to alleged modification should be regarded as nothing more than the imperfect recollection of the witnesses of what may have been said in the course of the negotiations, but which was superseded by the written agreement as finally concluded late in the afternoon of September 11th. There are certain other expenses which the libellant incurred and paid after the Queen was raised, in order to ascertain whether she was worth repairing. Though I have some doubt as to the necessity of some of them, I allow, including interest to date, \$1,418.50. The damages will be:

(1) Value of Queen and outfit, with interest from September 6, 1886, to date,	\$47,700 00
(2) Subsequent expenses and interest,	1,418 50
Total,	\$49,118 50

The other exceptions are overruled.

THE WYANOKE.¹

THE RUTH DARLING.

BUCK *et al.* v. THE WYANOKE.

(District Court, S. D. New York. November 9, 1889.)

1. COLLISION—FOG—DUTY OF STEAMER TO REVERSE.

A steamer, navigating in a dense fog, at night, on the open sea, at the rate of from seven to ten knots per hour, being two-thirds her full speed, heard voices nearly ahead, indicating the proximity of another vessel. *Held*, that it was her duty to reverse, as well as stop, her engines, and not to alter her helm without reversing, until the location and direction of the other vessel was ascertained with certainty. *Held, also*, that she was in fault for ringing up full speed again after once stopping, without reasonable assurance that the danger was past.

2. SAME—SAILING VESSEL—MECHANICAL FOG-HORN.

A sailing vessel is bound to have, and use in a fog, mechanical means for sounding her fog-horn.

3. SAME—SPEED OF SAILING VESSEL.

Six knots is immoderate speed for a sailing vessel, under nearly full sail, in a dense fog, at night.

4. SAME—SPEED OF STEAMER.

Seven knots, in a dense fog, at night, is immoderate speed for a steamer whose full speed is only ten or eleven knots.

In Admiralty. Action for damages by collision.

Carter, Rollins & Ledyard, for libellants.

Biddle & Ward, for claimants.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. The above libel was filed to recover for the loss of the schooner Ruth Darling and her cargo in a collision with the side-wheel steamer Wyanoke, off Cape May, in a fog, at about 2:15 A. M. of March 28, 1889. The steamer's stem struck the schooner on the starboard side a little forward of the main rigging, breaking a hole in her side, from which the schooner speedily sank. Her captain and two men were on deck at the time. The lookout only was saved. The other two were lost. Two men who were below also escaped. Until a few minutes before the collision the steamer, bound from New York, was making a course of S. S. W.. The schooner, bound from the West Indies to New Haven, having the wind to the southward and a little variable, was sailing wing and wing, making a course from N. to N. by E., and crossing the course of the steamer, therefore, by an angle of about one or two points. About 15 minutes before the collision the vessels ran into a bank of fog, so dense that other vessels or lights could be seen only a short distance. The lookout of the schooner testifies that the first thing he heard was the sound of a whistle; that soon after he first saw the steamer's mast-head light; the next instant a green light, "a little bit on his starboard bow,—just enough to say on her starboard bow;" that between hearing the whistle and seeing the light "there was just time enough to blow one blast of the horn," and "when the lights were first seen the vessels were about half a ship's length away;" that he had heard no previous whistle; that he sung out, "Hard a-port," but the captain ordered, "Hard a-starboard," that he had previously given six or seven signals on the horn of three blasts each, from one to two minutes apart, as near as he could guess; that the horn had no bellows or mechanical appliances for blowing, and had some holes near the mouth piece stopped up with soap.

The steamer, before running into the fog, was under full speed of about ten or eleven knots. Soon after entering the fog, she commenced giving fog signals, and was put under one bell, which, according to the engineer's testimony, would give nearly two-thirds the number of revolutions that full speed gives. That would make her speed at the rate of about seven knots. The master, coming into the pilot-house, ordered full speed. Very soon voices were heard, which he thought were on the port bow, but which the lookout located ahead or about ahead. The master thereupon stopped the engine. Listening for the voices, and not hearing them, he says he supposed they had gone by, and again gave the order, "full speed," and ported. Almost immediately after, as he says, he saw the schooner's green light on his port bow, and then rang four bells and a jingle bell to stop and back strong. No fog horn from the schooner was heard. The master heard voices twice, at an interval, as he judges, of some ten seconds. He estimated the time between hearing the voices first and the collision at two minutes, and between hearing the voices the second time and ordering the wheel to port at about half a minute.

Considering the fact that, though voices were heard, the horn was blown every one or two minutes, and was not heard, it is hardly probable that the interval between hearing the voices first and the collision was as much as two minutes. It was natural that the steamer's lights should be seen sooner than the schooner's. The fact that the collision

was nearly at right angles shows that the combined changes of the two vessels amounted to from four to six points. From the testimony on both sides it is probable that each of the vessels contributed about equally to this change. The testimony of the lookout of the schooner is explicit that the steamer's lights were first seen a little on his starboard bow. There is no reason to discredit this testimony, as it is reconcilable and consistent with the steamer's testimony, if the schooner be located at first a little to the westward of the line of the steamer's course, and if the schooner's green light was first seen on the steamer some time afterwards, (as the testimony in fact shows,) and after the steamer, by porting, had brought the schooner's light a little on her port bow. That view, and no other, so far as I can perceive, reconciles the testimony of the two vessels; and such, I think, must be held to be the facts. The captain estimates his speed at the time of the collision at two knots. It is probable that the vessels were not more than a quarter of a mile apart when the steamer's lights were first seen, and that the interval between that and the collision was not over a minute.

If the situation was as stated above, it follows that there would have been no collision had the vessels kept their courses, and neither changed until the heading of the other was known. Upon the above facts, therefore, both vessels must be held to blame for non-observance of the rules of navigation;—the schooner, for having no mechanical means for sounding her fog-horn, (*The Love Bird*, L. R. 6 Prob. Div. 80,) and for going at the immoderate speed of six knots, having nearly all her canvas set, and being therefore at nearly full speed, (as the wind then was,) in a dense fog; the steamer, for going at too great speed, —nearly seven knots;—for ringing up "full speed" very soon after voices had been heard nearly ahead, without any reasonable assurance that the danger was past; for not reversing, as well as stopping, her engines, when voices were heard nearly ahead, (which must have been known to be very near,) until the location and direction of the other vessel were ascertained with certainty; and for changing her helm, by porting, under such circumstances, without at the same time reversing, as required by article 18 of the rules of navigation. I can hardly imagine circumstances in which reasonable prudence would more urgently demand a reversal of the engines, in order that the vessel might be brought to a stand-still as soon as possible, than where a vessel's speed is two-thirds her full speed, and voices are heard, nearly ahead, in a dense fog, before the other vessel or her lights can be seen. The uncertainties as to the source of sounds in a fog equally demand that no change of course should be made, under such circumstances, unless accompanied by reversing. *The Lepanto*, 21 Fed. Rep. 651, 659, and cases cited; *The Pottsville*, 24 Fed. Rep. 655; *The Frankland*, L. R. 4 P. C. 529; *The Dordogne*, L. R. 10 Prob. Div. 6, 9; *The Britannic*, 39 Fed. Rep. 395, 399. See *The Vindomora*, L. R. 14 Prob. Div. 172. Had the legal rules in either of the above respects been observed, it is not probable that the collision would have occurred. Each fault was therefore material, and the damages must accordingly be divided. If not agreed on, a reference may be taken to a commissioner.

FIRST NAT. BANK v. FOREST.

(Circuit Court, N. D. Iowa, E. D. December 26, 1889.)

FEDERAL COURTS—JURISDICTION—ACTION BY NATIONAL BANK.

Act. Cong. Aug. 13, 1888, § 4, provides that national banks shall, "for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located," and that the circuit and district courts of the United States shall not have in such cases "jurisdiction other than such as they would have in cases between individual citizens of the same state." *Held*, that the federal courts have jurisdiction of an action between a national bank located in one state and a citizen of another state.

Motion to Suppress Summons and Dismiss for Want of Jurisdiction.

Action by First National Bank of Grand Haven, Mich., against John Forest.

Chas. A. Clark, for plaintiff.

Boies, Husted & Boies and Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, J. In support of the motion to dismiss this cause for want of jurisdiction, it is contended that, under the provisions of section 4 of the act of congress approved August 13, 1888, courts of the United States cannot take jurisdiction of suits in which a national bank is a party. It cannot be questioned that the language of the last clause of the section is susceptible of the construction claimed for it by defendant, yet, if this is the meaning of the latter clause, it wholly destroys the force of the first clause of the section, which declares that national banking associations shall, "for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located." If the intent had been, as is claimed, to deprive the United States courts of jurisdiction of suits by or against national banks, it would have been easy to have so declared. Instead of so doing, it is enacted by the first clause that, for the purpose of suing and being sued, the banks shall be deemed to be citizens of the states in which they are respectively located; thus clothing them with the rights, in matters of suits, possessed by individual citizens of the state of their location. And then follows the second clause, which declares that the circuit and district courts of the United States shall not have, in such cases, "jurisdiction other than such as they would have in cases between individual citizens of the same state." If this is to be construed as is claimed by defendant, it, in effect, nullifies the clear meaning of the first clause, for in that it is declared that the banks shall stand on a parity with individual citizens, and it is the right of the individual citizen to sue a citizen of another state in the United States court. If the last clause had not been added to section 4 of the act of 1888, is it not entirely clear that, by the provisions of the first clause, national banks would, in the matter of suits, have had just the rights, no more and no less, of an individual citizen of the state in which it was located, which would have included the right to sue a citizen of another

state in the federal court? This is clearly the intent of the first clause, and could it have been the intent of congress to confer this right upon banks in the first clause of the section, and then in the latter clause to take it away? It is a fundamental rule of construction that, if possible, all portions of the act shall be given force and effect, and one part shall not be so construed as to nullify other portions of the act, unless it clearly appears that such was the legislative intent. While the language used in the second clause is not happily chosen for the purpose, yet it seems reasonably clear that it was not the intent to nullify one clause by the other, but to secure the general purpose of the section by further declaring that the federal courts should have no other or different jurisdiction in suits brought by or against national banks than they would have in case the given suits were pending between individual citizens. If, according to the literal construction sought to be put upon the last clause of the section, national banks cannot sue or be sued in the federal courts, except in cases involving a question arising under the constitution or laws of the United States, then the enactment of the first clause was wholly superfluous; for, if jurisdiction exists only when a federal question is involved, then it is immaterial whether the bank is or is not to be deemed a citizen of the state of its location. To give any force, therefore, to the first clause, it must be held that it was the legislative intent by the first clause to place national banks on the same footing with corporations created under state laws, and by the second clause to negative the claim that might be made to federal jurisdiction by reason of the fact that national banks are created under a law of congress. Thus construed, force is given to both parts of the section. If this is not the construction, then we would be forced to the conclusion that congress intended to deprive national banks of rights enjoyed by the individual citizens and by corporations created under the laws of the states. The conclusion reached is that the court has jurisdiction, and the motion to dismiss must be overruled.

TULLOCK et al. v. WEBSTER COUNTY et al.

(Circuit Court, D. Nebraska. December 26, 1889.)

REMOVAL OF CAUSES.—RIGHT TO REMOVE.

On appeal by a tax-payer to the district court from an allowance of a claim by the county supervisors, as provided by Comp. St. Neb. p. 855, § 1010, the appellee, being the party who is bound to establish his claim, must be regarded as plaintiff, and, as such, has no right of removal to the federal court on account of local prejudice, under the act of March 3, 1887, which gives such right to the defendant only.

On Motion to Remand.

Mason & Whedon, for plaintiffs.

G. M. Lamberton, for defendants.

BREWER, J. This case is before me on motion to remand. I notice but a single question. The facts are these: The petitioners, under con-

tract with the county of Webster, constructed a bridge over the Republican river. When the work was done they presented a bill to the county supervisors, which account was audited and allowed. Under the peculiar provisions of the Nebraska statutes, any tax-payer, by giving bond, can appeal to the district court from such allowance, and one James McNeny, under this statute, so appealed. After the case was docketed in that court, these petitioners filed a petition and bond for removal to the federal court, on the ground of local prejudice. Now, the act of March 3, 1887, which was in force at the time, gives the right of removal to the defendant only; and that the petitioners were plaintiffs in fact as well as plaintiffs in form there can be no doubt. The sections of the statute referring to this matter are found on page 293 of the Compiled Statutes of Nebraska, and one of them reads as follows:

"The clerk of the board, upon such appeal being taken, and being paid the proper fees therefor, shall make out a complete transcript of the proceedings of the board relating to the matter of their decision thereon, and shall deliver the same to the district court; and such appeal shall be entered, tried, and determined the same as appeals from justice courts, and costs shall be awarded thereon in like manner." Section 39.

It will be perceived that by it appeals are to be entered, tried, and determined as appeals from a justice court; and from page 855 and section 1010, same volume, we find the rule thus given as to appeals from justices' courts.

"The plaintiff in the court below shall be plaintiff in the district court, and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in the said court."

In the proceeding before the county supervisors the petitioners were the actors,—the parties who were bound to establish their claim. They were the plaintiffs. So, when the case comes to the district court for trial they are still the actors. On them rests the burden. They must prove their claim; and, failing so to do, their case will be dismissed. In the petition filed in the district court the petitioners style themselves plaintiffs. Their counsel sign their names as attorneys for "plaintiffs." The papers are entitled "A. J. Tullock & Co. vs. The County of Webster." And even in their brief filed in this motion the petitioners are spoken of as the plaintiffs. So they are in form the plaintiffs, and so treated through all the proceedings; and they are in fact the plaintiffs, on whom the burden of the case rests. Hence, under the statutes, they have no right of removal, and the motion to remand must be sustained.

ANDERSON *et al.* v. BOWERS *et al.*

(Circuit Court, N. D. Iowa, W. D. December 10, 1889.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

In an action by resident tax-payers against county officials and bondholders, one of whom is a non-resident, to restrain the collection of a tax levied for the payment of alleged illegal bonds, and to cancel the bonds, there is no separable controversy with relation to the county officials and bondholders.

2. SAME.

The citizenship of the county officials will not defeat the right of removal on the part of the non-resident bondholder, as the former must be deemed to be interested on the same side of the controversy with the complainants. Following *Harter v. Kernochan*, 103 U. S. 562.

3. SAME.

But the bonds not being all owned by the non-resident defendant, but by several, one or more of whom were residents, and the record not showing that the bonds owned by the non-resident belonged to a different issue or series from those owned by resident bondholders, there was not a separable controversy pending between complainants and the non-resident which would authorize a removal of the cause.

In Equity. Bill to restrain collection of taxes. Motion to remand. *Kauffman & Guernsey* and *Van Wagner & McMillan*, for complainants. *Henderson, Hurd, Daniels & Kiesel*, for the Orient Insurance Company.

SHIRAS, J In the original bill filed in this cause it is averred that the complainants are residents of Lyon county, Iowa, owning property in said county, and that they, in common with all other tax-payers in said county, are interested in the question of the extent of taxation which can be legally imposed upon the taxable property in said county; that under the laws of Iowa the county has no authority to create an indebtedness in excess of 5 per centum of the assessed valuation of the property in the county; that bonds have been issued largely in excess of this limitation, and that same are illegal; that the defendants, being the treasurer, auditor, and members of the board of supervisors of said county, have levied, and are proceeding to enforce the collection of taxes in excess of the legal rate, and for the payment of the illegal bonds issued by the county; that the complainants, for themselves and on behalf of the other tax-payers of the county, seek to restrain the collection of said taxes, and to have the same declared void; and to that end they pray an injunction against said county officials. Service of the original notice was had upon the county treasurer, and at the ensuing term of the state court a default was entered against him, and a decree for an injunction as prayed for. Subsequently an amendment to the bill was filed, making several of the bondholders defendants, and praying that the bonds held by them be declared void, and canceled.

The Orient Fire Insurance Company, a Connecticut corporation, one of the defendants to the amended bill, filed its petition for the removal of the cause into this court, and the transcript having been filed, the complainants now move for an order remanding the case, on the ground that this court has not jurisdiction. On part of the Orient Company it is claimed that there exists in its favor a separable controversy, and, as

the amount exceeds \$2,000, the cause was one removable into this court. Viewed with relation to the county officials and the bondholders, I do not think a separable controversy exists. As against the county officials, the remedy sought is a decree declaring the tax void, and restraining its collection, but the ground alleged therefor is the illegality of the bonds. As against the bondholders, the remedy sought is a decree declaring the bonds void, and restraining their collection, on the same ground of illegality in the issuance thereof. The decision of the one question of the validity of the bonds held by the Orient Insurance Company decides alike the question whether the county officials should be restrained from collecting the tax, and the question whether the bonds shall be decreed to be void. It cannot, therefore, be held that the bill presents a controversy against the Orient Company, touching the bonds owned by it, separable from the controversy, touching the same bonds, presented by the bill viewed in relation to the county officials.

The question then arises whether, as to this single controversy, there are adversary parties who are citizens of the same state. If it were not for the decision of the supreme court in *Harter v. Kernochan*, 103 U. S. 562, I should be strongly inclined to hold that the county officials ought not to be deemed to be interested with the complainant adversely to the bondholder, yet I cannot find any substantial ground for distinguishing this case from that, upon the facts. In that case the bill was filed by the township and two resident tax-payers against the state treasurer and auditor, the county clerk and treasurer, the township collector, supervisor, clerk, and justices of the peace, and the holders of the township bonds. The bill declared the bonds not binding upon the township, for want of authority in the issuance thereof, and prayed a decree restraining the state, county, and township officers from collecting any tax for the payment of the bonds, for the cancellation of the bonds, and other relief. Upon the question of the removability of the cause, the supreme court held:

"Disregarding, as we may do, the particular position, whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of Harter township upon the bonds; * * * that upon one side of the dispute are all of the state, county, and township officers and tax-payers, who are made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He alone, of all the parties, is, in a legal sense, interested in the enforcement of liability upon the township. It is therefore a suit in which there is a single controversy, embracing the whole suit, between citizens of different states, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois. Removal Cases, 100 U. S. 457."

Under this decision it is clear that the citizenship of the county officials will not defeat the right of removal on part of the insurance company, for the supreme court holds that they are deemed to be interested on the same side of the controversy with the complainant, and, as they are all citizens of Iowa, the controversy is in fact one between citizens of different states.

In *Harter v. Kernochan* it appeared that all the bonds in question were owned by Kernochan, and therefore there was but one cause of action, in which all the parties were alike interested. In the case now under consideration the bonds are not all owned by one party, but by several, one or more of whom are citizens of Iowa, and the query is whether this fact defeats the right of removal on part of the Orient Insurance Company. In the bill of complaint it is averred that the bonds alleged to be invalid were issued in the years 1878, 1880, 1881, 1882, 1884, and 1885; the last issue, in 1885, being 120 bonds, of \$1,000 each. In the amendment to the bill, making the bondholders parties, it is averred that the several named parties, including George B. Provost, who is a citizen of Iowa, are the owners of the bonds in question, but it is not shown what particular bond or bonds each one owns. Upon the face of the bill it does not appear whether Provost is or is not interested in the same series of bonds with the Orient Insurance Company. In the petition for removal filed by that company, it is averred that the company is the owner of 10 of the bonds described in the bill, and "that the attack upon the said bonds of this petitioner is entirely distinct and different from the attack upon the bonds of each of the other defendants, and that the defense, therefore, is likewise entirely distinct and different, and the whole controversy between the plaintiffs and this petitioner is entirely distinct and different, from that between the plaintiffs and each other of said new parties defendant." If the record, including the petition for removal, showed that the bonds owned by the Orient Insurance Company belonged to a different issue or series from those owned by Provost, it could be well claimed that the controversy over the validity of each series or issue of bonds was separate and distinct, and that there was therefore a separable controversy pending between the plaintiffs and the company which would authorize a removal of the cause; but the difficulty lies in the fact that the record does not show that the bonds owned by Provost and the Orient Insurance Company do belong to different issues or series. The averment in the petition for removal, to the effect that the attack upon the bonds owned by the company is distinct and different from that made upon the bonds held by the other defendants, is a mere conclusion. The facts should be so stated as that the court can, from the facts, reach the conclusion. There is nothing in the petition for removal, nor in the record of the pleadings, which shows that upon the trial the validity of the bonds held by Provost and those held by the Orient Company may not turn upon the same question. It may very well be that the bonds held by Provost, or some of them, and those owned by the Orient Company, are part of the series of 120 bonds issued in May, 1885. If so, then there is not a separable controversy existing between the plaintiffs and the Orient Company. It may be that there does, in fact, exist a separable controversy, but the party seeking the removal has failed to make plain the fact, and in such case the state court was not required to yield up jurisdiction of the cause. If this court should retain the case, and proceed to a trial on the merits, it might appear that the bonds owned by Provost and the Orient Insurance Company are part of the series is-

sued on the 15th of May, 1885, in which case both parties would be interested in one and the same controversy, and the same is true of other single issues of bonds. As it does not, therefore, certainly appear that the controversy between complainants and the Orient Insurance Company is separable and distinct from that between complainants and Provost, and as the latter is a citizen of the same state with complainants, it follows that it is not shown that this court has jurisdiction, and the motion to remand must be sustained.

CLEAVER v. TRADERS' INS. Co.

(Circuit Court, E. D. Michigan. July 8, 1889.)

1. REMOVAL OF CAUSES—PRACTICE AFTER REMOVAL—PRIOR RULINGS BY STATE COURTS.

When an action is removed from a state court to a federal court, the action continues the same, and all rulings made or opinions expressed in the highest court of the state are treated precisely as if they had been made in the federal court; otherwise, if the action in the state court be discontinued, and a new action begun in the federal court.

2. SAME.

Hence, where, in an action upon a policy of insurance the supreme court of the state had held that certain conduct upon the part of the insurance company should be submitted to the jury as evidence of its intention to waive a forfeiture for over-insurance, held, that such ruling was binding upon the federal court.

3. INSURANCE—BREACH OF CONDITION—WAIVER OF OBJECTION.

A forfeiture incurred by running a manufacturing establishment after the hour allowed by the policy should be taken advantage of at the first trial after knowledge of the facts is brought home to the insurance company, or it will be considered as waived.

(Syllabus by the Court.)

At Law.

This is an action upon a policy of fire insurance. The action was originally begun in the circuit court for Tuscola county, was tried in May, 1886, and a verdict returned for the plaintiff. The policy provided that if the insured should procure any other or further insurance upon the property insured, without the consent of the company written upon the policy, it should become void. There was a further provision that the agent of the company should have no authority to waive, modify, or strike from the policy any of its printed conditions, nor, in case the policy should become void by reason of the violation of any of its conditions, had the agent power to revive the same. The only defense set up upon the trial was an additional insurance of \$2,000 in the Michigan Millers' Fire Insurance Company. This policy was put upon the property covered by the defendant's policy about nine months after the latter was written; and the consent of the company to the taking of this additional insurance was not indorsed upon the policy.

In reply to this defense, evidence was produced tending to show that the agent of the defendant company was informed of the plaintiff's intention to take out additional insurance upon his property, and that such

agent said that it would be all right, and even went so far as to help him fill out the application. After plaintiff received his additional policy, he informed the agent that he had procured it; to which the agent replied, "All right." Upon the trial in the circuit court, upon this state of facts, the plaintiff recovered a verdict, but, upon writ of error the supreme court reversed the case, and sent it back for a new trial; holding that the company was not estopped by the act of its agent to deny its liability and to declare the policy void, since it might limit the powers of its agent in any legal way, and make such limitation a part of its contract with the insured. 32 N. W. Rep. 660.

Upon a retrial of the case in the Tuscola circuit, the plaintiff offered additional testimony tending to show that the company, after being informed of the additional insurance upon the property destroyed, contrary to the terms of the policy, replied to its agent, in a letter, stating it supposed this would be a waiver of its rights on the subject of additional insurance, and sent an adjuster to the plaintiff, who requested the assistance of the insured in adjusting the loss, and offered him a portion of the policy in full satisfaction. The court directed a verdict for the defendant, when the case was again taken to the supreme court upon writ of error, and again reversed, (39 N. W. Rep. 571;) the court holding that the question whether the company had waived the condition of its policy in regard to additional insurance should have been submitted to the jury. Thereupon the defendant caused the case to be removed to this court under the local prejudice subdivision (3) of the Revised Statutes, (section 639,) where the cause was retried before a jury. Two defenses were made upon the trial in this court: (1) The over-insurance; and (2) the running of the flouring-mill after the hours limited in the policy. The case was submitted to the jury upon the facts raised under both defenses, and resulted in a disagreement.

It is now submitted to the court, upon a preliminary hearing, to determine the questions of law in the case as the basis of the ruling upon a second trial.

T. W. Atwood and C. P. Black, for plaintiff.

L. D. Norris, for defendant.

BROWN, J. Defendant claims that, the taking of the second policy having been fully established, there is no evidence which would authorize a jury to find that the company waived the forfeiture of the policy by reason of such over-insurance, and, inferentially, that the supreme court was wrong in holding that there was.

In reply, it is insisted by the plaintiff that the ruling of the supreme court in this connection is *res adjudicata*, and that we are bound by the construction given by that court to the evidence upon the subject of waiver. We think the plaintiff is correct in this contention. In the case of *Loomis v. Carrington*, 18 Fed. Rep. 97, decided some years ago by this court, we had occasion to hold that in cases removed from a state court this court will not review the orders made prior to the removal, but will take the case precisely as it finds it, accepting all prior

decrees and orders as adjudications in the cause. In this case the judgment of the federal court had been garnished by a proceeding in the state court, and that court had made an order upholding such proceeding; and it was held that, although our own opinion might be that a judgment of the federal court could not be garnished by the process of a state court, yet that we ought to decline to review the propriety of this order. This principle has frequently been applied in other cases.

Thus, in *Brooks v. Farwell*, 4 Fed. Rep. 166, it was held that an order of the state court overruling a motion to quash the service of a writ could not be reviewed, or in any manner set aside in the federal court. "We do not," says Judge HALLETT, "on the removal of a cause from a court of the state, review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court."

So, in *Smith v. Schwed*, 6 Fed. Rep. 455, it was held that, upon the removal of a cause from a state court, an injunction would not be dissolved upon the ground that the bill filed in the state court was not verified according to law and the practice of the courts of chancery.

In *Duncan v. Gegan*, 101 U. S. 810, it was held that proceedings had in a cause were not vacated by its removal from a state court to the circuit court. "The circuit court," says the chief justice, "when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off." See, also, *Wertheim v. Railway Co.*, 11 Fed. Rep. 689; *Milligan v. Manufacturing Co.*, 17 Fed. Rep. 465.

These cases, it is true, apply to interlocutory orders made in the state court, but the precise question involved in this case appears to have been settled in the recent case of *Williams v. Conger*, 125 U. S. 397, 418, 8 Sup. Ct. Rep. 933. This case was originally tried before a jury in a state court, and, being taken to the highest court of the state, that court ordered a new trial, deciding that a certain document was admissible in evidence as an ancient deed. Afterwards the cause was removed to the circuit court of the United States, and it was held that the decision of the state supreme court upon the question of admissibility was binding upon the courts of the United States. In delivering the opinion, Mr. Justice BRADLEY remarked that "if the action had originally been brought in the circuit court upon proper jurisdictional grounds, and had been tried as it was in the state court, and if, on a writ of error from this court, we had decided as the supreme court of Texas did, we should have felt bound by our first decision. We would not have allowed it to be questioned." "The present case is in exactly the same category. The removal of the cause from the state court does not put us in the position of a court of review over the supreme court of Texas. When it acted, it was the highest court that could act in the cause, and stood in precisely the same position that we stand now. Its action must be accepted by us as that of a court having plenary and final jurisdiction." We think this case is decisive of the one under consideration. Had this

case been originally commenced in this court we should have felt at liberty to review the ruling of the state court, as we have sometimes done where the decision of the state court was adverse to the plaintiff, and he has discontinued and begun again in this court. The case of *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974, is an illustration of this principle. This was an action to recover damages for personal injuries inflicted upon the plaintiff while he was traveling as a passenger upon a railroad train. Before the commencement of the action the plaintiff had sued defendants upon the same cause of action in the state court, and had obtained judgment against them, which was reversed by the supreme court of Massachusetts, and the case remanded for a new trial. The plaintiff thereupon became nonsuit, and began the action in the federal court. The question was whether the plaintiff could recover for an injury sustained while traveling upon Sunday. The state court held that the facts set out in the bill of exceptions did not show that the plaintiff was traveling, at the time of the accident, either from necessity or for charity. The federal circuit court followed this ruling, upon the ground that the same question having been submitted to the jury in the state court, and having been passed upon by the supreme court of the state, it felt itself bound by that adjudication. The supreme court, however, held that it was not a matter of estoppel which bound the parties in the federal court, because there was no judgment entered in the case in which the ruling of the state court was made, but affirmed the action of the circuit court upon other grounds.

It results, then, that when an action is removed from the state court the action continues the same, and that all rulings made or opinions expressed in the highest court of the state are considered precisely as if they had been made here. We merely take up the case as it left the state court, and carry it on to its conclusion. If, however, the case in the state court is discontinued, and a new action begun here, such rulings are not binding upon us.

From this review of the law it results that in this case we are bound by the ruling of the state court to submit the evidence upon the subject of waiver to the jury, as that court decided that the circuit court for Tuscola county should have done. In this connection, however, we should feel at liberty to call the attention of the jury to the letter of January 25th, which seems to have been overlooked in the consideration of the case by the supreme court of the state.

2. The question of running after hours is a more serious one. There is a stipulation in the policy that if it (the insured property) be a manufacturing establishment running in whole or in part over, or extra, time, or running between 6 o'clock P. M. and 6 o'clock A. M., then, and in every such case, this policy is void, and all insurance thereunder shall immediately cease and determine. It was undisputed that upon the night of the fire the mill was run until about half past 9 o'clock. The evidence tended to show that at the time the adjuster Berne went to Caro to determine the amount of loss he inquired of one Wilders, who was the agent of the plaintiff, in regard to running the mill at night, and was in-

formed that he ran it until after 9 o'clock. There was further evidence tending to show that the plaintiff had a conversation with the agent of the company at the time the policy of which this was a renewal was issued, and that when the agent read it over to the plaintiff he told him that it would never do, because he sometimes ran the mill all night, and that the agent replied, "That is all right," and that he never heard anything from it. The court then asked the question whether this was the first time this defense had been made, to which counsel replied: "It is the first time it was ever known. The first time it came out was on the criminal examination at Caro for burning the building, when Wilders was put on the stand, and testified that the mill had run that night up to half past 9." The agent, who testified on behalf of the plaintiff, also said that he was satisfied that he knew the mill was being run at night: "It is not a very great ways to where I live. I certainly knew it at the time I wrote that letter to the company, because I had a talk with Mr. Wilders about when he left the mill, and what he was doing there that night. I knew that the mill was running,"—though he said he had no distinct recollection of being informed of the fact.

The fact that Quinn knew of this at the time the prior policy was taken out, or afterwards, we think, is immaterial, since his knowledge is of no greater weight than his express consent, and by the provisions of the policy he had no power to waive, modify, or strike from the policy any of its printed conditions, or to revive the policy after it had been forfeited. It will be observed that this view of the power of the agent was sustained by the state supreme court when the case was first before it, and we are as much bound by that ruling as we are by its subsequent ruling, that the evidence upon the subject of waiver was sufficient to be submitted to the jury, nor would the fact that Berne was subsequently informed that the mill was run by night be any evidence of a waiver since it would be nothing more than knowledge that the insured had voluntarily seen fit to terminate the policy. *Insurance Co. v. Watson*, 23 Mich. 488; *Insurance Co. v. Riker*, 10 Mich. 279; *Insurance Co. v. Fay*, 22 Mich. 467.

The real question connected with this branch of the case, as it seems to us, is this: Did the company have notice, at the time the case was tried in the state court, of this defense? If it did not, then, clearly, it is not estopped to set up that defense now. If it did, we are inclined to the opinion that it was bound to set it up as a defense at that time, and that it is estopped to do so now.

There is no doubt of the general rule that where a company intends to insist upon the failure to comply with the clause requiring proofs of loss to be furnished, and bases its refusal upon other grounds, it cannot set up upon the trial the non-receipt of proper proofs of loss.

We are inclined to the opinion that this principle ought to be extended to all defenses, not involving the merits, which are claimed to work a forfeiture of the policy, and that in justice to the plaintiff all such causes of forfeiture ought to be set up at the time the case is first tried, if the company is shown at that time to have had knowledge of them. In this case, it was asserted by counsel that they knew nothing of the fact

that the mill was run at night until the criminal examination, which took place after the trial in the state court; but the evidence of the plaintiff in this connection tends to show that Berne was informed of it when he went to Caro, to adjust the loss. If this be so, and we are correct in our impression of the law, the defense should have been made in the state court, and the defendant is estopped to make it here. *Cobbs v Association*, 36 N. W. Rep. 222; *Carpenter v. Insurance Co.*, 28 N W Rep. 749; *Insurance Co. v. Norton*, 96 U. S. 234; *Castner v. Insurance Co.*, 50 Mich. 273, 15 N. W. Rep. 452; *Insurance Co. v. Kittle*, 39 Mich. 51; *North Berwick Co. v. Insurance Co.*, 52 Me. 336.

In this connection, counsel for the plaintiff rely with great confidence upon the case of *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466. This was an action upon a policy of life insurance. Upon the first trial it went to the jury upon the single issue of an alleged breach of warranty. Upon the next trial a verdict was instructed for the defendant, which was set aside by the supreme court. Upon the next trial, evidence was offered of death by suicide, and it was held by the supreme court that the fact that it did not insist upon this defense upon the previous trials did not operate as a waiver. The case is distinguishable from the one under consideration in two important particulars: *First*, the report of the case does not show that the fact of suicide was known to the company at the time of the prior trials; *second*, the defense was one which went to the merits of the case,—such a defense as, in this case, that the plaintiff had burned his own property. It was a defense that went to the very basis of liability, and tended to show that the defendant was not responsible for that kind of loss. In delivering the opinion, the court confined itself to such defenses as involve the merits, and held that as to those defenses there was no waiver from the fact that it had neglected to insist upon them upon a former trial. In the case under consideration the fact that the plaintiff ran his mill after the hour specified in the policy is a technical defense, not involving the merits of the case, and not tending in any way to show that the defendant had suffered any actual injury or prejudice.

ABRAHAM v. NORTH GERMAN INS. CO.

(Circuit Court, N. D. Iowa, E. D. December 30, 1889.)

1. INSURANCE—REFORMATION OF POLICY.

Where the agent of an insurance company agrees to insure property for the benefit and protection of the owner, and receives the consideration for such contract of insurance, but, in writing out the policy, fails to make it express the real contract entered into, equity will reform the policy, if the company is bound to make good the contract which the agent in fact made in its behalf.¹

2. SAME—AGENTS.

Where an insurance company issues a policy of insurance in pursuance of a contract made by one assuming to be its agent, it is estopped to deny the agency.

3. SAME.

The company is bound, not only by the contract appearing upon the face of the policy, but by that actually made by such agent.

In Equity. Bill to reform policy of insurance.

Blake & Hormel and Chas. A. Clark, for complainant.

Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, J. From the evidence in this case it appears that in 1883 the complainant owned an elevator building at Newhall, Iowa, together with the machinery therein, the same being placed on the land of the Chicago, Milwaukee & St. Paul Railroad Company; the same being used for the reception and forwarding of grain upon said railway. The business was carried on in the name of H. Eyler, and the title of the property was ostensibly in him, but in fact the property and business belonged to complainant; Eyler being merely an employe, receiving a fixed salary of \$50 per month. In September, 1882, a policy of insurance was issued upon the property by the Council Bluffs Insurance Company, through its agent, George Snyder, then residing at Cedar Rapids, Iowa; the written portion of the policy being as follows:

"\$2,500. H. Eyler, Newhall. \$1,300 on his two-story frame, shingle roofed elevator, situated on railroad ground of the C., M. & St. P. R. R. Co., in the town of Newhall, Benton county, Iowa; \$200 on his steam-engine contained therein; \$1,000 on his grain therein. Loss, if any, payable to G. G. Abraham, mortgagee, as his interest may appear."

On the 2d day of January, 1883, a policy was issued by the North German Insurance Company, the written portion of which is as follows:

"\$1,000. H. Eyler, Newhall, Benton county, Iowa. One thousand on his two-story frame, shingle roofed elevator building, situated on railroad ground of the C., M. & St. P. Ry., in the town of Newhall, Benton county, Iowa."

On the 12th of September, 1883, a fire occurred, destroying the elevator and its contents. Notice of the fire was given to the company in the form of an affidavit signed by Eyler, in which he states that his el-

¹ As to when equity will grant reformation of written instruments or other relief on the ground of mistake, see *Critchfield v. Kline*, (Kan.) 18 Pac. Rep. 898, and note; *Appeal of Hollenback*, (Pa.) 15 Atl. Rep. 616, and note; *Schwass v. Hershey*, (Ill.) 18 N. E. Rep. 272, and note; *Gerdine v. Menage*, (Minn.) 43 N. W. Rep. 91, and note; *Herrick v. Starkweather*, 8 N. Y. Supp. 145.

evator, insured by the company, had been destroyed by fire, and his loss amounted to the sum of \$4,800. On the 6th day of October, 1883, proofs of loss were furnished, in the form of an affidavit, signed by Eyler and Abraham, in which it was set forth that Abraham was the real owner of the property and business, and that the latter was carried on in name of Eyler, but in fact was the business of Abraham. The defendant company refusing to pay, an action at law was brought by Abraham, setting forth the policy, the happening of the fire, the actual condition and ownership of the property; that the same were known to the defendant at the time the policy was issued; and that the policy was in fact intended to cover his interest. The company demurred to the petition, and the court held that upon the face of the policy it was a contract insuring the interest of Eyler, and not that of Abraham, and that in the action at law relief could not be had on the grounds alleged, but that the same must be sought by a proceeding in equity. Thereupon the present bill was filed, and, issue being joined therein, the cause is submitted upon the pleadings and evidence; the object sought by the bill being a reformation of the policy so as to conform it to what, it is claimed, was the real contract of insurance intended to be represented by it.

The evidence clearly establishes the fact that the elevator, and the business carried on in connection therewith, belonged in fact to Abraham, and that Eyler had no money interest therein. If the same was destroyed by fire, the loss would be Abraham's, and not Eyler's, and therefore any insurance against loss by fire, to be of any value, must be available to Abraham. The only testimony touching the interviews had relating to the issuance of the policies is that of Abraham and Eyler. It is stipulated by the parties that the defendant has made due effort to ascertain the present whereabouts of Snyder, but has been unable to find him or procure his testimony. Abraham testifies that he had known Snyder for several years before the policy in the Council Bluffs Company was issued; that he was engaged in the insurance business; that, on the day of the issuance of the policy in the Council Bluffs Company, Snyder came to complainant's office, at Watkins, to see about insuring the elevator; that in that conversation he told Snyder that he owned the elevator, its contents, and the business carried on therein; that Eyler was merely an employe, on a monthly salary; that the property and business was kept in the name of Eyler because complainant was running an elevator at Watkins, on the Chicago and Northwestern road, and the railways competing with each other would not permit both elevators to be run by one person; that Snyder agreed to insure the property; that the price was agreed upon, to-wit, \$75; that the agreement was to insure his property; that he paid Snyder the agreed premium; and that the latter agreed to, and did, issue the policy in the Council Bluffs Company. He further testifies that at this interview he told Snyder of the fact that there was a mortgage on the property to Rosenbaum Bros., and Snyder told him he had been at Newhall, and had gone through the building, and knew its condition. There is nothing to contradict or

weaken this testimony, except the fact that it comes from complainant, and that his interest would lead him to stretch his recollection to the utmost in aid of his own case. Giving full weight to this consideration, it must still be held that the main facts testified to are proven, unless we are to wholly disregard complainant's testimony. If, then, it be true that Snyder came to Watkins to see Abraham about the insurance on the property at Watkins, and that the contract was there made and closed by the payment of the premium and the issuance of the policy, is it not clear that Snyder did make the contract of insurance on behalf of the Council Bluffs Company with Abraham, receive payment from him of the premium, and deliver the policy to him, and can these facts be explained on any other theory than that Snyder knew that Abraham was the real party in interest, the one whose interest in the property was such as to authorize him to contract for its insurance, and whose interest was to be protected? The policy he delivered for the Council Bluffs Company, upon its face, provides that in case of loss the amount due was to be paid to Abraham, mortgagee, thus showing that he knew that Abraham was interested in the property. The undisputed facts that Snyder came to Abraham for the purpose of getting the insurance upon the elevator; that he made the contract with him, received payment of the premium from him, and delivered the policy to him,—show that Snyder knew that Abraham had an interest in the property, and then, too, corroborate Abraham's testimony, to the effect that Snyder knew the facts as they existed, and agreed to insure the property, knowing Abraham to be in fact the sole owner thereof. It is clear, beyond question, that Abraham's purpose in entering into the contract of insurance must have been to procure insurance for his own benefit; and the entire evidence, therefore, fully justifies the conclusion that Abraham, on the one part, and Snyder, on the other, intended to, and did in fact, contract for insuring the property in question for Abraham's benefit, and for his protection, as the actual owner thereof. When Snyder filled out the policy, he so worded it that it failed to embody the contract he had made with Abraham. He seems to have thought that, as the property and business were ostensibly carried on in the name of Eyler, the policy must be made in his name, with the provision that in case of loss payment was to be made to Abraham, mortgagee. In thus writing the policy, Snyder failed to express the contract he had in fact made, and failed to give any insurance upon the property which could be enforced. Under such circumstances, unless the policy can be reformed, the contract which was in fact made cannot be enforced. But it may be very truthfully said that in all the acts thus done by Snyder he was acting as the agent of the Council Bluffs Company, having no relation with the defendant; and that proving that a case for the reformation of the one policy exists does not show that a like case exists as against the present defendant. In one sense, this is true; yet the true force and significance of the acts of the parties touching the policy issued by the defendant company cannot be understood without reference to the acts of the same parties connected with the first policy issued. Touching the policy issued

by the defendant, it appears that Abraham concluded that he should have a larger amount of insurance upon the property than was afforded by the policy in the Council Bluffs Company, and he told Eyler that, in case he (Eyler) should see Snyder before he himself did, he should tell him that he wanted additional insurance. Abraham testifies that in January, 1883, Snyder came to him at Watkins for the purpose of discussing the question of additional insurance; that he was busy at the time, and told him to see Eyler about it. Eyler testifies that Snyder came to Newhall, and told him that Abraham had sent him there to see about taking out additional insurance, to the amount of \$1,000, on the elevator property; that Snyder inquired whether there had been any changes in the property since he had insured it before, in the Council Bluffs Company; that witness told him there had been no change; that there was the mortgage to Rosenbaum Bros. still on it; that Snyder said the Council Bluffs Company would not take a further risk on the property, but that he was agent for the North German Company, and that Abraham could get additional insurance in that company; that he went over the building, examining it; that he said the premium for \$1,000 insurance would be \$30; that the witness paid him \$30, out of money belonging to Abraham, and Snyder agreed to send the policy from Cedar Rapids; that the policy came to him by mail a day or two afterwards. As has been already said, there is no testimony contradicting that of Eyler and Abraham. Can there be, then, any reasonable doubt that when Snyder arranged for the issuance of the additional insurance for \$1,000 he knew the facts touching the elevator property just as fully as when he issued the first policy, or, in other words, that he knew that Abraham was the owner of the property sought to be insured; that it was his interest that was to be protected; that the money paid him was so paid for the purpose of securing protection for Abraham, and for no other purpose? This being so, can there be any doubt that Snyder intended to, and did, contract to insure the property for the benefit of Abraham, as the owner thereof, just as Eyler testifies he agreed to do? If he in fact agreed to insure the property for the benefit and protection of Abraham, and received the consideration for such contract of insurance, but, in writing out the policy, he failed to make it express the real contract he had entered into, is it not clearly a case for reformation of the policy, provided the defendant company is bound to make good the contract which Snyder in fact made in their behalf?

This brings us to a consideration of the relation in which Snyder stood to the defendant company. Upon this question the defendant has introduced no evidence whatever, but insists that the burden is upon complainant of establishing the fact of his agency and the extent of his powers. This is undoubtedly true, yet, as it is within the power of the defendant company to readily show the limitation on his powers and authority, if any exists, the court is justified in assuming from the silence of defendant that his authority was as extensive and complete as the uncontradicted evidence fairly shows it to have been. It appears beyond question that Snyder assumed to act for the defendant company. He

agreed to take insurance for the sum of \$1,000 on the property of the defendant company. He fixed the rate of premium to be paid. He received payment of the premium, and agreed to have the policy written out and forwarded. He did not take a written application for insurance, setting forth the condition of the property, and agree to submit that to the company, but he examined the building himself, made inquiries regarding the title and other matters connected with the property, and closed the contract of insurance on the spot, received payment of the premium, and agreed to have the policy written out and forwarded, which was done in due season. No communication, written or verbal, ever passed between the company and Abraham or Eyler touching the issuance of the policy, except that had between Snyder and these parties. The company issued the policy by reason of the contract entered into by Snyder. The policy, as issued by the company, acknowledges the receipt of the premium. The issuance of the policy by the company is a ratification of the action of Snyder in their behalf, and justifies the conclusion that he was their agent in that transaction. Thus, in *Bronson's Ex'r v. Chappell*, 12 Wall. 681, it is said:

"Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent, and their recognition or acquiescence by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects, as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted under a mistaken conclusion. He is estopped to take refuge in such a defense."

The inference to be fairly drawn from the act of the company in issuing the policy is that in contracting for the insurance of the property Snyder was their agent. In dealing with Abraham, Snyder assumed to act on behalf of the company, as their agent, and the company, by issuing the policy, recognized and affirmed such action on his part; and the court, therefore, is entirely justified in finding that Snyder represented the company in contracting for the insurance upon the property, and that the company is bound by his acts in that particular.

It is argued for defendant that it can only be properly bound for the contract appearing upon the face of the policy; that it consented to make that contract, and no other; and that it cannot be inferred that Snyder had authority to make any other contract than that evidenced by the policy as issued. If this contention is correct, it practically eliminates Snyder from the case, and holds that he was not the agent for the company in any sense, and that the defendant is not bound by anything that took place before the issuance of the policy. The evidence, beyond question, shows that the actual contract of insurance was made at Newhall. It was at Newhall that the amount of the insurance was agreed
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upon, the price to be paid was settled, and the payment thereof made and received. If Snyder represented the company, the contract was made at Newhall, and at no other time or place. What was afterwards done by the company was solely in recognition of this contract. The company, by its action, justifies the conclusion that it recognized the authority of Snyder to contract for the company touching the insurance of the property in question. It was upon the faith of the contract made with Snyder that Abraham, through Eyler, paid the premium agreed upon. The company has received the premium thus paid, and cannot now be permitted to say that it is not bound by the contract made by Snyder. The company, through its agent, Snyder, contracted to insure the property in question for the benefit of Abraham, the real owner thereof, and was paid by him for so doing. The company, through its agent, filled out the policy, but so worded it that in legal effect it insured Eyler's interest, in whose name the business was carried on. This is not what the parties intended or contracted for.

It is said that the policy was written as the parties agreed should be done; and that the mistake as to its legal effect is a mistake of law; and that a court of equity will not grant relief in such cases. In entering into contracts, parties are deemed to know the principles established by law, and contracts are construed with reference to the law applicable to the subject-matter of the contract; and therefore, in that sense, the law, as it actually is, enters into and forms part of the contract that the parties make. If, however, in a given case, the parties actually mistake or misunderstand the principle of law applicable to the subject-matter of the contract, and reach an agreement relying upon this mistake of the law, there is no ground upon which a court of equity can reform the contract. The court cannot know whether the parties, if they had correctly understood the law, would have entered into any contract on the subject, or what terms they might have reached touching the same. While the court might, therefore, be entirely satisfied that the parties, had they in fact correctly understood the principles of law applicable to the case, would not have made the contract they did make, the court cannot know what contract they would have made, if any; and therefore, in such case, the court cannot reform the contract, although it might be justified in setting it aside. When, however, the mistake lies, not in a misunderstanding of the principles of the law as controlling the subject of the contract, or the rights of the parties connected therewith, but merely in the terms proper to be used in defining the actual contract of the parties, such a mistake, though in one sense a mistake of law, is one that a court of equity will correct. The mistake sought to be reformed in the present case falls within the latter category. The evidence clearly establishes the fact that the actual agreement of the parties was that the property was to be insured for the benefit of Abraham, who was the real owner, and that the company entered into this contract with full knowledge of the condition of the property, of the ownership thereof, and the incumbrance thereon. It is not a case, therefore, of a mistake in the contract actually made, but of a mistake in the terms used in filling out the policy, whereby

it does not represent the contract actually existing between the parties. The power of the court to correct a mistake of this nature, and to conform the policy to the contract as actually made, cannot be questioned. *Williams v. Insurance Co.*, 24 Fed. Rep. 625; *Snell v. Insurance Co.*, 98 U. S. 85. Complainant is therefore entitled to a decree for the reformation of the policy of insurance issued by the defendant company, as prayed for in the bill of complaint, and for costs.

WOOLWORTH v. ROOT.

(Circuit Court, D. Nebraska. December 26, 1889.)

1. JUDGMENT—RES ADJUDICATA—DEEDS—EFFECT OF RECORD.

M., claiming to be the owner of a certain tract of land, brought suit against defendant to quiet title. A decree was entered May 8, 1873, quieting title in M. On June 24, 1873, M. deeded to complainant an undivided one-half. On the same day he conveyed the other undivided one-half to W., and on June 4, 1879, the executors of W. conveyed that undivided one-half to complainant. Defendant asserting title, and entering into possession of the land, complainant brought suit to quiet title in himself. It appeared that M., prior to the commencement of the suit, had executed a deed to W., dated August 19, 1869, and recorded September 15, 1869; and defendant claimed that M., therefore, had no title when he filed the bill, and that the decree was obtained by fraud upon the court; that defendant was not aware of the condition of the title at the time of the suit and decree, and was therefore not precluded from raising the question. *Held*, that the deed from M. to W., being recorded, was constructive notice to defendant, and he was concluded by the decree against him divesting his title, and vesting it in M.

2. SAME—FRAUD.

As the evidence showed that, prior to the filing of the bill, W., who was the brother of M., called on complainant, and produced a writing signed by the two brothers, the effect of which was to revest the title in M.; that by direction of W. complainant brought the suit in the name of M., who afterward confirmed all that had been stated; and that after the decree of 1873 it was agreed that M. should convey to complainant an undivided one-half of the premises,—this testimony removed all suggestion of fraud or wrong.

3. SAME—DEED—COLLATERAL ATTACK.

Defendant could not justify his attempt to avoid the effect of the decree on the ground of the insufficiency of the deed from M. to W., in 1869, because there were no witnesses to it.

4. ADVERSE POSSESSION.

As, by the decree and the deed made in pursuance of it, all title and right of possession in defendant was transferred to M., no retention of possession by defendant was adverse to the title conveyed, and he could set up no title based upon that possession until he had first given notice of his intention to claim adversely.

5. WILLS—TESTAMENTARY POWERS.

A will which specifically authorizes and empowers the executors "to grant, bargain, sell, and convey, and, if necessary, to mortgage, any and all real estate, and deeds, releases, and mortgages to make and acknowledge, as fully and amply as I could do were I living," gives to the executors a power under which they can convey after the probating of the will, although no previous license was obtained from the probate court.

In Equity. Bill for an injunction.

A. J. Poppleton and J. M. Woolworth, for complainant.

George W. Covell and J. L. Webster, for defendant.

BREWER, J. This is a bill to carry into effect a decree of this court. In a general way, these may be stated as the facts: On August 27, 1870,

Oliver P. Morton, claiming to be the owner of a certain tract of land, began a suit in this court against Allen Root, this defendant, to quiet title. On May 8, 1873, a decree was entered declaring that Root had no title, and quieting the title in complainant, directing Root to make a deed to complainant, and, in case of his failure, appointing Watson B. Smith as special master, and directing him to execute such a deed. Allen Root, the defendant, did not make the deed as directed; and on July 4, 1873, Watson B. Smith, special master, made a deed to complainant, Oliver P. Morton. On June 24, 1873, after the date of the decree, complainant, Oliver P. Morton, and wife, deeded to the present complainant, James M. Woolworth, an undivided one-half. On the same day he conveyed the other undivided one-half to William S. T. Morton, and on June 4, 1879, the executors and executrix of William S. T. Morton, deceased, conveyed that undivided one-half to the complainant, James M. Woolworth. The present complainant, by this supplemental bill, shows that he has succeeded to all the rights and title of Oliver P. Morton; that defendant, notwithstanding the decree against him, is asserting title, and has entered into possession of the real estate; and prays for a writ to oust him from the possession, and to put complainant in; and also for an injunction restraining the defendant from asserting any right in or to the premises, or from occupying the same, or any part thereof.

Several questions have been raised and argued with great learning by counsel. It appears that Oliver P. Morton, prior to the commencement of this suit, had executed a deed to William S. T. Morton, which deed was dated August 19, 1869, and recorded September 15, 1869, in the records of this county; and it is claimed that Oliver P. Morton, therefore, had no title when he filed the bill, and that the decree was obtained by fraud upon the court; that the defendant was not aware of the condition of the title at the time of the suit and decree, and is therefore not now precluded from raising the question. Whatever actual knowledge the defendant may have had from Oliver P. and William S. T. Morton, the deed was recorded, and therefore implied notice, and Root is concluded by a decree against him divesting his title, and vesting it in Oliver P. Morton. But, further, the evidence shows that, prior to filing the bill, William S. T. Morton, the brother of Oliver, called on Mr. Woolworth, the present complainant, with reference to the title to this property and other litigations; that he produced a writing, signed by the two brothers, the effect of which was to revest the title in Oliver P. Morton; that, by direction of William S. T. Morton, Mr. Woolworth brought the suit in the name of Oliver; that afterwards Oliver confirmed all that had been stated; and that, after the decree of 1873, William was here, and settled with Mr. Woolworth for his services in that case and other matters, and agreed that Oliver should convey to Woolworth, as was done, an undivided one-half of the premises. This testimony does away with all suggestion of fraud or wrong. The title which the Morton brothers claimed was different from the one which defendant claimed, and it was a matter which did not concern him, in whose name the suit was brought, providing only a decree could be obtained binding as to the respective

titles. When his title was declared bad, and theirs good, it was a matter entirely immaterial to him in whose name the decree was rendered. As to Oliver and William, each assented to the proceeding as it was had. Each understood that it was a decree affirming the title which they claimed, and they dealt with the property after the decree as though the title was really in Oliver, and not in William.

Some question was made as to the sufficiency of the deed from Oliver to William in August, 1869, because there were no witnesses to it. But I put no stress upon that; the legal title was doubtless conveyed by that deed. The two brothers assented to the suit in the name of Oliver, had signed papers purporting to revest the title, and after the decree recognized the title as in Oliver. There was no wrong or fraud in this, and equity sees nothing of which the defendant can now avail himself to justify his attempt to avoid the effect of that decree.

Again, it is insisted by the defendant that the deed from the executors of William S. T. Morton failed to transfer any title, because the sale was not made under the directions of the probate court of this county, or in compliance with the laws of this state, with regard to sales of real estate of deceased persons. Any failure in this deed would not, of course, interfere with the transfer of title by deed from Oliver P. Morton directly to the present complainant, and I know of no reason why such present complainant could not invoke the benefit of this decree, even to protect a one-half interest. But is the deed from the executors incompetent to transfer title? The will was duly probated in Indiana, where the testator resided, and thereafter a copy of the will was filed in the county court of this county, and duly admitted to probate. The will not only gives general powers to the executors to execute the will, but specifically provides that they be fully authorized and empowered "to grant, bargain, sell, and convey, and if necessary to mortgage, any and all real estate, and deeds, releases, and mortgages to make and acknowledge, as fully and amply as I could do were I living." Now, this language in the will granted to the executors a power under which they could convey after the probating of the will, although no previous license was obtained from the probate court. See *Clark v. Tainter*, 7 Cush, 567; *Conklin v. Egerton's Adm'r*, 21 Wend. 429, and cases cited; *Newton v. Bronson*, 13 N. Y. 587; in which it is held that an executor is incompetent to act as such beyond the jurisdiction in which he is appointed, but that, if he be a donee of a power of sale contained in the will, he may execute the power beyond the jurisdiction, because he acts in conveying the land as a devisee of a power created by the owner of the estate, and not under authority conferred by the surrogate.

Finally, defendant insists he has acquired a title by possession for more than 10 years, and alleges that for more than 19 years last past he has been in the actual, open, notorious, exclusive, and adverse possession of all of the real estate, and by the testimony he introduces he endeavors to substantiate this claim. He says that he entered into possession in 1869, and has ever since been in possession. He does not pretend that the character of his possession has changed, or that any no-

tice was ever given to the Mortons or to this complainant of the title or claim under which he was holding possession since the date of the decree. In other words, he puts before the court a continuous possession, commencing in 1869, before the rendering of the decree, and lasting until the present time, with no change in the circumstances of such possession, and no notice to the complainant since that decree. Now, if the testimony sustained this allegation of possession, open, continuous, and exclusive, (and it comes very far short of it,) it would not avail the defendant aught. By the decree, and the deed made in pursuance of it, all title and right of possession in Root were transferred to complainant. They were equivalent to a voluntary conveyance by him to Morton. Under these circumstances, no retention of possession was adverse to the title conveyed, and he could not bolster up a title based upon that possession until he had first given notice of his intention to claim adversely.

These are the substantial questions, and must be resolved in favor of the present complainant. When the matter was before me on demurrer, I ruled that this proceeding could be maintained, and that by this supplemental bill complainant had a right to execute the decree. I see no necessity of reconsidering that question. I understand the rule in equity to be that when once a decree has been rendered the benefit of that decree can be obtained, not merely by the complainant, but by those holding under him. It would be strange that, after a decree had been rendered to quiet a complainant's title, any heir, devisee, or grantee from him should be put to the necessity of an independent suit for the purposes of securing the benefits of that adjudication. When the decree was rendered establishing the title of Morton, and quieting it as against any claim of defendant, that was an adjudication which defendant was bound to accept as final, unless by suitable proceedings in appeal he succeeded in reversing it. Instead of pursuing his legal remedy by appeal, he has sought in this indirect way to set aside that decree. Equity will tolerate no such proceeding. A decree will be entered as prayed for, enjoining him from setting up any claim to this property, and directing the marshal to put him out of possession, and restore possession to plaintiff.

JENKINS v. TRAGER.

(Circuit Court, S. D. Mississippi. M. D. November 25, 1889.)

1. BOUNDARY LINE BETWEEN LOUISIANA AND MISSISSIPPI.

The line of demarkation run, fixed, and marked by Andrew Ellicott, commissioner on the part of the United States, and William Dunbar, commissioner on the part of Spain, in 1793, was the true boundary line between the territory of the United States and that of Spain prior to the purchase of the latter territory, and is, and ever since has been, the boundary line between the states of Mississippi and Louisiana, irrespective of any mistakes or errors in running and marking said line.

2. PUBLIC LANDS—PRESUMPTION OF PATENT FROM LAPSE OF TIME.

John Jenkins, plaintiff's father, purchased the land in controversy in 1831, and immediately went into actual possession, under a deed describing metes and bounds,

and remained in possession until 1855, when he died. His executors under his will continued in possession until 1867, when this land was partitioned to plaintiff, who has held possession ever since. *Held*, that the law presumes that a patent issued for the same from the United States, and that the conveyance, coupled with the possession, vested in the plaintiff a valid legal title to the land embraced within the calls of the deed, in the absence of proof to the contrary.

3. BOUNDARIES—BY CONSENT.

When the boundary line between the lands owned by adjoining land-owners is unknown, they may by parol fix a line between each party, each party mutually agreeing thereto, and acting thereon, which is binding between them; but, if the line is known, then the transfer of any portion of the land on one side of the line from the one to the other must be in writing, to be valid.

4. ADVERSE POSSESSION—RIGHTS OF GRANTEE.

The adverse possession of land by the grantor cannot avail the grantee, beyond the boundary line described in the deed.

(*Syllabus by the Court.*)

At Law. Ejectment.

Nugent & McWillie, for plaintiff.

Calhoun & Green, for defendant.

HILL, J., (charging jury.) The plaintiff, in his declaration, alleges that he is the legal owner of the land, and improvements thereon, described in his declaration, and is entitled to the possession thereof, with the rents and profits thereon since the 21st day of May, 1882, when it is alleged the defendant unlawfully deprived him of the possession of the same. To this declaration the defendant has pleaded not guilty, which throws upon the plaintiff the burden of proving to your reasonable satisfaction the truth of the allegations made in the declaration.

It is admitted that the defendant is, and was at the time the suit was commenced, in possession of the land described in the declaration, though it is insisted that it is in Louisiana. The question to be decided by you is to ascertain from the proof whether or not the plaintiff was, at the time he brought his suit, the legal owner of the land, and improvements thereon, as described in his declaration. The certificate of the register of the land-office, given to Richard Collins, dated January 1, 1809, is evidence that Collins had entered 480 acres of land lying on the east side of the Mississippi river, but does not describe the land so that it could be found, and, if there was no other evidence in the case, would be insufficient evidence to sustain the action. But the deed of Richard Collins and wife to William Collins, evidently, was intended to embrace the same land, and describes it as being in Wilkinson county, Miss., bounded on the west side by the Mississippi river, and on the south by the line of demarkation between the United States and the Spanish territory, being the same line now dividing the states of Mississippi and Louisiana. This line of demarkation, as shown by the evidence before you, was established by Andrew Ellicott, commissioner on the part of the United States, and William Dunbar, commissioner on the part of Spain, in 1798, and has ever since been recognized by the states of Mississippi and Louisiana as the dividing line between them. It is conceded that the land described in the declaration is within the boundary set out in this deed, if it lies north of said demarkation line, and that if it lies south of this line it is not within the calls of any of the deeds read in

evidence to establish the plaintiff's title. The deeds and transcripts from the records of the probate courts of Adams and Wilkinson counties, read in evidence, establish the following facts: That William Collins conveyed the lands purchased from Richard Collins and wife to John Wall, and that the heirs at law of John Wall conveyed whatever of title John Wall had in the same lands to John F. Carmichael; that John F. Carmichael died intestate, leaving his sister, Phoebe Carmichael, his only heir at law, to whom the land in controversy, together with other lands, descended; and that Phoebe Carmichael, on the 3d day of August, 1838, conveyed the land thus cast upon her by descent to John C. Jenkins, the father of plaintiff. The uncontradicted parol evidence establishes the fact that said John C. Jenkins, soon after his purchase, went into actual possession of the lands so purchased; that he cleared and cultivated a portion of them, and continued up to his death in such possession; that his executors under his will continued in the possession thereof until the 28th of February, 1867, when they were partitioned, and the south-west corner of the tract, embracing the land conveyed by Richard Collins and wife to William Collins, and through mesne conveyances vested in John C. Jenkins, was allotted to the plaintiff, who immediately went into the actual possession of the same, and so continued up to the bringing of this suit. This actual occupation, therefore, covered a period of about 50 years. From this possession, taken under the deed from Phoebe Carmichael, and so long continued, it will be presumed that a patent was issued by the United States to the original purchaser of the land, and that John C. Jenkins, in his life-time, had, and the plaintiff, his son, has, a valid legal title to the land described in the declaration, unless he be barred, as to that portion of it now in controversy, by the adverse possession of the defendant or Mrs. Cheatham, under whom he claims title. Such adverse possession, however, must be continual and unbroken for the space of 10 years next before the commencement of this suit, to be availed of by the defendant. The possession of a part of the lands conveyed to the plaintiff and his ancestor is a possession of all the lands included in the conveyance under which such possession was taken; but, as to any part of the land not described in the deeds relied on, the adverse possession can only extend to the portion in actual occupation adversely for 10 years without any break therein. This rule applies to the adverse possession claimed on both sides.

The first and most important question to be ascertained by you under the proof is as to where the original line of demarkation, fixed by the commissioners Ellicott and Dunbar, is, as that must fix the boundary, not only between the states of Mississippi and Louisiana, but between the land claimed by the parties to this suit; both asserting that line as their line and only boundary. The thirty-first parallel, north latitude, was agreed to be the line between the United States and Spain, and consequently between the states of Mississippi and Louisiana; and it was further agreed that the commissioners named should determine where that parallel was, and fix and mark its actual location. When that was

done, the line of demarkation as fixed must remain to this day, whether there was any mistake made in determining, running, and marking it or not; and no subsequent agreement or survey can change or alter it, nor can the fact that the one state or the other exercised jurisdiction of any kind on the opposite side of the line, or that those residing on the one side or the other supposed they were living in one state when they were in fact residing in the other state, be evidence of the place where the line of demarkation is, if the proof shows to your satisfaction that the commissioners actually ran and marked it at a different point. The surveys and other written evidence upon the part of the plaintiff place the said line just south of the store-house and ground occupied by defendant, and is *prima facie* proof that this is the line fixed by the commissioners; but it is insisted upon the part of the defendant that the evidence introduced by him shows that this is not the true line, and that the line run and marked by the said commissioners, properly retraced, is north of the said line, and north of the land in controversy in this suit. Whether this is so or not, you must determine from all the evidence in the cause, after carefully considering and weighing it. It is insisted upon the part of the plaintiff that before the line was retraced by the engineer, Babbitt, it was a matter of dispute, and doubtful, where the line of demarkation was fixed and marked by the commissioners, Elliott and Dunbar; and that he and the defendant mutually agreed that said Babbitt should find out, as best he could, where the said line was, and rerun and remark it; and that when so rerun and remarked it should be the boundary line between them, no matter what the result should be; and that after the line was run and marked by said Babbitt, and found to be south of the land in controversy, defendant agreed to remove the houses and improvements, and that plaintiff was not informed he did not intend to do so, or to stand by the agreement, until just before this action was commenced. This agreement is denied by the defendant. You will determine from the testimony whether it was made or not. Where the line separating the lands of two persons is unknown, they may by parol agree and fix a line between them; but it must be mutually and unconditionally agreed to, and acted upon, by them. If, in this case, you shall find from the proof that the line run by Babbitt was actually agreed upon after it was determined and marked, and that the defendant agreed to remove his buildings within some future time, but that he changed his purpose, and did not notify the plaintiff of such change, and that the plaintiff relied upon the agreement and promise, the defendant would be estopped from repudiating such an agreement. As before stated, however, the agreement must have been mutually entered into between the parties, and acted upon by them, or the defendant must have entered into such agreement as would have induced the plaintiff to believe that the defendant conceded to him the right to the possession of the premises, and was only occupying them by the sufferance of the plaintiff. If this was the fact, then the agreement would be valid and binding, and would fix the boundary line between the parties to this suit, but could not affect in any way the line of demarkation be-

tween the states of Mississippi and Louisiana fixed and marked by the commissioners Ellicott and Dunbar in 1798, even if that line was run by said commissioners north of the lands in controversy. If you believe this to be so, your verdict will be for the defendant, as this court would have no jurisdiction to try the issue between the parties, the premises being in another state, while the agreement might be binding between the parties. It is claimed on the part of the defendant that, although the land in controversy lies north of the real demarkation line between said states, and is in the state of Mississippi, yet that Mrs. Cheatham, under whom he holds, before his purchase, and he since such purchase, have held continuous adverse possession of the land in controversy for more than 10 years before this action was commenced, and, therefore, that the plaintiff is barred of his recovery. The conveyance from Mrs. Cheatham to plaintiff specifies the said demarkation line as the northern boundary of the land conveyed, and any possession of the land had by her, to be availed of by defendant, can only be extended to that line. Any possession which Mrs. Cheatham may have had beyond that line cannot be availed of by defendant, as it is not embraced in his deed, and is not shown to be claimed by Mrs. Cheatham, so as to show an outstanding title in her.

If, after weighing and considering the proof on both sides, you shall find the issue in favor of plaintiff, you will ascertain the value of the rents of the land, and of the improvements described in the declaration, since the 21st day of May, 1882, up to the present time, the value of the improvements put thereon by the defendant, and the value of the land without the improvements; and you will deduct the amount of the rents from the value of the improvements, and state the same in your verdict, or the balance of the rents over the improvements, as the case may be. In weighing the evidence on all these points, you will consider all that has been introduced on both sides, including the testimony of the plaintiff and defendant, who are competent witnesses. The interest each has in the controversy only goes to his credibility. If you shall find conflicts in the evidence, you will reconcile the differences, if you can; but, if you cannot, you will determine which statements are most probably true. If you shall find from the proof that the plaintiff is not the legal owner, and entitled to the possession of the land under the instructions given, your verdict will be simply for the defendant.

WOODBURN v. CINCINNATI, N. O. & T. P. RY. Co.

(Circuit Court, E. D. Tennessee, S. D. December 20, 1889.)

1. CARRIERS—OF GOODS—SHIPPING CONTRACT.

Plaintiff made a shipment on a road connecting with defendant's, and took a receipt from the agent, which stated that the company was "not accountable for weight, number, or condition of the packages." Following this was the name of plaintiff, destination of the goods on defendant's road, and the words, "Valuation limited to \$5.00 per 100 pounds in case of total loss." On the back was printed a statement that "when a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever;" also a printed statement that the owner of the goods, in accepting the receipt, agrees to be bound by all its stipulations, written or printed, as fully as though signed by him. Plaintiff then signed and delivered to the company a paper stating that he had voluntarily shipped at a lower rate than the general tariff, on condition that he release the company from all liability for loss or damage, and containing a formal release to the company, and all other railroad or transportation companies to whom the goods should be delivered for transportation. This release was attached to the manifest, went along with the goods, and was received by defendant. The shipping receipt was not under seal, or witnessed, and was retained by plaintiff. The goods were received by defendant at a freight rate agreed on between the roads. *Held*, that the shipping receipt and release were separate and independent papers, prepared and signed at the instance of the company receiving the goods; and that defendant could not, in its own interest, elect which of the two should be treated as the shipping contract.

2. SAME—SHIPPING RECEIPT.

The shipping receipt, not having been executed as a contract under seal, and not having been regarded and treated as one by either of the railroad companies, and having been put forward as the rate of indemnity on a total loss when there was only a partial loss, cannot be made the basis of plaintiff's recovery.

3. SAME—LIMITING LIABILITY.

As the release executed by plaintiff provided for a complete and unconditional exemption of the carrier from liability on account of loss or damage to property in the course of transportation, it is void, as against public policy, and plaintiff is entitled to recover for the full value of his goods lost.¹

4. SAME—LIABILITY OF CONNECTING LINES.

When the unconditional release came into the hands of the defendant's agents, together with the goods shipped, it was notice to defendant of the illegality of the transaction, and its liability must be determined by the principles of the general law.

At Law. Action for damages to freight.

W. H. De Witt and Wheeler & Marshall, for plaintiff.

Lewis Shepherd, for defendant.

KEY, J. The plaintiff shipped a car-load of furniture and other household goods, at the city of Philadelphia, upon the Pennsylvania railroad. Their destination was Chattanooga. They came over the lines of the Pennsylvania Railroad to the city of Cincinnati, and were delivered to the defendant, and were started over its line to Chattanooga. On their way, two of defendant's locomotives, drawing trains in opposite directions, collided, and the car containing plaintiff's goods was wrecked, and most of his goods destroyed. This suit has been brought for the value of the goods, and a jury is waived, and the whole case is left to the court for decision.

¹Respecting the extent to which common carriers may limit their liability by contract, see *Railroad Co. v. Thomas*, (Ala.) 3 South. Rep. 802, and note 2; *Express Co. v. Harris*, (Ind.) 21 N. E. Rep. 340, and note; *The Portuense*, 85 Fed. Rep. 670, and note; *Hull v. Railway Co.*, (Minn.) 43 N. W. Rep. 391.

The Pennsylvania Railroad Company executed a receipt for this carload of freight, dated February 27, 1888. This paper was handed to the plaintiff, and is produced by him. On its face is stamped: "Loaded by the shipper. Pennsylvania R. R. Co. Not accountable for weight, number, or condition of packages." There is written in the blank space for marks and description of property:

"M. A. Woodburn,
Chattanooga,
Hamilton county,
Tennessee.

Valuation Limited
to \$5.00 per 100 lbs.
in case of total loss.

71 cts. 10,000 lbs."

On the back of this receipt is printed, in very legible characters:

"When a valuation, as agreed upon, shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever."

This receipt, as it is styled, has various other stipulations and conditions printed upon its face and back, but they apply mainly, if not altogether, to the general course of shipments, and the current course of business, upon the lines of the railroad. The case in hand is contested upon the ground that it is exempt and different in its features from the run of ordinary transactions with public common carriers, and only the special and peculiar language involved in the controversy is quoted. The concluding clause in the printed conditions upon the back of the receipt is as follows:

"And finally, in accepting this shipping receipt, the shipper, owner, and consignee of the goods and the holder of the shipping receipt, agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder."

This shipping receipt was signed by the agent of the railroad company, and delivered to the plaintiff. At the same time, and as a part of the transaction, the plaintiff signed a paper in the following language:

"I, M. A. Woodburn, have this day delivered to the Pennsylvania Railroad Company, at Shack station, the following property, viz.: One car household furniture marked, 'M. A. Woodburn.' And I have agreed to pay freight on the same at the rate of ——— cents per hundred pounds from Philadelphia to Chattanooga; and I do hereby acknowledge that I have had the option of shipping the above-described articles at the rate of ——— cents per hundred pounds, according to the general tariff of said company, and thereby retaining the security of the liability of said company as common carrier of said property upon the line of their own railroad, but that I have voluntarily decided to ship at the above-mentioned rate of ——— cents per hundred pounds, and to release the said company, and any other railroad or transportation company to whom the said articles may be delivered for transportation to or towards their place of destination, of and from all liability for breakage, leakage, loss, damage, decay, delay, or otherwise howsoever, to said property, considering that the difference in my favor in the cost is more than equivalent to the risk of transportation. And I do therefore, in consideration of the premises, remise, release, quitclaim, and discharge the said railroad company, and

all other railroad or transportation companies to whom the said property may be delivered for transportation to or towards its place of destination, of and from all claims, demands, or liability whatever for breakage, leakage, loss, damage, decay, delay, or otherwise howsoever to said property, while the same is in their care, custody, or possession; and I hereby authorize the said railroad company, as my agents, to deliver said property to any other railroad or transportation company over whose route it is necessary to be carried to its place of destination; and I agree that the said railroad company shall not be considered as carriers of said property beyond the line of their own road, or in any event to be held liable for the negligence or non-performance of any other railroad or transportation company to whom the said property may be delivered as aforesaid."

In a note below the signature of the plaintiff the paper provides that "this contract (in addition to contract in G—Form 41) is to be executed by all shippers of light furniture, household goods, or other property for which a release is required, if shipments are destined to points beyond the lines noted above. It should be pinned to and forwarded with the manifest accompanying the shipment." The shipping receipt mentioned heretofore is noted as "G—Form 22B." This car-load of goods was sent from Philadelphia to Cincinnati over the Union Line, which embraces the Pennsylvania Railroad and the Pittsburgh, Cincinnati & St. Louis Railroad, under the management of the Pennsylvania Railroad, and was there delivered to the defendant, to be taken to Chattanooga. The delivery slip of the Union Line shows that the car was delivered to the defendant March 2, 1888; that the weight of the goods was 24,000 pounds; that freight was charged thereon at the rate of 56 cents per 100 pounds, of which the Union Line was entitled to 31 cents and defendant to 25 cents,—that is, the Union Line would receive the sum of \$74.40 and the defendant \$60; and a like slip of the Cincinnati Street Connection Line shows that it was entitled to \$2.40 for carrying the car between the two lines of railroad, and, when this sum is deducted from the \$60, defendant's share of the charges of transportation, it leaves the net sum of \$57.60 due defendant, as stated by witness Bryan. This delivery slip furnishes all the evidence on the part of defendant as to the rates charged; but it is shown by defendant's proof that if full damages had been claimed, or were to be claimed, in case of loss, the rate would have been doubled, or nearly so. Plaintiff swears that it was agreed that he should be charged 47 cents per 100 pounds on his shipment, and that the higher rate was 92 cents.

In the case of *Inman v. Railway Co.*, 129 U. S. 139, 9 Sup. Ct. Rep. 249, the chief justice, in delivering the opinion of the court, says:

"To secure care, diligence, and fidelity in the discharge of its public functions, the common law charged the common carrier as an insurer; but the rigor of the rule has been relaxed so as to allow reasonable limitations upon responsibility, at all events, to be imposed by contract. We have, however, uniformly held that this concession to changed conditions of business cannot be extended so far as to permit the carrier to exempt himself, by a contract with the owner of the goods, from liability for his own negligence."

In *Hart v. Railroad Co.*, 112 U. S. 340, 341, 5 Sup. Ct. Rep. 151, it is said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carriers the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. * * * The subject-matter of a contract may be valued, or the damage in case of a breach may be liquidated, in advance. In the present case, the plaintiff accepted the valuation as 'just and reasonable.' The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation, according to the nature of the animal."

Again, page 343, 112 U. S., and page 157, 5 Sup. Ct. Rep., it is said:

"The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in cases of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

In a later decision it is stated:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to hingle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld. * * * But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment. It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it from negligence in the performance of its duty, the company remains liable for such negligence. * * * The general doctrine is nowhere stated more explicitly than in *Hart v. Railroad Co.*, and *Insurance Co. v. Transportation Co.*, [6 Sup. Ct. Rep. 750, 1176.] just cited. * * * In the one, [*the Hart Case*], a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and

of protecting himself against extravagant and fanciful valuations, which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants." *Steam Co. v. Insurance Co.*, 129 U. S. 441, 442, 9 Sup. Ct. Rep. 469.

The principles and distinctions of these decisions are so clear that they need neither comment nor elucidation, and upon them rests the controversy in this trial. The defendant, in support of his defense, relies upon two papers,—one, the shipping receipt, signed by the railroad agent; and the other, the contract, signed by the plaintiff. These papers are separate and distinct in character, different in their provisions, and dissimilar in terms. They cannot be regarded as complementary to each other, as evidence of the same contract. It is true they bear the same date; and we may infer that they have reference to the same property, looking to the face of the papers only. The first paper has written upon its face: "Valuation limited to \$5.00 per hundred pounds, in case of total loss." The second paper stipulates "to release the said company, and any other railroad or transportation company to whom the said articles may be delivered for transportation to or towards their place of destination, of and from all liability for breakage, leakage, loss, damage, decay, or delay, or otherwise howsoever, to said property, considering the difference in my favor in the cost is more than equivalent to the risk of transportation. And I do therefore, in consideration of the premises, remise, release, discharge, and quitclaim the said railroad company, and all other railroad or transportation companies to whom the said property may be delivered for transportation to or towards its place of destination, of and from all claims, demands, or liability whatever for breakage, leakage, loss, damage, decay, delay, or otherwise howsoever, to said property, while the same is in their care, custody, or possession." This is a contract for complete exemption from any and all liability on account of loss or damage to the property in the course of its transportation, and manifestly against public policy, and void under the decisions cited. Admitting that the first contract is such as might be legal in its character, which of these papers is to control in the decision in this cause, under the circumstances of this case? The last contract is signed by the plaintiff. It is a form of agreement prepared and presented to him by the railroad, for his signature. When signed, it was witnessed by two of the officers of the railroad company. It is under seal, and on its face it is stated that "this contract should be pinned to and forwarded with manifest accompanying the shipment." It was so forwarded, and came along, with the manifest of the goods, to the hands of the defendant, and is produced upon the trial as evidence protecting it from or limiting its liability. It was the contract that went along with the goods, and stopped when they stopped. It was the paper that the officers and agents of the transportation companies saw when the goods came to their hands. The other paper was signed by the agent of the railroad company only. It was not witnessed, nor was it under seal. It did not travel with the goods. The stub or invoice upon which its special features were copied remained in the possession of the railroad company at Philadelphia until produced

for this trial. With the parties thus situated, in the language of one of the decisions already quoted, "the carrier and his customer do not stand upon a footing of equality." The individual customer has no real freedom of choice. He cannot afford to higggle or stand out, and seek redress in courts. He prefers rather to accept any bill of lading, or sign any paper, that the carrier presents." Both these papers were prepared by the railroad company, and executed at its instance. After a collision has taken place between the contracts, it can hardly be permitted to the company to select from the wreck the paper most beneficial to its interests, and require the other party to be controlled by its provisions. Equity and justice demand the contrary.

But it may be insisted that, while all this may be true as between the Pennsylvania Railroad Company and the plaintiff, it does not apply to the defendant. It is true that the defendant made no contract with the plaintiff as to the transportation of these goods. The goods were delivered to it by the Pittsburgh, Cincinnati & St. Louis Railway Company, a member of the Union Line. The witness of the defendant states that the goods were shipped under a limitation of value. He knew the fact from the notations on the delivery slip, which showed the contract of shipment of these goods, "that the rate of freight was much less than the regular freight rate for that class of goods. It was less because the shipper assumed the risks of damage and loss in course of transportation, and agreed that the value should be limited, in case of loss, to \$5.00 per 100 pounds." When the witness is asked to file any written or printed contract which accompanied the delivery of the goods to the defendant, or has been received since, and to attach all of them to his deposition, he responds:

"As requested, I hereto attach the contract, street connection, transfer slip, and the delivery slip, marked, respectively, 'Exhibits A, B, and C.' They were received, with the goods, March 3d, 1888, from the P., C. & St. Louis Ry. Company."

The contract attached is the original contract signed by the plaintiff, which is required to be pinned to and accompany the manifest of the shipment. The street connection transfer slip shows only that the car with the goods marked to plaintiff, "Chattanooga, Tenn.," had passed over its line; that the goods weighed 24,000 pounds, and its share of freight thereon was \$2.40. The delivery slip of the Union Line shows by its heading that this line is composed of the Pennsylvania Railroad and Pennsylvania lines west of Pittsburgh. That the car of goods had been shipped from Shackamaxon station, February 27, 1888, manifest No. 28, car 5,054, and arrived at Cincinnati, March 2, 1888. That the goods were marked: "M. A. Woodburn, Chattanooga, Tenn. One car household furniture, at owner's risk. Care of Cin. Southern." That the weight of the freight was 24,000 pounds; rate, 56 cents per 100 pounds, of which the Union Line was entitled to 31 cents and the Cincinnati Southern to 25 cents. Not one word is said in either of these papers about the limitation of value to \$5 per 100 pounds in case of total loss. The contract, and the only contract, accompanying the delivery of the goods

to the defendant is that executed by the plaintiff, exempting the company from any and all liability in case of loss or damage. The witness, however, states that the delivery slip from the connecting carrier shows a rate which is the rate for household goods shipped under a limitation of value in case of loss. The idea of the witness is that the two papers constitute a single contract of a compound character; that is, that the paper signed by the plaintiff as shipper, in consideration of the reduced rate of freight, exempted the companies from all partial damage or injury,—from such as did not amount to a total loss; and that the limitation of value in the paper signed by the railroad agent applied to total loss, exclusively. The contract evidenced by the paper signed by the plaintiff is void, whether its provisions apply to partial or total losses; and, under the theory suggested, that is, that both papers constituted but one contract, the nature and character of the provisions which invalidated the stipulations of the void paper must taint and destroy the entire contract. Being contrary to public policy, every part of the contract inhering in or dependent upon these illegal stipulations must fail.

But the stipulations of the paper executed by the plaintiff do not embrace or pertain to partial losses only, but they include damages and losses of every kind and character, both partial and total. When this paper came to the hands of defendant's agents, along with the goods to which it referred, it was notice to the defendant of the illegality of the transaction, and does not shield or protect it. Again, if the one paper applied to partial losses only, and the other paper to total losses only, the last paper would have no force or effect in this cause, because there has been no total loss of the goods. The plaintiff has accepted and received of the goods a quantity weighing about 500 pounds, and many more of them remained in the hands of the defendant in a damaged state. We have, under the condition of things, under the theory suggested, no liability on one writing because the loss is not total, and no liability on the other writing because its terms exclude any recovery under it for any injury, however it may arise. Such a contract, everything else out of the way, would not be fair and reasonable, and would be invalid on that account. A contract of the character of this should not only be fair and reasonable, but should be carried out fairly, and in substantial conformity to its provisions. This was not done in the business under consideration, conceding the validity of the contract executed by the agent of the railroad. That paper shows no rate for the freight, but it does show that there were 10,000 pounds of the freight. One of the witnesses for the defendant testifies that he weighed the goods, and they amounted in weight to 10,040 pounds. The testimony further discloses that the consideration of the limitation of \$5 per 100 pounds upon the value of these goods was the reduced rate plaintiff was to pay for transportation, and that this rate was about one-half the rate which was charged when there was no limitation upon the value of the shipment. The delivery slip given by the Union Line to the defendant, at the time the goods were delivered to it, represented the goods to be of the weight of 24,000 pounds, and charges freight accordingly. The

freights thus charged were upon more, by weight, than twice the quantity of goods received for shipment, so that plaintiff was charged more than double the amount contracted for, and more than the full rate would have been had no contract of limitation of value been made. It is not probable that the change of weight was intentional; but it is unexplained, and, so far as plaintiff is concerned, operates to his prejudice as much as if it had been intentional. If the railroad company abandoned its contract, the plaintiff might disregard and abandon it, and the parties would be left to be controlled by the general law applicable to the transaction.

It may be insisted that, whatever the conduct of the Pennsylvania Railroad Company may have been, the defendant is innocent of any wrong. It did not enter into any contract with the plaintiff in respect to the transportation of these goods. That it received the goods in the usual course of business between itself and the Union Line, as connecting lines of public common carriers, without notice of any wrongdoing. All this appears to be true. But the defendant did receive the goods, as such carrier, for transportation, and undertook to deliver them at their point of destination. While the goods were in its custody they were damaged or destroyed by its negligence. If it had no special valid contract with the plaintiff limiting its liability, its responsibility must be determined by the principles of the general law. The defendant made no such special contract upon its own account. Such contract as was made for it was made by the Pennsylvania Railroad. That contract is invalid, as we have seen, and cannot stand. The result is, the defendant's contention here must be determined under the principles of the public law, unaffected by any special contract. Defendant must be held responsible for the injury to the goods to the full extent of the damage to them by the collision in which they were wrecked.

There is but one item in the lot of goods about which there is any controversy as to value. That is the value of a piano. The plaintiff proves the value of the goods shipped to have been \$3,396.43. He admits that he has received of goods shipped various articles of the value of \$704.81, which, subtracted from the gross sum, leaves \$2,691.62. Among the articles which make this sum are a piano and stool valued at \$500. The piano was in use about 10 years, and was stored in 1874, and remained in store until just before it was shipped, when it was overhauled and repaired at a cost of \$50. It cost originally \$700. The valuation must not be a fanciful one. It must be such a sum as it would bring in the market, provided the owner wanted to sell, and the purchaser wanted to buy. Such a piece of goods is likely to be highly prized by the family, and an exaggerated opinion be entertained by them of its value. The piano was more than 20 years old, and would not probably bring a high price in the market. Taking the proof in regard to it altogether, I think \$250 would be a fair market price for it at the time of the accident. The plaintiff says he has never paid freight upon the shipment. As he receives full damages, he ought to account for the freights, which amount to \$134.40. This amount, added to the \$250

deducted from the charges for the piano, produces the sum of \$384.40, which, when taken from the balance due according to plaintiff's statement, will leave \$2,307.22, for which he will have judgment, with interest at the rate of 6 per cent. from May 1, 1888, and costs.

RAMSAY v. RYERSON.

(Circuit Court, E. D. New York. December 27, 1889.)

1. CRIMINAL CONVERSATION—FACTS NECESSARY TO BE SHOWN.

In an action for criminal conversation, where the act of adultery is not shown by direct proof, the plaintiff must show—*First*, a disposition to illicit intercourse on the part of the wife; *second*, a disposition to illicit intercourse with the wife on the part of the defendant; and, *third*, opportunity to gratify such mutual disposition.

2. SAME.

In such cases the rule is that when the evidence is as capable of an interpretation which makes it consistent with the innocence of the accused party as of one consistent with his guilt, the meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent.

3. SAME—EVIDENCE—PRESUMPTION FROM FAILURE TO INTRODUCE.

If the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent that proof of a more direct and explicit character was within the power of the party, it will be presumed that if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.

4. SAME—SUFFICIENCY OF EVIDENCE.

The circumstance upon which plaintiff especially relied in support of the inference that defendant was disposed towards improper intercourse with the wife was the discovery of two letters which plaintiff claimed were written by defendant. The letters were unsigned, were not shown to have ever been in defendant's possession, and were sought to be connected with him only by proof as to handwriting. Besides defendant's testimony denying the writing of the letters, two witnesses who had known defendant, and had business transactions with him, for 25 years, testified positively to the opinion that the letters were not in defendant's handwriting. In opposition to this testimony there appeared only the plaintiff himself. His only knowledge of defendant's handwriting was derived from having once seen him fill up an insurance policy, from having once received an itemized bill from him, and from having several times seen him make entries in his books. *Held*, that the evidence was insufficient to establish the fact that defendant wrote the letters.

At Law.

Motion for a new trial in action for criminal conversation, the jury having given plaintiff a verdict for \$2,500.

Benno Loewey, for defendant.

- (1) Where a wrong is charged wherein there is moral turpitude, there is a presumption of innocence. *Morris v. Talcott*, 96 N. Y. 100; *Jaeger v. Kelley*, 52 N. Y. 274; *Pollock v. Pollock*, 71 N. Y. 137; *Crook v. Rindskopf*, 105 N. Y. 476, 12 N. E. Rep. 174. (2) A verdict influenced by prejudice, misapprehension, or improper motives on the part of the jurors should be set aside as against the weight of evidence. *Corning v. Factory*, 44 N. Y. 577; *Wilkinson v. Greely*, 1 Curt. 63; *Childs v. Railroad Co.*, 20 Law Rep. 561; *Cady v. Insurance Co.*, 18 Int. Rev. Rec. 30; *Stafford v. Hair-Cloth Co.*, 2 Cliff. 82; *Fuller v. Fletcher*, 6 Fed. Rep. 128; *Pollard v. Railway Co.*, 62 Me. 93; *Clark v. Bank*, 8 Daly, 481; *Cruikshank v. Bank*, 26 Fed. Rep. 584. (3) Where all the witnesses to a fact are equally trustworthy, the court will

be governed rather by the means of knowledge they possess than by their number. *Taylor v. Harwood*, Taney, 487. (4) Expert testimony must be received and acted upon with caution. *U. S. v. Pendergast*, 32 Fed. Rep. 198. (5) A plaintiff being now permitted to state his own case as a witness, ought, when he is conversant with all the facts, to be able to make his right of action entirely clear. *Meddaugh v. Bigelow*, 67 Barb. 106; *Lynch v. Pyne*, 42 N. Y. Super. Ct. 11; *Corney v. Andrews*, 14 N. Y. St. Rep. 672. (6) Error in the charge is ground for a new trial. *Scott v. Lunt*, 7 Pet. 596; *U. S. v. Beatty*, Hemp. 487; *Emerson v. Hogg*, 2 Blatchf. 1. (7) What constitutes interest in a witness. *Bork v. Norton*, 2 McLean, 422; *Burroughs v. U. S.*, 2 Paine, 569; *Moran v. McLarty*, 75 N. Y. 25; *Fralick v. Stafford*, 11 Wkly. Dig. 327; *Sharon v. Hill*, 26 Fed. Rep. 337. (8) The effect of interest in a witness. *Newton v. Pope*, 1 Cow. 110; *Elwood v. Telegraph Co.*, 45 N. Y. 554; *Nicholson v. Conner*, 8 Daly, 212; *Kavanagh v. Wilson*, 70 N. Y. 179; *Andrews v. Hyde*, 3 Cliff. 516. (9) Failure to call a producible witness. *U. S. v. Schindler*, 10 Fed. Rep. 547; *Clifton v. U. S.*, 4 How. 242. (10) Hostile relations between a witness and the party against whom he is called, a proper subject of charge. *Starr v. Cragin*, 24 Hun, 177; *Newton v. Harris*, 6 N. Y. 345; *Patterson v. People*, 12 Hun, 140. (11) Condonation a bar to actions against the paramour. *Norris v. Norris*, 30 Law J. Div. & Matr. 111; *Aitken v. Macree*, 15 Fac. Col. 562, 2 Shaw, Dig. 842; *Adams v. Adams*, 36 Law J. Div. & Matr. 62, L. R. 1 Prob. & Div. 333. (12) Condonation as affecting husband's testimony as to guilt. *State v. Marvin*, 35 N. H. 22; *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Phillips v. Phillips*, 1 Rob. Ecc. 160; *Cook v. Wood*, 76 Amer. Dec. 677; *Hodges v. Windham*, Peake, 53. (13) Negligence of plaintiff in these cases. *Bunnell v. Greathead*, 49 Barb. 106; *Duberley v. Gunning*, 4 Term R. 657; *Winter v. Henn*, 4 Car. & P. 494; *Calcraft v. Earl of Harborough*, Id., 499; *Reeve, Dom. Rel.* (3d Ed.) 140; *Seagar v. Sligerland*, 2 Caines, 219; *Travis v. Barger*, 24 Barb. 614. (14) Measure of damages. *Leeds v. Cook*, 4 Esp. 256; *Ferguson v. Smethers*, 70 Ind. 519; *Cowing v. Cowing*, 33 Law J. Div. & Matr. 150; *Dain v. Wycoff*, 7 N. Y. 191; *Blunt v. Little*, 3 Mason, 106.

Z. M. Ward, also, for defendant.

(1) The verdict resting wholly on the testimony of a party which is opposed by that of disinterested and unimpeached witnesses should be set aside. *Pol-lard v. Railway Co.*, 62 Me. 93. (2) In doubtful cases, the hypothesis of innocence should prevail. *Mayer v. Mayer*, 21 N. J. Eq. 246. (3) New trial will be granted where the verdict is against the weight of evidence, although there was testimony on both sides. *Manufacturing Co. v. Foster*, 51 Barb. 350; *Adsit v. Wilson*, 7 How. Pr. 64; *Kinne v. Kinne*, 9 Conn. 102; *Brown v. Frost*, 2 Bay, 126; *Curtis v. Jackson*, 13 Mass. 506; *Byron v. Beal*, 7 Atl. Rep. 601; *Dexter v. Toll-Bridge Co.*, 12 Atl. Rep. 547; *Reclamation Co. v. Cunningham*, 71 Cal. 221, 16 Pac. Rep. 711; *Bell v. Shields*, 19 N. J. Law, 93; *Corlies v. Little*, 14 N. J. Law, 373; *Boylan v. Meeker*, 28 N. J. Law, 274; *Windmuller v. Roberston*, 23 Blatchf. 233, 23 Fed. Rep. 652.

George F. Elliot, for plaintiff.

(1) A strong preponderance of evidence against the verdict is not enough to warrant setting it aside. *Hickenbottom v. Railroad Co.*, 15 N. Y. St. Rep. 11; *Morss v. Sherrill*, 63 Barb. 23; *Beckwith v. Railroad Co.*, 64 Barb. 299; *McKinley v. Lamb*, Id. 199; *Cheney v. Railroad Co.*, 16 Hun, 415; *Pope v. Allen*, 10 Reporter, 783; *Bills v. Railroad Co.*, 84 N. Y. 10; *Emberson v. Dean*, 46 How. Pr. 236; *Brooks v. Moore*, 67 Barb. 393; *Clark v. Bank*, 8 Daly, 481; *Waters v. Insurance Co.*, 7 Reporter, 456; *Fuller v. Fletcher*, 11 Reporter, 601; *McCann v. Meehan*, 13 Reporter, 224; *Archer v. Railroad*

Co., 13 N. E. Rep. 318; *Isley v. Keth*, 9 N. Y. St. Rep. 828; *Redlein v. Railroad Co.*, 7 N. Y. St. Rep. 264; *Reitmeyer v. Ehlers*, 9 N. Y. St. Rep. 63; *Mulholland v. Mayor*, 9 N. Y. St. Rep. 85; *Archer v. Railroad Co.*, 106 N. Y. 602, 13 N. E. Rep. 318. (2) Where the evidence is contradictory, the finding of the jury is conclusive. *Finney v. Gallaudet*, 2 N. Y. Supp. 707; *Miller v. O'Dwyer*, 1 N. Y. Supp. 618; *Cummings v. Vanderbilt*, Id. 523; *Smith v. Inhabitants*, (Me.) 13 Atl. Rep. 890; *Purinton v. Railroad Co.*, (Me.) 7 Atl. Rep. 707; *Byron v. Beal*, (Me.) Id. 601; *Nash v. Somes*, (Me.) 10 Atl. Rep. 447. (3) Verdict should not be set aside for excessive damages, unless jury were plainly influenced by passion or prejudice. *Eppendorf v. Railroad Co.*, 69 N. Y. 195; *Avery v. Railroad Co.*, 2 N. Y. Supp. 101. (4) New trial should not be granted, although some mistakes have been made, if, on the whole, the verdict be substantially right, and justice have been done. *McLanahan v. Insurance Co.*, 1 Pet. 170; *Hunt v. Pooke*, 1 Abb. (U. S.) 556. (5) Generally, as to setting aside verdicts. *Folsom v. Skofeld*, 53 Me. 171; *Price v. Evans*, 4 B. Mon. 386; *Jossey v. Stapleton*, 57 Ga. 144; *Kighillinger v. Egan*, 75 Ill. 141; *Miller v. Balthasser*, 78 Ill. 302; *McAlexander v. Puryear*, 48 Miss. 420; *Wiggin v. Coffin*, 3 Story, 1; *Peck v. Land*, 2 Ga. 1.

LACOMBE, J. It is apparent from the verdict that the jury discredited the testimony both of the defendant and of the plaintiff's wife. In discussing the question, therefore, whether the verdict is, as defendant claims, against the weight of evidence, such testimony will be entirely disregarded by the court. When, however, the jury discredited the defendant's testimony, they did not thereby put the case in the same condition as if the defendant had not testified at all. Still less did they thereby alter the issues raised by the pleadings. The defendant's side of the story was not practically abandoned because of any failure on his part to sustain it with his oath; and, under the pleadings, the burden rested upon the plaintiff to show affirmatively, by competent and sufficient legal proof, that between April and October, 1887, his wife committed adultery with the defendant. If the proof were insufficient to establish that charge, the jury were not at liberty to supply any defects in such proof by inferences from outside; nor were they warranted in assuming that because they decided the defendant's narrative to be false they were entitled to jump to the conclusion that the converse of such narrative must be true, without any further examination of the testimony. In actions of this character, where the act of adultery is not shown by direct proof, the plaintiff must show—*First*, a disposition to illicit intercourse on the part of the wife; *second*, a disposition to illicit intercourse with the wife on the part of the defendant; and, *third*, opportunity to gratify such mutual disposition. It must be shown that a criminal attachment subsisted between the wife and the defendant, and that they had an opportunity to gratify their unlawful passion. *Pollock v. Pollock*, 71 N. Y. 137. The jury were so charged, and in plain and unmistakable terms were told that, while they might find these three essentials as inferences from facts, they must, in drawing such inferences, use only the facts in proof.

The evidence, if any, as to the first of these essentials need not now be discussed. This motion will be considered solely in the light of such evidence as affects the defendant. The circumstance upon which plain-

tiff especially relied in support of the inference that defendant was disposed towards improper intercourse with the wife was the discovery of the two letters, Exhibits A and C. The plaintiff claimed that these were written by defendant, and that therefore the jury might take them into consideration when drawing inferences as to defendant's disposition. The letters were unsigned, were not shown to have ever been in defendant's possession, and were sought to be connected with him only by proof as to handwriting. Not counting the defendant, who denied writing them, but whose testimony, as above indicated, the jury did not credit, there were three witnesses, and three only, examined on this point. De Baum, who had known defendant, and had business transactions with him, for over 25 years, and was quite familiar with his handwriting, testified positively to the opinion that A and C were not in defendant's handwriting. Lydecker, who had known him for 30 years, had repeated business transactions with him, and who was in no way interested in the result of this suit, also testified to the same effect. In opposition to this testimony there appeared only the plaintiff himself. His only knowledge of defendant's handwriting was derived from having once seen him fill up an insurance policy, from having once received an itemized bill from him, and from having several times seen him, in the country grocery store which he kept at Ramsays', N. J., make entries in his books. Enlightened by such measure of experience, he expressed the opinion that Exhibits A and C were written by the defendant. And, though he, as well as the defendant, had lived at Ramsays' all his life, he did not call a single witness from the many persons in that place who must be entirely familiar with defendant's handwriting. If this action were one to recover a liquidated amount upon a written obligation for the payment of money, the authenticity of which was in dispute, it is incredible that a single one of these twelve jurymen, who presented the outward seeming of intelligent business men, would have found such proof sufficient to establish the genuineness of the document sued upon. That they reached a different conclusion as to the documents in this case, and their verdict seems to indicate that they did so, resulted, probably, from an acute attack of that species of mental hysteria to which jurymen in sexual cases are so peculiarly liable. Besides these letters, the only circumstances relied on by the plaintiff as sustaining the inference that defendant had a disposition towards illicit intercourse with the wife are these: It appeared that defendant made repeated visits to the house of defendant while the latter was absent in New York. It also appeared, however, that he always called there to deliver butter or groceries, in the ordinary transaction of his business. Mrs. Tenure, the only witness to these visits, says that he came on business, to deliver goods, and did not stay more than 10 minutes, at the longest. It was shown that on one occasion he brought to the house a package of groceries under the string of which was a letter; but it also appeared that defendant was postmaster, and occasionally left his customers' mail with their groceries. The witness Mrs. Tenure also testified that the plaintiff's little boy came out of his mother's room and into witness' room, when defendant came, which

was only on Saturday mornings; but she also admitted that in the winter-time the boy came into her room nearly every day, and that in the summer-time he was always out of doors; and it was with the period from April to October only that the complaint is concerned. The same witness also testified that on one occasion defendant stopped in front of the house in a sleigh and she heard him say to the plaintiff's wife, who had gone to the gate, in a low voice,—not exactly a whisper, but a low voice,—“We are watched;” but the same witness also admits that she, the observer and reporter of this conversation, was at the time at the window of her own room,—a distance, according to her own statement, of from 100 to 150 feet. Except for the letters, there is absolutely nothing else on this branch of the case. Such evidence, standing alone, is altogether too feeble to support the inference which the jury seem to have drawn from it, especially in view of the fact that the offense charged against the defendant is a crime,—an offense involving moral turpitude. In such cases the rule is well settled that when the evidence is as capable of an interpretation which makes it consistent with the innocence of the accused party as with one consistent with his guilt the meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent. *Morris v. Talcott*, 96 N. Y. 100; *Jaeger v. Kelley*, 52 N. Y. 274; *Pollock v. Pollock*, 71 N. Y. 137; *Crook v. Rindskopf*, 105 N. Y. 476, 12 N. E. Rep. 174.

The only remaining evidence of the case is that tending to show opportunity. The plaintiff testified that, suspecting his wife's unfaithfulness, he followed her one morning, accompanied by a young man, a stranger, whom he hired for the occasion. That he saw her enter the Cosmopolitan Hotel, by the ladies' entrance. Thereupon he entered the hotel himself, by the main entrance, into the restaurant; thence went to the clerk's desk, looked over the register, to see if he could trace any names, stated his case to the clerk, who referred him to the proprietor, found the latter, and, with his permission, accompanied by the clerk, went upstairs, into the hallway outside of room No. 59. The door of No. 59 was shut, but through the fan-light over the top he heard voices within, one of these voices being that of his wife. He understood what was said, but did not state it, not being asked by either side so to do. He then left the hall-way, returning, after a considerable time, with a detective and the young man. They took post in a room adjoining, and, after another long interval, entered room 59, which they found untenanted, the bedclothes tumbled, a champagne bottle and two wine glasses standing on the table, and his wife's parasol in the fire-place. On his way home that evening he met his wife on the train. He did not see the defendant that day, except, perhaps, at Ramsay's in the evening. With regard to this narrative, two suggestions are pertinent. In the first place, it is testified to only by the plaintiff. Himself an interested witness, he does not seek to corroborate his statements by the evidence of the young man, the clerk, the register, the proprietor, or the detective, nor does he attempt to account for the absence of any of them, except the boy, *infra*. In *Clifton v. U. S.*, 4 How. 242, it is said that “if the weaker

and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal." Plaintiff's failure to avail of any corroborative proof, when such, for all that appears, was readily producible, requires us to examine this part of his narrative with more than ordinary caution. In the second place, it will be noted that, so far as above set forth, plaintiff's statement of occurrences at the Cosmopolitan Hotel does not implicate the defendant. What is it that connects him therewith? The additional statement of the plaintiff that he recognized one of the voices which he heard through the fan-light as that of George I. Ryerson. Though he knew defendant well, he was not particularly intimate with him,—had no such acquaintanceship with the tones of his voice as he may be assumed to have had with those of his wife's. Beyond this statement of plaintiff's opinion, however, as to the identity of the voice of an unseen speaker, there is not a *scintilla* of evidence connecting defendant with the transactions at the Cosmopolitan Hotel on the 11th of August. Upon this point, as in regard to the letters, plaintiff is the sole witness. To sustain a verdict in such an action as this solely upon the evidence of the plaintiff, who testifies, not to facts, but to opinions, and to opinions formed at a time when his mind was excited, and his judgment prejudiced by the passions of jealousy, shame, and anger, would be contrary alike to reason and authority.

This verdict is not sustained by the evidence, and should be set aside, especially where, as in this case, it has, perhaps, been induced by matters not in proof. On the third day of the trial, plaintiff, who had endeavored unsuccessfully to subpoena defendant's wife the evening before, called the marshal to the stand, and undertook to prove by him, before the jury, what efforts he had made to find her. This was promptly excluded. Again, at the close of defendant's case, plaintiff moved on affidavits for leave to reopen his case and to examine a new witness, the young man who accompanied him to the Cosmopolitan Hotel, and whom he had not called in chief. This was refused, on the ground that it appeared by the plaintiff's own statements, and by the city directories, that he might easily have procured the witness' attendance by the first day of the trial. So, too, plaintiff was, on the objection of defendant's counsel, refused leave to reopen his case by recalling witnesses, and examining them as to new matter not developed on cross-examination. The results of all these applications were before the jury, and, no doubt, led them to suppose that testimony damaging to the defendant was thus kept out of the case by his objection. Beyond the statement that they "might not draw inferences without actual facts to support them," the jury were not specially cautioned against giving any weight to supposed testimony not before them, the court assuming that they possessed a

higher degree of intelligence than they seem to have displayed; and this extraordinary verdict may find its possible explanation in a prejudice excited by defendant's insistence on a strict application of the rules of proof. By whatever cause it was induced, however, it is clearly not sustained by the evidence, and should be set aside.

Allusion was made upon the argument to the denial of defendant's motion to take the case from the jury upon the whole proof. Counsel refer to a rule familiar to state practice, viz., that where the court would set aside a verdict if against the defendant, it should nonsuit when asked so to do. A nonsuit in a state court and a direction of a verdict for defendant in a federal court, however, do not leave the plaintiff in the same position. In the one case he can pay up his costs, get together more evidence, and sue again; finding in the nonsuit no bar to his recovery. To such new action, however, the judgment entered upon direction of a verdict in a federal court would be a bar. *Insurance Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. Rep. 99; *Oscanyan v. Arms Co.*, 103 U. S. 261. In denying the defendant's motion to direct a verdict in his favor, it was stated that such denial was induced by the consideration that the defendant was not thereby irreparably prejudiced, the motion for a new trial securing him against any wrong from a verdict founded on insufficient proof. At the same time, it appeared to the court that, in view of the suggestion of additional proof made on the motion to reopen the case, it would be unfair to the plaintiff to prevent him from going to a jury either in this case or in any other. He might have been irreparably injured by the direction of a verdict. Let the verdict be set aside.

PREBLE v. BATES *et al.*

(Circuit Court, D. Massachusetts. December 10, 1889.)

1. BILL OF EXCEPTIONS—IN FEDERAL COURT—FILING.

A bill of exceptions, so far as regards the duty of the attorney taking it, should be considered as filed when taken to the clerk's office and placed in the hands of the proper officer for filing. The form of indorsement placed on it by the clerk is immaterial.

2. SAME.

Rev. St. U. S. § 914, requiring the pleading, practice, and forms in the circuit court to conform as near as may be to those of the courts of the state in which it is held, does not govern the preparation and perfecting of a bill of exceptions. *In re Iron Co.*, 9 Sup. Ct. Rep. 150, followed.

3. SAME—TIME OF PERFECTING.

In the federal courts the rule is that the bill of exceptions must be signed at the term in which judgment was rendered, not the term at which trial was had.

At Law.

L. C. Southard and B. F. Butler, for plaintiff.

Samuel Hoar, for defendants.

COLT, J. The question now before the court is whether a bill of exceptions can be allowed in this case. A verdict was rendered for the

plaintiff December 20, 1888, and on December 22, the counsel for the plaintiff consenting, 20 days were allowed the defendants within which to file a bill of exceptions. On January 11, 1889, or within the 20 days, the counsel for the defendants took their proposed bill of exceptions to the clerk's office of the circuit court, and handed it to the deputy-clerk, who then wrote across it, in pencil, the following memorandum: "Rec'd Jan. 11, 1889." The objection is made that this was not a filing of the bill of exceptions, and that consequently no bill is now before the court. I cannot see the force of this objection. So far as the counsel for the defendants is concerned, the bill should be considered as filed when taken to the clerk's office and placed in the hands of the proper officer for filing. The form of indorsement which the clerk, as a matter of practice or of convenience, puts upon the paper is immaterial, and cannot affect the rights of the parties. Whether notice was given the plaintiff's counsel of the filing of the bill, or a copy was served upon him, or whether what was done was in conformity with the practice in the state courts, (Pub. St. Mass. 847,) are also immaterial; because the practice and rules of the state court do not apply to proceedings in the circuit court, taken for the purpose of reviewing in the supreme court a judgment of the circuit court, and such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within section 914 of the Revised Statutes. *In re Iron Co.*, 128 U. S. 544, 553, 9 Sup. Ct. Rep. 150.

The counsel for the plaintiff raises the further objection to the allowance of any bill of exceptions in this case, that a bill of exceptions cannot be signed after the term at which the trial took place, except with the consent of counsel, or the express order of the court, and that in the present case more than one term has elapsed since the trial. After a careful examination of the cases referred to by counsel, I conceive the rule to be this,—that a bill of exceptions must be signed at the term in which judgment was rendered. This rule is subject to certain exceptions, dependent upon special circumstances, which, however, it is not necessary to consider in this case. I admit that the expression is sometimes used, "at the term the trial was had," as distinguished from the phrase, "at the term judgment was rendered." The true rule, however, is stated by Chief Justice WAITE, in *Muller v. Ehlers*, 91 U. S. 249, in the following language:

"As early as *Walton v. U. S.*, 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions, without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances."

In the present case the motion for a new trial was not finally disposed of until October 12, 1889, and no judgment has as yet been entered upon the verdict. As soon as the motion for a new trial was overruled the defendants' counsel asked to have their bill of exceptions allowed. The

consideration of the bill of exceptions was unnecessary until the motion for a new trial was decided, because that motion might have been granted, when the exceptions would fail, as a new trial would take place. The course of proceedings in this case shows the reason and justice of the rule that it is the term at which judgment is rendered, rather than the term at which the trial was had, that a bill of exceptions must be signed. For these reasons, I shall hold that the bill of exceptions in this case, filed by the defendants with the clerk, is properly before the court.

GORDON *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. December 5, 1889.)

1. CUSTOMS DUTIES—APPRAISEMENT—FOREIGN MONEY—SHANGHAI TAELS.

Small masses of silver, not always uniform in size, nor regular in shape, but conforming generally to an oval shape like that of a hat turned upside down, or of a Chinese shoe, marked by an officer selected by the *consensus* of Chinese bankers with characters indicating the fineness, and the number of taels, or the weight of the silver therein, and circulated in China as the only money of account, are coins of China; and the value of a tael of the same is a proper subject of annual estimation by the director of the mint, and of proclamation on the 1st day of January by the secretary of the treasury, within the meaning of section 3564, Rev. St. U. S.

2. SAME—PROCLAMATION AS TO VALUE.

If the value of a foreign coin be estimated by the director of the mint upon the basis used by him in estimating the values of other foreign coins of the same metal, proclaimed by the secretary of the treasury on the 1st day of January of any year, and be proclaimed by the secretary of the treasury during a subsequent month of the same year, the director, in the absence of any proof to the contrary, will be presumed to have performed his entire duty, and to have made such estimation of the value of such foreign coin at the time required by said section 3564, and the proclamation, during such subsequent month, by the secretary of the treasury of its value so estimated, is a compliance by him with the requirements of that section.

At Law. Action to recover back duties.

The plaintiffs made one importation August 28, and another September 21, 1886, into the port of New York, from Shanghai, China, of certain dressed furs, which were invoiced in Shanghai taels. The defendant, as collector of customs at that port, pursuant to the decision of the treasury department, (S. 6839,) made April 3, 1885, converted the taels at the rate of \$1.175 each into money of account of the United States; and on August 28 and September 22, 1886, respectively, the duties in the case of these importations, as estimated by the proper officers, at the legal rate thereof, on the amounts of such money so obtained, were paid by the plaintiffs to the defendant as such collector. On January 31 and February 1, 1887, respectively, the duties in the case of these importations were liquidated by the proper officers at the same amounts as the estimated amounts. Thereafter, within the time required by law, the plaintiffs protested against the exaction of duties on these amounts, claiming that duty should have been exacted on amounts so obtained by converting these taels into money of account of the United States, at the rate of \$1.1094 each; and, having made appeals

which were decided adversely to them, brought this suit to recover the duties exacted, on the difference between the amounts of money of account of the United States obtained by converting into the same these taels at the rate of \$1.175, and the amounts of such money to be obtained by converting into the same these taels at the rate of 1.1094 each. Section 3564, Rev. St. U. S., provides that "the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the value of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed on the 1st day of January by the secretary of the treasury."

On the trial, the plaintiffs, to establish that the value of these taels was as claimed by them in their protest, put in evidence a treasury circular which was issued between the dates of the importations in suit and the dates of the liquidation of the duties paid thereon, and of which the following is a copy:

"CIRCULAR.

"*Value of the Shanghai Tael.*

"1886. Department No. 144. Division of Customs.

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY.

"WASHINGTON, D. C., October 16, 1886.

"*To Collector of Customs and Others:* Under the decision dated April 3, 1885, (Synopsis, 6839,) the value of the Shanghai tael for custom-house purposes was fixed, by the advice of the director of the mint, at \$1.17 5-10. The director of the mint now reports that, upon the basis used in estimating the value of foreign silver coins specified in the circular of January 1, 1886, the value of the Shanghai tael would be \$1.1094. This value (\$1.1094) should be adopted, therefore, by custom-house officers for the tael mentioned, in cases of importations or withdrawals made after the date of these instructions, and the value heretofore attached to other Chinese taels will be reduced in the same proportion.

C. S. FAIRCHILD, Acting Secretary."

It appeared from the testimony of the defendant's witnesses that the Shanghai tael was 566 grains, or about an ounce and one-third, of silver; that fifty of these taels was a large lump, and one tael was a small lump, of silver; that each of these lumps of silver was oval shaped,—shaped somewhat like a hat turned upside down, or like a Chinese shoe, and called "sycee;" that these lumps of silver had stamped or written thereon, or written on a piece of paper pasted thereon, marks or characters indicating the fineness of the silver, and the weight or number of taels thereof; that these marks or characters were so put on by what was called the Koom Koo office, which was appointed by the consent and sanction of the Chinese bankers, and possibly of the Chinese government, though it was not a regular government office; that, as witnesses understood, any private person could melt up a lump of silver, and have such marks or characters put on it by that office; that these taels were not coin, but weight; that they were the currency or money in which all accounts were kept in Shanghai; that there were in China, besides the Shanghai tael, the Chefoo tael, the Tien Tsin tael, and various

other taels; that these other taels were also lumps of silver of different shapes, stamped or marked in a similar way to what the Shanghai taels were; that they were not coin, but weight, and were, in the respective parts of China in which they had their origin, the currency or money in which all accounts were kept; that all these different taels were regarded in China as having different values; that each of them was of less value than the haikwan tael, or government tael, in which duties at the custom-houses in China were estimated; that, in other words, it took the ordinary tael and some fraction thereof to equal in value a government tael; that the foreign value of all of these taels fluctuated as the value of silver fluctuated in London, but their value in China did not fluctuate; the copper cash, or tsien, as it was called, having certain Chinese characters on it, and issued by the different provinces of China, was its only coin; that there were a great many different issues of copper cash, of many sizes and qualities; that the copper cash was one thousand parts of a tael; that, like the Mexican silver dollar, it varied in value in China from time to time, the tael being the only standard of value, and was bought and sold the same as merchandise.

Both sides having rested, the defendant's counsel moved the court to direct the jury to find a verdict in favor of the defendant on the following grounds: (1) That as the taels in suit, as appears from the evidence therein, are not coin, but currency, no power by section 3564, Rev. St., or any other law of the United States, was given to the director of the mint to estimate, and to the secretary of the treasury to proclaim, their value; (2) that if the value of these taels were a proper subject of estimation by the director of the mint, and of proclamation by the secretary of the treasury, the time of such estimation and proclamation was, by section 3564, Rev. St., for the year 1886, limited to the 1st day of January of that year, and any such estimation or proclamation made after the last-mentioned day was null and void and of no effect for any purpose during that year; (3) that as treasury circular No. 144, issued October 16, 1886, is the only thing in the case upon which the plaintiffs rely to establish the value of the taels in suit, there is no evidence in the case to show that the value of these taels, as taken by the defendant, as collector of customs, was not the true value thereof; and (4) that the plaintiffs have not proven facts sufficient to entitle them to recover. The plaintiffs' counsel also moved the court to direct a verdict for the plaintiffs.

Edwin B. Smith and D. I. Mackie, for plaintiffs.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) I shall follow the ruling which I made in the other case. *Gordon v. Hedden*, May 7, 1889.¹ It is not essential to a coin that it should bear the date of its issue, nor that it should bear the name or *insignia* of the sovereign, nor that it should be

of any particular form, nor that its counterfeiting be made a crime by statute. In this case it appears that in China small masses of silver, not always uniform in size, nor regular in shape, but conforming generally to the design which the witness drew for us, are brought to an officer to be weighed and assayed. That officer is not directly an appointee of the government, but it seems to acquiesce in his discharging his functions. He is selected by a *consensus* of the leading members of financial and commercial houses, and it is his duty, after examining each mass, to inscribe on it a statement of its weight and fineness, predicated on the tael as a standard. Thus upon each separate mass (called "sycee") it is stated that it contains five taels and two-tenths, or three taels and one-seventh, or whatever may be the fact. These shoe-shaped pieces of silver, thus marked, circulate as the only money of account. They seem to be properly within the provisions of section 3564 of the Revised Statutes referred to, being of a substance intrinsically valuable, and as readily comparable with our standard as are the various gold and silver tokens of other countries. Such seems to have been the view taken at the mint, for the director has made the comparison and determination as to the Chinese tael, both in 1885 and 1886. There is no force in the contention of the defendant that a retrospective effect will be given to the proclamation of the secretary of the treasury if the plaintiffs' views are sustained. It appears in proof by the proclamation of October 16, 1886, that the director of the mint made the determination of value which he was required to do. When, as matter of fact, he made such determination is not stated in the proclamation, and does not appear in proof. The statute directed him to make such determination in January of 1886, and, in the absence of any proof to the contrary, it will be presumed that he performed his entire duty, and made the determination at the time when the statute directed him to. A verdict is directed for the plaintiffs for the full amount claimed.

UNITED STATES v. HOLMES.

(District Court, E. D. Missouri, E. D. December 26, 1889.)

1. POST-OFFICE—DETAINING LETTER—INDICTMENT.

An indictment against a postmaster, under Rev. St. U. S. § 8390, for detaining mail, is sufficient if it allege in the words of the statute that the letter in question was unlawfully detained, with intent to prevent its arrival. It need not aver that the letter was knowingly and willfully detained.

2. SAME.

The indictment alleging that the letter was detained two days, "with intent to prevent the arrival and delivery of the same" to the person addressed, the offense was complete, although at the expiration of that period there may have been a change of purpose.

On Demurrer to Indictment.

Thos. P. Bashaw, for defendant.

Geo. D. Reynolds, U. S. Dist. Atty.

THAYER, J. 1. The indictment in this case is in the language of the statute, (section 3890, Rev. St. U. S.,) and charges the defendant, who was at the time postmaster at St. Charles, Mo., with unlawfully detaining, for the period of two days, in his post-office, a certain letter addressed to the first assistant postmaster general, Washington, D. C., the posting of which was not prohibited by law, with intent to prevent the arrival and delivery of the same to the person to whom it was addressed. Relying on the decision in *U. S. v. Carll*, 105 U. S. 611, the defendant's counsel has demurred to the indictment because it is not averred that the letter was knowingly and willfully detained. The two cases, however, are not parallel. In the *Carll Case*, which was an indictment, under section 5431, for uttering forged securities of the United States, with intent to defraud, the court held that no offense was committed, unless the accused knew that the security was forged when he uttered it, although the statute in question did not in terms require such knowledge to be shown, to warrant a conviction. It also held that it did not necessarily follow that the accused knew that the instrument was forged or counterfeit, although it was uttered, as alleged, with intent to defraud; that the accused might have supposed it to be a genuine security, even though he uttered it in execution of a fraudulent purpose of some sort. Hence it was ruled that an indictment in the very language of the statute was bad, it being essential that it should appear that the accused knew the security to be forged or counterfeit. The reasoning does not seem applicable to the case now under consideration. It may be conceded that the defendant in the case at bar did not commit an offense, if the detention of the letter was accidental; but it is not possible to conceive how the detention could have been unintentional or unknown to the defendant, if, as the indictment avers, it was detained by him with intent to prevent the arrival and delivery of the same. The case is one in which the fact that the wrongful act in question was done knowingly and intentionally is necessarily implied from the intent with which the act is said to have been done. For that reason the court holds that it was sufficient to allege, in the words of the statute under which the indictment is drawn, that the letter in question was unlawfully detained, with intent to prevent its arrival, etc.

2. It is further insisted that it is manifest from the whole indictment that the accused did not intend to altogether prevent the arrival and delivery of the letter, but merely to delay delivery, and hence that the indictment should have been drawn, under section 3891, for detaining or delaying mail matter. Without stopping to inquire whether, under section 3890, an intent to perpetually detain must be shown, or whether an intent to detain temporarily will suffice, the answer to the objection is that the detention for two days is alleged, in the very language of the statute, to have been "with intent to prevent the arrival and delivery of the same" to the person addressed. If detained, even for that period, with intent to altogether prevent delivery, the offense was complete, al-

though at the expiration of that period there may have been a change of purpose. The demurrer, in my opinion, is not well taken, and is therefore overruled.

UNITED STATES v. DORSEY.

(District Court, S. D. Mississippi, M. D. November Term, 1889.)

1. POST-OFFICE—ROBBERY FROM MAILS—DECoy LETTERS.

The use of test or decoy letters by inspectors of mails, for the purpose of ascertaining the depredators upon the mails, is proper and justifiable, as a means to that end.

2. SAME.

The abstracting, from a letter in a registered mail package, of a silver certificate, by a railway postal clerk, after he has received it as such, and while in his possession, to be conveyed by him as other registered mail, though placed there to give him opportunity to take it, if he so chooses, is a violation of section 5467.

(Syllabus by the Court.)

Motion for a peremptory instruction to the jury to return a verdict of not guilty.

A. M. Lee, U. S. Atty.

Calhoun & Green, for defendant.

HILL, J. The question submitted to the court for decision arose upon the defendant's motion to instruct the jury to return a verdict of not guilty. The indictment makes the following averment:

"That the defendant, George P. Dorsey, on the 15th day of May, 1889, in this district, and within the jurisdiction of this court, the said George P. Dorsey being then and there employed in the postal service of the United States, in the capacity of a postal clerk, a certain registered package numbered 39, post-marked Shellmound, Miss., and directed to Messrs. Eyrich & Co., New York, and purporting to be signed by Mary Winford, in which said letter was inclosed a certain United States silver certificate, of series 1880, lettered B, and numbered 7,537,482, and of the denomination of ten dollars, and which said package had not been delivered to the party to whom it was addressed, unlawfully and feloniously, he, the said Dorsey, the said certificate out of the said package and letter then and there did steal, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

To which indictment the defendant has pleaded not guilty. It is admitted by the district attorney, on the part of the United States, that the package, letter, and certificate were prepared by Pettigrew, then acting as an inspector of the mails of the United States, and whose business was then to detect depredations on the mails of the United States, for the purpose of detecting these depredations on the railway route between Greenwood, in Leflore county, and Jackson, Miss., and not for the purpose of being conveyed by the mail to the persons addressed on

the back of the letter containing said silver certificate, but that it was intended to be placed in the hands of the postmaster at Greenwood, and by him delivered to the postal clerk at Greenwood, to give the postal clerk an opportunity to embezzle said package and letter, and to steal said silver certificate, after he should have received the same, and before the delivery thereof to the transfer postal agent at Jackson, Miss. The evidence of Pettigrew, the inspector, and the postmaster at Greenwood, is that the package known as a "registered" envelope, or package, containing the letter in which was inclosed the certificate described in the indictment, was delivered to the defendant, then acting as the postal clerk on the said route from Greenwood to Jackson, Miss. The uncontradicted testimony further is that the package described in the indictment was delivered by the defendant to the transfer clerk at Jackson, and that it was afterwards delivered by him to said Pettigrew and to McDonald, another inspector in the mail service, engaged with said Pettigrew in the examination of mail depredations on said route. The testimony of said Pettigrew and McDonald is that they opened said package and letter, and found that the same had been opened, and the silver certificate inclosed therein had been abstracted, and taken out of the same. There has been much other testimony on both sides, but which need not be stated in the consideration of the question raised by this motion.

The questions are: *First*. Was this package, letter, and certificate such mail matter as is embraced within the meaning of section 5467 of the Revised Statutes of the United States, under which the indictment is predicated? *Secondly*. Was the same intended to be conveyed through the mails of the United States, and the embezzlement or stealing of which by an employe in the mail service, into whose possession the same might come, constitutes the offense under said statute? All the decisions that I have found on the question of the right and propriety of using test or decoy letters to detect depredations on the mails of the United States, or those of other governments, justify their use, and for the reason that there is no other department of government in which so many persons are so directly interested, but there is some difference of opinion in reference to whether or not a package or letter, so used, and not intended to be received by the party to whom the same is addressed, the embezzlement and stealing of which, with the inclosure, is intended by the statute to be embraced, is the subject of embezzlement and larceny, within the meaning of the statute. The decisions mainly relied upon on the part of the defendant to sustain the motion are the recent decisions of Judge SPEER, of the southern district of Georgia, in the case of *U. S. v. Denicke*, 35 Fed. Rep. 407, and of Justice HARLAN, in the case of *U. S. v. Matthews*, Id. 890, and the cases referred to in the opinions in these cases. The decision in the first-named case is in point; and, if it is the law, will sustain defendant's motion, and some of the expressions used by the learned justice in the last-named case, if applicable to the facts in that case, would give the position some support; but the only question in that case was, whether it was intended that the letter should be con-

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veyed by mail at all, but seized before it entered into the mail. The justice, in the conclusion of the opinion, uses these words:

"My decision rests upon the ground that there was evidence tending to show that the Weidner letter was not intended to be conveyed by mail, and that the district court erred in not leaving it to the jury to determine, under all the evidence, whether it was intended to be so conveyed. The question presented is, I admit, a close one; but my best judgment favors this construction of the statute, as the one most likely to give effect to the will of congress."

I have a very high regard for the legal opinions of Justice HARLAN, and would hesitate long before disagreeing with him, in a case where he was himself fully satisfied with his own conclusions, which I infer he was not in this particular case, though, under the facts in that case, his judgment was right; that is, the question of the intention that the letter should go into the mail, under the facts proven, should have been left to the jury. I also have a high regard for the legal opinion of Judge SPEER, but am compelled to act upon my own convictions in all cases in which I am not bound by the decision of higher tribunals; and, while there are decisions on both sides of the question, I am satisfied that the opinion of Judge BROWN, concurred in by Circuit Judge JACKSON, both of whom are among our most learned and able jurists, announcing the rule which it is admitted is adverse to the motion in this case, is sustained by a weight of both authority and reason which outweighs that produced in favor of their motion, which opinion will be found in the case of *U. S. v. Wight*, 38 Fed. Rep. 106. The evil intended to be prevented by the statute is different from that in case of a common-law larceny. It is to prevent breaches of trust by those intrusted with the mails of the United States,—a branch of the public service in which almost every man and woman in the United States has a direct interest. The purpose of the statute is that all mailable matter intrusted to any of the employes, officers, or agents in the postal service, shall, without any interference with it, save that required in its necessary transportation, be conveyed from the place where it is delivered to the officers, agents, and employes of the mail service to the point of destination, by the first practicable means; and any unauthorized interference with such mail matter, and its safe and speedy transportation, is a gross breach of trust, if done by any of such employes or agents, and to prevent which was the purpose of congress in the enactment of the statute. The evidence shows that this package and contents were duly placed in the possession of the postmaster at Greenwood, and by him delivered to defendant, as the postal clerk, to be by him carried in the mail, as other mail matter, to be delivered to the transfer agent in Jackson, just as were other packages of the same kind. This is admitted by the defendant. And the package was so carried and delivered; that is, the package and the letter conveyed in it were so carried and delivered, and not intercepted by the inspectors until after the delivery to the transfer agent at Jackson. As to what was done after this, is not embraced in the present inquiry. The uncontroverted facts shown by the proof, in my opinion, establish the fact that the letter and certifi-

cate inclosed in the registered envelope were intended to be conveyed in the mail on that route, within the meaning of the statute, and that it "is no defense to the defendant that the purpose was to give him an opportunity to rifle its contents, if he saw proper to do so, though this was the only purpose of its being placed in his possession. This position, I am satisfied, is maintained by both authority and reason. The question, in nearly all the cases relied upon by defendant's counsel, was as to whether or not the letters or mail matters were intended to be placed in the mail for transportation, and therefore they do not apply to the facts in this case; and, so believing, I feel constrained to overrule the motion of defendant, to peremptorily instruct the jury to return in his favor a verdict of not guilty. I am gratified that this case is in the district court, and that a writ of error can be obtained from the circuit judge, to remove the case to the circuit court, where that court can correct any errors which I have made. I will endeavor to instruct the jury that any errors I may commit will appear in such way as to enable the circuit court to understand and correct them, as I would very much regret that the defendant should suffer for any error of mine; that is, if a verdict should be returned against the defendant; but, if in his favor, my error in this ruling, as to him, will be harmless.

UNITED STATES v. SMITH.

(Circuit Court, E. D. Virginia. December 23, 1889.)

1. INFORMATION—INFAMOUS OFFENSES.

Any offense involving imprisonment in a general state-prison or penitentiary is infamous, and cannot be prosecuted by information, under the first clause of the fifth amendment Const. U. S., which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

2. SAME—RIGHT TO FILE INFORMATION.

The right to file an information is not a prerogative of the prosecutor's office. The district attorney must first have leave of court; and the court may require him, before granting leave, to bring the accused before the court to show cause, if cause there be, against the filing of the information.

On Motion for Leave to File Information for Violation of Rev. St. U. S. § 5506.

T. R. Borland, U. S. Dist. Atty., and L. C. Bristow, Asst. U. S. Dist. Atty.

C. V. Meredith, James Lyons, and Meade Haskins, for defendant.

HUGHES, J. The information which the United States attorney moves for leave to file informs the court and charges that the accused did, at the election held for a representative in congress in Richmond on the 6th

day of November, 1888, unlawfully hinder, delay, prevent, and obstruct certain citizens named from voting in the said election. The information is founded on section 5506 of the United States Revised Statutes, which denounces as the punishment of the offense charged a fine of not less than \$500, or imprisonment for not less than one month nor more than one year, or both fine and imprisonment. A preliminary question raised in the argument was whether the district attorney may of right, by virtue of his official prerogative, file informations charging citizens with offenses brought officially to his knowledge. This cannot be done, under the rules and practice of this court, except upon previous complaint under oath, after opportunity has been given the accused to appear before the examining officer, and to confront the witnesses testifying in support of the complaint. This requisite makes it necessary that the district attorney shall have leave from the court to file an information; and, if it is within the discretion of the court whether to grant the leave or not, then the right to file is not a prerogative of the prosecutor's office, and the court may require him, before granting leave, to bring the accused, by rule or other proceeding, before the court, to show cause, if cause there be, against the filing of the information. *A fortiori* is this the case where the objection is not merely to the propriety or expediency of that method of proceeding in this particular case, but is to the jurisdiction of the court to entertain the information at all; which latter is the objection made in the case at bar. The grand jury represents the public conscience. If an act is committed offensive to the public peace, morals, interests, or policy, and is made criminal by law, the grand jury is the institution ordained in the English and American jurisprudence which is empowered to take the act under cognizance, and determine whether or not the offender shall be prosecuted criminally. It is for the grand jury to declare whether the offense is so grave as to form a case for prosecution or so trivial as to be ignored. If offenses are committed which are only private or personal in their character and bearing, they may be prosecuted by information. This is the original and general distinction between offenses properly cognizable by a grand jury and those which may be proceeded against directly by government, in the person of its public prosecutor. It is true that in practice the distinction was not long observed. The domain of the indictment was habitually invaded. Government frequently indulged in arbitrary prosecutions, instituted on the individual motion of the public prosecutor. The practice grew into an abuse, and the framers of the constitution of the United States, sensitively tenacious of the liberty of the citizen, introduced a provision into the organic law intended as a protection from arbitrary prosecutions. The first clause of the fifth amendment of that instrument declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury;" that is to say, that no person shall be triable for an infamous offense except on an indictment. In subordination to this provision of the constitution, all penal acts of congress must be construed by the courts. Indeed, they are all enacted in contemplation of this provision. An act of congress which admirably

well illustrates the distinction between offenses triable on indictment and those triable on information is that which confers jurisdiction on the police court of the District of Columbia. This act grants to that court "original and exclusive jurisdiction of all the offenses against the United States committed in the District not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable in the penitentiary." This act has been cited by the supreme court of the United States as a correct exposition of the distinction between offenses that must be prosecuted by indictment in the courts of general jurisdiction and those which may be prosecuted by information or other summary proceeding in courts of limited jurisdiction. See the case of *Mackin v. U. S.*, 117 U. S. 354, 6 Sup. Ct. Rep. 777. Many cases came before the circuit courts of the United States involving the distinction between crimes triable by indictment and those by information, before the supreme court was called upon to define that distinction. In these cases we held, looking to the word crime in the constitution, that it was the character of the crime that constituted the distinction, and not the punishment denounced by acts of congress. The circuit courts had held, as I did in *U. S. v. Baugh*, cited below, that if the offense charged is not treason, and is not declared by act of congress to be a felony, and is not of that class of misdemeanors which fall within the designation of *crimen falsi*, rendering the person convicted incompetent to testify in a court of justice, the prosecution might be by information. But when the question came before the supreme court for the first time, in 1884, and in two subsequent cases, they reversed the judges of the circuit courts, and required us to look not to the "crime," as we had thought the constitution required us to do, but to the punishment denounced by congress against acts made criminal by statute. In *Ex parte Wilson*, 5 Sup. Ct. Rep. 939, the supreme court said, in positive language, as follows:

"Within the last fifteen years, prosecutions by information have greatly increased, and the general current of opinion in the circuit and district courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness. *U. S. v. Shepard*, 1 Abb. (U. S.) 431; *U. S. v. Maxwell*, 3 Dill. 275; *U. S. v. Block*, 4 Sawy. 215; *U. S. v. Miller*, 3 Hughes, (U. S.) 553; *U. S. v. Baugh*, 4 Hughes, (U. S.) 501, 1 Fed. Rep. 784; *U. S. v. Yates*, 6 Fed. Rep. 861; *U. S. v. Field*, 21 Blatchf. 330, 16 Fed. Rep. 778; *In re Wilson*, 18 Fed. Rep. 33. But, for the reasons above stated, having regard to the object and the terms of the first provision of the fifth amendment, [of the national constitution,] as well as to the history of its proposal and adoption, and to the early understanding and practice under it, this court is of opinion that the competency of the defendant, if convicted, to be a witness in another case is not the true test; and that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court. The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury."

In another case, the supreme court reiterated that "the test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury," (*Mackin v. U. S.*, 6 Sup. Ct. Rep. 778,)—ruling that the punishment, not the crime, shall be considered, and that the punishment, if infamous, makes an indictment necessary. The court being necessarily called upon to indicate the criterion of infamy, held, further, that public opinion, and not legal and technical definitions, must determine what punishments are infamous and what not so; adding that "what punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." Still, there is nothing in the abstract utterances of the supreme court which determines what punishments do work infamy and what do not. That court assumes that the circuit courts had held that those crimes which disqualify the accused to testify were the only crimes which fell within the category of "infamous." This is not strictly so, for all these courts had held that in addition to the *crimen falsi* those crimes of every grade which the statutes declared to be felonies were infamous, and should be prosecuted on indictments. Overruling us generally in our practice of looking to crimes, and requiring us to look to punishments, in determining which were infamous and which not, the supreme court has not given us any abstract rule to guide us in distinguishing infamous from non-infamous punishments, except to declare that unstable public opinion is to govern, and not the definitions of text-books, or the precedents registered by the law reporters, except those of the supreme court itself. So far, therefore, as the circuit courts are concerned, this important question has passed beyond the pale of original reasoning; and we are under the necessity of looking solely for our guidance to public opinion, as interpreted to us by the highest authority known to our law, the authority of the supreme court itself, manifested by its decisions in such cases as have been taken before it. Three cases of the sort have been cited in argument at the bar, and I know of no others yet reported, viz., those of *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. Rep. 777; and *U. S. v. De Walt*, 128 U. S. 393, 9 Sup. Ct. Rep. 111. In *Ex parte Wilson*, the trial had been had in Arkansas, on an information founded upon section 5430 of the Revised Statutes of the United States, which denounces as the penalty for the offense created, a fine of not more than \$5,000, or imprisonment at hard labor for not more than 15 years, or both; and the accused had been sentenced to pay the maximum fine, and to suffer the maximum term of imprisonment. In the *Case of Mackin*, a conviction had been had in a prosecution by information, under section 5440 of the Revised Statutes, which makes the penalty of the offense charged a fine of not less than \$1,000 nor more than \$10,000, and imprisonment not more than two years. The sentence of the court was for a fine of \$5,000, and for the maximum

term of two years' imprisonment. In the *De Walt Case* the prosecution had been by information based upon section 5209 of the Revised Statutes, which makes the penalty for its violation imprisonment for not less than 5 nor more than 10 years in a state jail or penitentiary. The sentence was for the maximum period of 10 years, by one of the territorial courts of Wyoming. In all these cases the offenses were obviously not properly triable on informations. The sentences were severe and extreme, and in every case the accused were subjected to confinement at hard labor in a penitentiary. The cases were unusual, and out of harmony with the general practice of the courts of the United States in all other districts. We have not allowed trials to be had on informations in cases involving punishment at hard labor in general penitentiaries. Be that as it may, the question now is, what is the rule to be derived from the three decisions of the supreme court under consideration? Of course, that court declared the proceeding in each case to have been unconstitutional, and discharged the prisoners from the sentences which they were undergoing. The general principle was thereby established that there could be no trial on information for an offense punishable at hard labor. That was the express ruling in *Ex parte Wilson*. But the court went further in the two later cases. In that of *Mackin*, it said:

"How far a convict sentenced by a court of the United States to imprisonment in a state-prison or penitentiary, and not in terms sentenced to hard labor, can be put to work, either as part of his punishment or as part of the discipline and treatment of the prison, was much discussed at the bar; but we have not found it necessary to dwell upon it, because we cannot doubt that at the present day imprisonment in a state-prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the states and territories as well as of congress."

And in the *De Walt Case* it held briefly, repeating its language in the *Mackin Case*, that "at the present day imprisonment in a state-prison or penitentiary, with or without hard labor, is an infamous punishment," and could not be inflicted in a prosecution by information. These three decisions of the supreme court furnish our only guide in dealing with the question at bar. If we regard the facts of the cases reviewed, the deduction from them is that hard labor is the ingredient of the imprisonment that rendered the punishment infamous. But if we regard the language of the court hard labor is not a necessary incident, and mere imprisonment in a state-prison or penitentiary renders the punishment infamous.

One question, however, is still left open by the supreme court: What did it mean by the term "state-prison?" It is used in juxtaposition and as synonymous with "penitentiary," the meaning of which is definitely established. All understand a penitentiary to be a prison for the compulsory confinement, generally at compulsory labor, of convicts from the criminal courts. In Pennsylvania and the southern states these prisons are called "penitentiaries." But in nearly all the northern states the term "state-prison" is used synonymously with the word "penitentiary." That designation of such a prison is part of the local vernacular,

particularly in Massachusetts, the state from which Mr. Justice GRAY was appointed, who delivered the opinions of the supreme court in the *Wilson* and *Mackin Cases*. I do not agree with counsel, who resist the filing of this information, that the term "state-prison" was used by the supreme court in the general sense of any jail or lock-up of a county or city owned by the state. Such a construction would lead us to the absurd conclusion that the supreme court meant to hold that no offense involving confinement, however brief, in a state or a city jail or station-house could be prosecuted by information. The supreme court's citation of the act of congress relating to the police court of the District of Columbia negatives such a supposition; that act expressly permitting summary prosecutions for misdemeanors "not punishable by imprisonment in the penitentiary." So far as the infamy of a punishment results from imprisonment, the decisions of the supreme court settle that imprisonment in a general state-prison or penitentiary inflicts infamy, and that no offense involving such imprisonment can be prosecuted by information. They further decide that if the statute which prescribes the punishment of an offense allows a maximum imprisonment long enough to authorize the convict to be taken to a penitentiary there cannot be a prosecution by information, however short a term of imprisonment may actually be inflicted by the court. I think these rulings settle the case at bar. The statute (section 5506) authorizes an imprisonment for 12 months. Convicts of this district are sent to penitentiaries outside of Virginia, under the authority of section 5546 of the Revised Statutes, which does not, like section 5541, limit the class of persons sent, to those who are sentenced for "longer than one year." The practice of the court when sentencing for as long a term as one year is to order the confinement to be in a penitentiary. Section 5506 and this practice of the court clearly bring the case at bar within the purview of the *Cases of Wilson, Mackin, and De Walt*. It is incumbent upon me, therefore, to deny the motion of the district attorney for leave to file the information under consideration.

ROOT v. MT. ADAMS & EDEN PARK INCLINED RY. CO.

(Circuit Court, S. D. Ohio, W. D. December 24, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for infringement of patent, for an "improvement in clamping apparatus for connecting street-cars," etc., "with endless traveling devices," it appeared that neither the complainant nor the defendant was engaged in the manufacture or sale of gripping devices; that defendant's use of his device had been continued about four years without notice or intimation from complainant that he claimed for the patent in suit any construction that would interfere with defendant's use; that no irreparable injury would be suffered by complainant if a preliminary injunction were refused, but that the operation of such order might be disastrous to the defendant, and might increase the risk of travel in forcing defendant to do away with some of his appliances upon his cable road. *Held*, that a preliminary injunction would be denied.

In Equity. On motion for temporary injunction.

George Harding and Wood & Boyd, for complainant.

Parkinson & Parkinson and Ramsey, Maxwell & Ramsey, for defendant.

SAGE, J. The complainant's suit is upon a patent granted to William Eppelsheimer, March 16, 1875, for an "improvement in clamping apparatus for connecting street-cars," etc., "with endless traveling devices." The defendant's device was patented to Henry M. Lane, October 18, 1887, and is for "grip mechanism for cable railways." The complainant moves for a temporary injunction. The complainant's patent was sustained in the case of *Root v. Railroad Co.*, 37 Fed. Rep. 673, in the southern district of New York. The defendant's device in that case was not identical with that used by the defendant in this case, but it is claimed that the decision is broad enough to include it. Before considering that question, however, it will be proper to state certain other propositions which ought to be taken into account in disposing of the complainant's motion. *First.* Neither the complainant nor the defendant is engaged in the manufacture or sale of gripping devices. *Second.* If the defendant be an infringer, his infringement is not wanton. He has used devices patented since the date of the complainant's patent, and his use has been with the consent of the patentee. It was stated in the course of the argument upon the motion, that the defendant was the proprietor of the patent, and there is therefore every indication that the defendant has been acting in good faith, and without any intent to infringe upon the rights of the complainant. This use by the defendant has been continued now about four years, without notice or intimation from the complainant that he claimed for the patent in suit any construction which would interfere with defendant's use of the gripping device employed upon his road. *Third.* The continuation, during this litigation, of the use by the defendant cannot possibly interfere with the grant of other rights by the complainant. The complainant's invention being suitable for use upon cable railways only, its use upon one line cannot have any bearing upon its use on other lines, unless it should operate as a recommendation for such use. Therefore it cannot be said that any irreparable injury will be suffered by the complainant if a preliminary injunction be refused. On the other hand, while the granting of the preliminary injunction would not add to sales or other disposition of his rights by complainant, it would, in fact, reduce complainant's recovery, in the event of a decree in his favor, by exactly the value of that use during the pendency of the restraining order. *Fourth.* The operation of a temporary restraining order might be disastrous to the defendant. It was urged by counsel for the complainant, upon the presentation of the motion, that the defendant could very easily remove from its gripping apparatus the rollers or idler pulleys, and thereby avoid infringement, and that the only detriment to the defendant would be the greater friction and wear of its cable. This is not, however, clear to the court. Without these pulleys there may be danger, in operating the device, of so engaging or entangling the strands of the cable with the

wooden clamps of the grip that the brakeman could not release the cable or stop the cars. If my recollection is not altogether at fault, such an accident occurred on a cable line in this city within the last year, and was near resulting seriously, if not fatally. Now, the defendant is a common carrier of passengers. A considerable portion of its track, between Walnut Hills and the heart of the city, is upon a heavy grade, and the court is not disposed, if it can avoid it, to make an order that may increase the risk of travel. Without entering upon the question whether the defendant infringes, which will be reserved for the final hearing, it is sufficient to say that there is fair ground for contest between the parties to this litigation. The only advantage to the complainant that the court can see would result from granting the preliminary restraining order would be, possibly, to force the defendant to a settlement, but that surely would be no ground for a preliminary injunction. The defendant is solvent, and abundantly able to pay any damages that may be decreed against it. The court, therefore, taking into account the special circumstances of the parties and of the case, and leaving the questions to be litigated between parties for consideration hereafter, will make an order that the defendant, within 30 days, execute a bond in the sum of \$20,000, to pay to the complainant such sum as may upon the final hearing be decreed in his favor, and in default thereof that a preliminary injunction issue.

LAPHAM DODGE Co. v. SEVERIN *et al.*

(Circuit Court, D. Indiana. December 24, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—WASH-BOARD.

Letters patent No. 163,252, granted to E. S. Heath, September 28, 1875, for improvements in wash-boards, consisting of a grooved flexible frame, two corrugated zinc plates, two cross-bars at the upper end of the plates, and a screw-rod extending across the frame at the lower end of the plates, and connected therewith by a lap-joint, is not infringed by a wash-board having two straight legs, not flexible, and a straight cap secured to the legs by tenon and mortise joints, with a single cross-bar at the upper end, and without a screw-rod.

2. SAME—PATENTABILITY.

Letters patent No. 187,842, issued to David I. George, February 27, 1887, for improvements in wash-boards, being for substantially the same invention as that described in said Heath patent, is void for want of patentable invention. Following *Pfanschmidt v. Mercantile Co.*, 32 Fed. Rep. 667.

3. SAME—CONSTRUCTION OF CLAIM.

Where a patentee amends his application so as to exclude an improvement described in a rejected application cited by the patent-office, and obtains a patent on such amended application, his assignee cannot enjoin, as an infringement, the use of the device described in the rejected application, even though the same was improperly cited.

In Equity.

Bill by the Lapham Dodge Company against Henry Severin, Frederick Ostermyer, and Berg Applegate.

*C. & E. W. Bradford and A. L. Mason, for complainant.
George H. Lothrop and George A. Christy, for defendants.*

GRESHAM, J. This is a suit for alleged infringement of letters patent No. 168,252, granted to E. S. Heath, September 28, 1875, and No. 187,842, granted to David I. George, February 27, 1887, both for improvements in wash-boards. The patents were assigned to complainants before suit. The answer denies that Heath and George were the original inventors, and it also denies infringement of the first patent. The Heath invention is for a combination which includes a grooved flexible frame, two corrugated zinc plates, two cross-bars at the upper end of the plates, a screw-rod extending across the frame at the lower edges of the plates, and a lap-joint, formed by lapping the edge of one plate over the edge of the other and over the screw-rod. This patent contains but a single claim, which reads: "The screw-rod and corrugated zinc plates, connected therewith by a lap-joint, as specified, in combination with the grooved flexible frame-piece, A, and cross-bars, B, B, as and for the purpose specified." "My invention," says the specification, "relates to the construction and arrangement of parts, as hereinafter described, whereby the corrugated zinc plates, which form the rubbing surfaces of the wash-board, are secured together and to the flexible grooved frame. * * * The flexible wooden or metal bar, A, has grooves, K, K, to receive the side edges of the zincs, *o, o'*, and a groove, H, to receive the top edge of a plate, *a*, which forms the upper part of the board. As shown, it (*a*) is one piece with one of the zinc plates. The upper ends of the zinc are confined between two parallel cross-bars, B, B, which are secured together by rivets, *b, b*. The lower edge of one of the zincs is bent around the cross-rod, C, which connects the ends of the frame-piece, A, and is made to overlap the edge of the other zinc. The rod has a screw end, D, which adapts it to be readily removed, to allow repair or substitution of the zincs. By it, also, the latter may be clamped more or less tightly, as required."

In his original application, Heath's claim read: "The combination of the bent frame, A, A, with a groove, H, supported by the cross-pieces, B, and held together by the iron rod, C, substantially as specified." This claim was rejected by the patent-office on two references,—the Saunders Hubbell patent of 1870; and the rejected application of William Swineburn, filed August 5th of the same year. Heath's solicitor submitted an argument against the pertinency of the reference to the Hubbell patent, and apparently, without further action, filed an amended application, with a claim limited, to avoid the Swineburn reference. The Saunders Hubbell patent describes two zincs, secured in a metallic bent frame, but separated by a plate between the zincs for support, thus presenting two washing surfaces. The Swineburn rejected application showed only one zinc plate, one cross-bar, and a screw-nut on each end of the bar or rod. While it is true that a description of the Heath invention is found in this application, the Swineburn board, so far as the evidence shows, was never brought into actual use, and his rejected ap-

plication on file in the patent-office was not a "printed publication" of the Heath invention, within the meaning of the statute. One of the complainant's experts testified that the new elements introduced by Heath to distinguish his board from the two references cited, were the two zinc plates, and the lap-joint connection, by which the plate, o, was connected with the screw-rod; and that if Heath had amended his claim to read, "The screw-rod, C, and a corrugated zinc plate having its lower end bent around said rod in connection with a grooved flexible piece, A, and a cross-bar, B, as and for the purpose specified," he would not have avoided the references on which his original claim was rejected.

The defendants' alleged infringing board has a frame formed of two straight legs, and a straight cap secured to the legs by tenon and mortise joints; the legs being grooved for the reception of a single corrugated zinc plate and the soap-board. At the upper edge of the zinc is a single cross-bar, grooved to receive the zinc and the soap-board. This cross-bar is connected with the legs by tenons, which enter mortises, and by a nail driven into each leg through the tenon. The lower end or edge of the zinc is formed into a roll or tube, through which and the legs an iron rod passes, the ends of which are upset, thus uniting the legs together. The difference between this board and the Swineburn board is mechanical and trivial.

When Heath filed his original application it was the practice of the patent-office to make references and deny patents on rejected applications. He amended his claim by adding the only features of difference between his board and the board described by Swineburn, and, having thus limited his claim to meet the requirement of the patent-office, it will now avail the complainant nothing that the rejected application was improperly cited. By submitting to the decision of the office, and amending his claim so as to exclude the Swineburn improvement, Heath excluded the defendants' board, and what he thus disclaimed the complainant cannot now claim.

The complainant insists that the Swineburn reference was waived by the patent-office, but that position is fully met by the fact that Heath was obliged to accept a patent with a claim too narrow to cover all the features of the Swineburn board. The invention was for a combination; the claim is clear; Heath was not a pioneer in the art; and the patent must be strictly construed. *Water-Meter Co. v. Desper*, 101 U. S. 337; *Vulcanite Co. v. Davis*, 102 U. S. 227.

One element in Heath's original claim was "the iron rod, C," and the corresponding element in the claim, as amended and allowed, is "the screw-rod, C," and having thus limited his claim to a particular kind of a rod, namely, a screw-rod, it cannot be expanded by construction to embrace an iron rod without the screw feature. "A lap-joint" was not embraced in the original claim, while the claim in the patent requires the two plates to be connected at the bottom by such a joint. "The bent frame, A, A," was an element in the original claim, and the word "flexible" is used in the claim, as allowed, for the word "bent." The frame is required to be flexible, so that by removing the screw-rod the legs of the

frame may be sprung apart sufficiently "to allow repair or substitution of the zincs." The claim in suit is not for a "plate," but for "plates," connected at the bottom as already described, and the plate of the patent is not found in the alleged infringing board. The defendants do not use the screw-rod "to clamp more or less tightly" their frame, which is not flexible, and is not, therefore, capable of being sprung apart for the purpose described in the patent. Their riveted or upset rod is not intended to be removed; it cannot be removed without breaking; the two rods do not perform the same function; and they are not mechanical equivalents.

The single claim in the George patent reads: "In a wash-board, the corrugated metallic plate, B, formed of a single piece of sheet metal, and provided at its lower end with a tubular enlargement, substantially as specified."

The Krebs patent of 1873 describes a corrugated metallic plate formed of a single piece of sheet metal, supported by a backing board, with a tubular enlargement at the upper end of the sheet to receive a rod, for the purpose of holding the plate in position. The slight difference between the Krebs board and the George board is purely mechanical. In *Pfanschmidt v. Mercantile Co.*, 32 Fed. Rep. 667, Judge NELSON held that the George patent was void for want of patentable invention, and I concur in that ruling. The bill is dismissed for want of equity.

ASSANTE v. CHARLESTON BRIDGE Co. et al.

(District Court, D. South Carolina. December 10, 1889.)

1. COLLISION—CONFLICTING EVIDENCE.

The witnesses for libelant were contradicted by those for respondent. The credibility of none of them was impeached, and all seemed equally worthy of credit. The libel was dismissed, and the costs were divided.

2. SAME—JURISDICTION—BRIDGES OVER NAVIGABLE STREAM.

There can be no doubt that a libel *in personam* will lie against the owners of a draw-bridge across a navigable stream if injury be done to a vessel passing through the draw.

(Syllabus by the Court.)

In Admiralty. Libel for damages.

Bryan & Bryan, for libelant.

Mitchell & Smith, for Thomas Young.

John F. Ficken, for the bridge company.

SIMONTON, J. The brig Emanuele was in tow of the tug Monarch up the Ashley river, an estuary of the Atlantic ocean. The Charleston Bridge Company have their bridge across the Ashley, about a mile and a half from its mouth. The bridge runs about east and west, and has a draw-bridge with two openings, each about 76 feet wide, divided by

a center pier, on which the draw-bridge works. The tug took the tow up on the western side of Ashley river, and, opening the western draw, steered directly for it. The tow-line was about 300 feet long. The brig, acting under instructions given to her when the towage began, followed in her wake. Just as the brig entered the draw, being within the fenders, she came into collision with the fenders on the western side of the draw, striking on her port bow, near the stern. She glanced off, and struck on the pivot pier on the east side of this draw. Her starboard anchor, hanging from the cat-head, became entangled in the bridge, and the brig, hanging onto the anchor chain, swung with tide, then three-quarter flood. She was disengaged, and pursued her course up the river. The port anchor of the brig was hanging by its chain from the hawse-pipe.

Libelant charges that the collision was due to two causes acting together. The one was that the bridge is built not directly across, but obliquely to, the current of the river; that the tide flows through the draw not parallel to, but at an angle with, the pivot pier; that vessels going through the draw are thus drawn against its sides by the tide. This is a defect in the construction of the bridge, unnecessarily obstructing a navigable stream, and so unlawful. The other cause of the accident is said to be the unskillful or negligent management of the tug in not allowing for this trend of the tide, and so adding its impetus, drawing the brig upon the fenders. The master and crew of the brig and the master and crew of the tug have been examined, each witness apart from the others. The testimony is directly contradictory. The people on the brig, including an interpreter, confirm the allegations of the libel, and fix the accident upon the action of the tide within the draw, aided by the negligent and unskillful management of the tug. On the other hand, the master and engineer of the tug, and a mariner who was a passenger on board of her, himself a tug-master, all said that when the tug was nearly through the draw, proceeding carefully, and the brig was between the fenders, the latter took a sudden, unexpected, and unaccountable sheer to port, and went right on the fenders, bows on. That nothing was done by the tug to cause this. They attribute it to unseamanlike conduct on the brig, and a sudden shifting of her helm. The crew of the brig deny that she made this sheer. They also say that the helm was not shifted until she struck. It was then put a-starboard. Here we have a direct contradiction by witnesses against whom there is no attack, and who seem to be telling the truth. Like Judge MORRIS in *The Leversons*, 10 Fed. Rep. 754, I have found the attempt to discover the cause of the collision attended with more than the usual embarrassment. There are two considerations which may lead to a conclusion. One is that the brig made just such a sheer, unexpected, sudden, and unaccountable, a short time after the towage began, near the mouth of the river. At least so says the master of the tug, and the master of the brig was examined in reply, and no attempt was made to contradict this. The proctor for libelant is most accurate and watchful, showing always full possession of his case. The omission is significant. So, also, the witnesses for the tug live in this community. They have acquired a

general character, good or bad. Their credibility has not been assailed. Without doubt it would have been assailed if the attack were profitable. The case being thus nicely balanced, I will follow the course of Mr. Justice NELSON under similar circumstances, (*The Sampson*, 4 Blatchf. 28,) and let things stand as they are. For this reason, also, no ruling is made upon the construction of the bridge. If the collision arose from the sheer, it cannot be attributed to the bridge. I am not prepared to say that it did not arise from the sheer. There can be no doubt as to the jurisdiction. *Railroad Co. v. Tow-Boat Co.*, 23 How. 209; *Atlee v. Packet Co.*, 21 Wall. 389; *The Arkansas*, 17 Fed. Rep. 383. I will therefore dismiss the libel; the costs to be equally divided between the libellant and both respondents.

THE S. O. PIERCE.¹

ENGLISH v. THE S. O. PIERCE.

(District Court, S. D. New York. December 12, 1889.)

COLLISION—SLIGHT BLOW—DELAY IN SUING—OLD BOATS.

The libellant's canal-boat, while lying at a dock, was hit by another boat in tow of the tug S. O. P.; but it appeared that the blow was not a hard one; that libellant's boat was very old; that nothing was found broken in her at the time; that she continued to run for several months without repairs, and was then only caulked a little; that the impinging boat was not even scratched by the contact; and that the libel in this suit was not filed until 21 months after the occurrence. *Held*, that under such circumstances there was too much doubt of any substantial damage to warrant a decree, and that the suit should be dismissed, but without costs.

In Admiralty. Action for damage by collision.

T. C. Campbell, for libellant.

R. D. Benedict, (*E. G. Benedict*, of counsel,) for claimant.

BROWN, J. The evidence leaves no doubt that while the libellant's canal-boat *S. A. Derrick*, loaded with ice, was lying moored alongside the bulk-head at Whitbeck's Ice-House dock, North river, August 23, 1887, she received something of a blow, or contact, from another canal-boat, the *Hummel*, which had been towed to that dock by the tug *S. O. Pierce*, and was cast off there by the tug. There is great contradiction as to all the details of the occurrences at the dock,—as to the tide; the object of landing the *Hummel*; the manner and kind of contact or blow; the number of other boats in tow of the *Pierce*; the time of landing; the length of the stop; and when the *Hummel* was removed. These contradictions are such as to make difficult any satisfactory decision as to these details. There are other undisputed circumstances, however, which bring the libellant's claim to any substantial damage under so much

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

doubt that I cannot feel warranted in rendering any decree in his favor. Nothing was found broken at the time,—only some additional leak. This was very soon stopped. The boat continued to run upon her regular business for several months afterwards without any repairs, and, so far as appears, without any material change in her leaking or in the necessary work of running her. In December she had some repairs, but only a small bill for caulking, over three months after the injury complained of. In the following spring her repairs were general. The Hummel received no harm,—not a scratch or mark was caused by the contact. No survey was made of the Derrick at the time, nor any notice of any survey given to the respondents, nor opportunity afforded them to see what, if any, damage had been done; and it was not until about 21 months afterwards that this libel was filed, though nothing prevented immediate suit. The libelant's boat was a very old one. Under the evidence, it is very doubtful even whether the blow was more than one of the ordinary contacts of navigation. Under such other circumstances as I have named, there is too much doubt as to any substantial injury caused by the blow to warrant any decree. I think the entertainment of such demands, and any attempt to give damages for the comparatively slight blow that this must have been, would be more likely to result in injustice, and lead to the multiplication of suits on ill-grounded and fictitious claims, than to promote the cause of substantial justice. I must therefore dismiss the libel; but, as I am satisfied as to the contact, though not as to any substantial legal damage from it, the dismissal must be without costs.

UNITED STATES v. MEXICAN NAT. RY. CO., (six cases.) SAME v. VILLEGAS, (three cases.) SAME v. FOWZER. SAME v. SANCHEZ, (five cases.)

(Circuit Court, W. D. Texas. December 10, 1889.)

STATUTES—REPEAL—JURISDICTION OF CIRCUIT COURTS—SUITS TO RECOVER PENALTIES.

Act Cong. Feb. 26, 1885, (23 St. 333,) prohibiting the importation of contract labor, provides in section 3 that every person violating its provisions shall forfeit for each offense the sum of \$1,000, which may be sued for and recovered as debts of like amount are now recovered in the circuit courts of the United States, and that it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States. *Held* that, as the suit to recover such penalty is of a criminal nature, this provision is not repealed by the act of August 13, 1888, (25 St. 434,) providing in section 1 that "the circuit courts of the United States shall have original cognizance * * * of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000," etc.

At Law. Action to recover penalty.

Andrew J. Evans, Dist. Atty., for plaintiff.

Dodd & Nicholson, for defendant.

MAXEY, J. This suit was instituted by the government against the defendant to recover a penalty of \$1,000 for the unlawful introduction or importation into the United States of a foreign laborer from the republic of Mexico, in violation of the act of February 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia." The defendant demurs to the jurisdiction of the court, on the ground that the amount in controversy is less than \$2,000. The provisions of the act under which jurisdiction is claimed by the district attorney are as follows:

"Sec. 3. That for every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same * * * shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor, including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States." 23 St. at Large, 333.

Several amendments have been made to this statute, but the only one deemed essential in this connection to consider authorizes "the secretary of the treasury to pay to an informer who furnishes original information that the law has been violated such a share of the penalties recovered as he may deem reasonable and just, not exceeding fifty per centum, where it appears that the recovery was had in consequence of the information thus furnished." Act Oct. 19, 1888, (25 St. at Large, 567.)

Prior to the passage of the act of August 13, 1888, the circuit courts

entertained jurisdiction of suits authorized to be brought by the act of February 26, 1885, (*U. S. v. Craig*, 28 Fed. Rep. 795 *et seq.*; *U. S. v. Rector*, 36 Fed. Rep. 303 *et seq.*) and this doubtless for the reason that jurisdiction over suits to recover the penalty and forfeiture prescribed by the latter act was thought to be conferred by the terms of the act itself upon those courts. Otherwise it appears reasonably clear that the circuit courts would have been without jurisdiction to determine the particular cases. *U. S. v. Mooney*, 116 U. S. 104, 6 Sup. Ct. Rep. 304.

It was the intention of congress, as plainly manifested by the third section of the act of February 26, 1885, to invest the circuit courts with jurisdiction of suits to recover the penalties and forfeitures denounced against offenders for a violation of the provisions of the act. That view of the law is not seriously denied by the defendant, but it is insisted by its counsel that the jurisdiction thus conferred upon the circuit courts was withdrawn and repealed by the act of August 13, 1888. No reference is made in the repealing clause of the last-named act to the act of February 26, 1885. Section 5 expressly continues in force certain laws specially named, not referring to the act under discussion. Section 6 repeals the last paragraph of section 5 of the act of March 3, 1875, section 640 of the Revised Statutes, "and all laws and parts of laws in conflict with the provisions of this act." 25 St. at Large, 436, 437. Referring to the effect of similar words employed in the repealing clause of the act of March 3, 1875, the supreme court says:

"This implies very strongly that there may be acts on the same subject which are not thereby repealed. The usual formula of a repealing clause intended to be universal is that all acts on this subject, or all acts coming within its purview, are repealed, or the acts intended to be repealed are named or specifically referred to. In this case the effect of the statute as a repeal by implication, arising from inconsistency of provisions, or from the supposed intention of the legislature to substitute one new statute for all prior legislation on the subject, is not left to its usual operations, but the statute to be repealed must be in conflict with the act under consideration, or that effect does not follow." *Hess v. Reynolds*, 113 U. S. 79, 80, 5 Sup. Ct. Rep. 377.

The contention of the defendant here is that there is an inconsistency, a conflict, between the acts of August 13, 1888, and February 26, 1885, and reliance is placed upon the first section of the former act to show such conflict. So much of the first section of the act of August 13, 1888, as it is deemed essential to notice, is as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners." 25 St. at Large, 434.

Jurisdiction is conferred upon the circuit courts, in the words of the act, "of all suits of a civil nature, at common law or in equity;" and the defendant assumes that those courts, by the language used, are invested with jurisdiction of suits to recover penalties and forfeitures, because, it

is urged, that suits of the description last named are suits of a civil nature. The argument is plausible, but it seems to be unsupported by the authorities.

It is useless to enter upon a critical analysis of the act of February 26, 1885, to demonstrate that the suits thereby authorized are not suits of a civil nature. Suffice it to say that the statute denounces the prohibited act of importation, etc., as an offense; the penalty attached to its commission is the forfeiture of \$1,000; and the proceeds are paid into the treasury, less such share of the penalties, under the amendment of October 19, 1888, as the secretary of the treasury may in his discretion pay the informer. It is apparent that the forfeiture does not arise from any contractual relation between the government and the offender. It does not accrue from the violation of a private right, but grows out of the commission of an offense against the public. That the mere form of the action is civil is regarded as immaterial, as the courts look beyond that to inquire into the nature of the suit. A reference to the authorities will be sufficient to show that the suit at bar is of a penal, not civil, nature, and the decisions appear to leave no doubt upon the point.

Thus it is said by the supreme court, construing a state statute, in a case affecting its original jurisdiction:

"The statute of Wisconsin, under which the state recovered in one of her own courts the judgment now here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another state doing business in the state of Wisconsin without having deposited with the proper officer of the state a full statement of its property and business during the previous year. * * * The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. * * * The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action, or whether under that law a judgment there obtained for the penalty might be enforced by execution, by *seire facias*, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to pay a pecuniary fine by way of punishment for the offense." *Wisconsin v. Insurance Co.*, 127 U. S. 299, 8 Sup. Ct. Rep. 1370.

The Wisconsin suit was in the form of an action of debt.

The question is thoroughly considered in an elaborate and interesting opinion rendered by Judge BREWER in *State v. Railroad Co.*, 37 Fed. Rep. 497-504; and also by Judge LACOMBE in the case of *Ferguson v. Ross*, 38 Fed. Rep. 161-163, to which reference is made.

There is a striking similarity between this suit and *U. S. v. Mooney*, *supra*. There the government brought suit in the circuit court to recover of the defendant \$20,000, the value of certain merchandise imported by him, which it was alleged he had forfeited to the United States. The

defendant moved to dismiss the suit for the want of jurisdiction. His contention was that, by the ninth section of the judiciary act of 1789, the district courts were given exclusive original cognizance of all suits for penalties and forfeitures incurred under the laws of the United States. It was conceded by counsel for the government that the exclusive jurisdiction of all suits for penalties and forfeitures under the customs laws of the United States continued in the district courts until the passage of the act of March 3, 1875; but it was claimed that the first section of that act gave the circuit courts concurrent jurisdiction of such suits, upon the ground that suits for penalties and forfeitures were included in the general language of the section,—“all suits of a civil nature, at common law or in equity.” The court held, speaking through Mr. Justice Woods, that the jurisdiction of the district courts was exclusive, and, discussing the question, said:

“It was never held that the words, ‘all suits of a civil nature, at common law or in equity,’ used in section 11, included suits for penalties and forfeitures, of which the district courts had been given exclusive jurisdiction by section 9. How, then, can the substantial re-enactment of section 11 by the act of March 3, 1875, with modifications immaterial, as far as the question in hand is concerned, have an effect which the original section did not?” 116 U. S. 106, 6 Sup. Ct. Rep. 305.

It is worthy of note that, under the Revised Statutes, “the district courts shall have jurisdiction as follows: * * * *Third*, of all suits for penalties and forfeitures incurred under any law of the United States.” Rev. St. § 563. The word “exclusive” does not appear in the revision. The effect of its omission is not discussed by the supreme court, nor is its consideration in this case deemed important.

If the language of the first section of the act of March 3, 1875, did not include suits for penalties and forfeitures, of which the district courts had jurisdiction under the act of 1789, no greater force or effect can be given the same language employed in the first section of the act of August 13, 1888, and it necessarily follows that the words used in the last-named act do not include suits for penalties and forfeitures, of which the circuit courts are given express jurisdiction by the act of February 26, 1885. The latter act, therefore, cannot be in conflict with the first section of the act of August 13, 1888, where the grant of jurisdiction embraces “all suits of a civil nature, at common law or in equity.” Again, it is familiar law that repeals by implication are not favored, and where there are two statutes upon the same subject the rule is to give effect to both, if it can be done by any reasonable construction. Says the supreme court:

“If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.” *State v. Stoll*, 17 Wall. 431; *U. S. v. Tynen*, 11 Wall. 92; *Venable v. Richards*, 105 U. S. 688.

Discussing the question of the repeal of one jurisdictional statute by another, Judge McCrary uses this language in reference to the act of March 3, 1875:

"But it is very clear that the act of 1875 has no such sweeping effect as that claimed for it by counsel. It is a general statute on the subject of the jurisdiction of the circuit courts, and it does not repeal prior statutes conferring jurisdiction upon those courts in special cases, or over particular controversies, unless it is clear from the language employed that such was the intent of congress. There is no express repeal of section 629 of the Revised Statutes. The law does not favor a repeal by implication, and, in order to support such a repeal, the repugnance between the later and earlier statutes must be quite plain. If the subsequent act can be reconciled with the former, it will not be held to repeal it. * * * To give to the act of 1875 the construction contended for, and to hold that there is no other statute under which the circuit courts of the United States can in any case have jurisdiction, would lead to consequences disastrous in their effects, and which congress could not have had in contemplation. An examination of prior statutes will show numerous provisions under which suits may be brought in particular cases in the circuit courts of the United States, and some, at least, of which could not be maintained under the act of 1875." *Bank v. Harrison*, 8 Fed. Rep. 722.

To same effect see opinion by Mr. Justice GRAY in *Price v. Abbott*, 17 Fed. Rep. 508.

It may be said of the defendant's position here, touching the effect of the act of August 13, 1888, as was said by the court in *Mooney's Case*:

"To sustain the contention of the plaintiffs, we must hold that the purpose of section 1 of the act of March 3, 1875, was to repeal by implication and supersede all the laws conferring jurisdiction on the circuit courts, and of itself to cover and regulate the whole subject. But this construction would lead to consequences which it is clear congress did not contemplate. * * * If that act is intended to supersede previous acts conferring jurisdiction on the circuit courts, then those courts are left without jurisdiction in any of the cases above specified, where the amount in controversy does not exceed the sum of \$500; and in several classes of cases, for instance, suits arising under the patent or copyright laws, neither the circuit nor district court of the United States would have jurisdiction when the amount in controversy is less than \$500. But by Rev. St. § 711, par. 5, the jurisdiction of the state courts in cases arising under the patent and copyright laws is excluded. Therefore, when the matter in dispute in a case arising under these laws is less than \$500, if we yield to the contention of plaintiffs, it would follow that no court whatever had jurisdiction. A construction which involves such results was clearly not contemplated by congress. The act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases, and over particular subjects. * * * Thus construed, there is no conflict between section 1 of the act of March 3, 1875, and section 9 of the act of 1789, which conferred exclusive jurisdiction on the district courts of suits for penalties and forfeitures incurred under the laws of the United States. The latter section, therefore, except as modified by statutes conferring jurisdiction upon the circuit courts in special cases, still remains in force." 116 U. S. 106-108, 6 Sup. Ct. Rep. 305, 306.

The *Case of Mooney* is not distinguishable in principle from this suit, and if the act of March 3, 1875, as held by Mr. Justice WOODS, did not repeal section 9 of the act of 1789, because there was no conflict between them, for a similar reason it must be held that the act of February 26, 1885, is not repealed by the act of August 13, 1888. There is no repugnance nor inconsistency between the two acts. They relate to suits of a different character,—the one to suits of a civil nature; the other to suits

of a penal or criminal nature. The act of 1885 confers jurisdiction on the circuit courts in special cases, and over particular subjects; that of August 13, 1888, is general in its character. Effect may be given to both, and both may stand without violating any rule of statutory construction. The act of August 13, 1888, therefore, does not repeal the former law, and jurisdiction of the circuit courts remains as conferred by the act of February 26, 1885. It follows that the demurrer to the jurisdiction must be overruled, and it is so ordered.

TEALL *et al.* v. SLAVEN *et al.*

(Circuit Court, N. D. California. December 30, 1889.)

1. EQUITY—JURISDICTION—FRAUD—CANCELLATION OF INSTRUMENTS.

There may often be a remedy, at law, for fraud, but where it is desirable to remove a cloud from the title to real estate by decreeing a cancellation of a fraudulent conveyance, that remedy, being more complete, courts of equity will take jurisdiction, and grant appropriate relief.

2. SAME—LIMITATION OF ACTIONS—DISCOVERY OF FRAUD.

In providing for limitations of actions founded on fraud, the legislature has adopted the principle established by courts of equity, that the cause of action shall not be deemed to have accrued until the "discovery of the facts constituting the fraud;" and to ascertain what conditions constitute a discovery, within the meaning of such statutes, the principles established in equity jurisprudence, whence the idea was derived, must be applied.

3. SAME—NOTICE.

The established principles as to the discovery of fraud, are: That the party must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which if diligently followed would lead to a discovery, is, in law, equivalent to a discovery.

4. SAME—RECORD OF FRAUDULENT DEED.

Where a deed alleged to be fraudulent, bearing evidence of fraud upon its face, has been duly recorded upwards of 30 years, it affords just as strong evidence of fraud to the parties defrauded, as it does to subsequent purchasers. As to the parties defrauded, the question, of what the record imparts knowledge, is not as in the case of subsequent purchasers, a question of statutory constructive notice, but of diligence.

5. SAME—PLEADING.

Where a bill to annul a conveyance on the ground of fraud is filed, more than 30 years after the performance of the acts of fraud complained of; and, in order to bring the case within the statutory exception, it is alleged, that, "the acts constituting the fraud" have only been discovered within 3 years before the filing of the bill, it is, also, necessary to set forth in the bill, *specifically*, what the impediments were to an earlier prosecution of the claim; how the complainant came to be so long ignorant of his alleged rights; the means used by the respondent to keep him in ignorance, and how he first came to a knowledge of his rights.

6. SAME—LACHES—NON-RESIDENCE.

The non-residence and continued absence of the complainant from the state does not excuse a want of diligence in ascertaining his rights.

7. SAME—FACTS IN SUIT.

It is alleged in the bill, that T., a citizen and resident of New York owning land in California, executed a power of attorney to D., to take exclusive possession and control of the same, and to sell and convey it at his discretion, which power of attorney was duly recorded and remained unrevoked till the death of T., on August 12, 1857; that after the death of T., on September 17, 1857, D. by virtue of said power of attorney executed in the name of D. a conveyance expressing a consideration of \$5,000, to R., of a large amount of said real property situated in the city of San José, the said conveyance bearing date August 1, 1857, 11 days prior to the death of T.;

that on the same day, for a like consideration expressed, R. conveyed the same property to D., by deed bearing the same date; that said conveyances were made without consideration, and for the fraudulent purpose of enabling D. to appropriate said property of T. to his own purposes; that said conveyances were acknowledged on September 17, and recorded on October 3, 1857; that the numerous respondents are grantees direct, and mesne, from D., and that they purchased with a knowledge of the title of T.; that D. in his life-time, and respondents, and their grantors, since D.'s death in 1876, concealed these fraudulent acts from complainants, a portion of the heirs of T., who have always lived in the state of New York and never have been in California, and that they did not discover these fraudulent acts until some time in the year 1887, a short time before the commencement of this suit. *Held*, (1) that the suit is barred by the statute of limitations of California; (2) that the cause of suit is stale, and will not be enforced within the established principles of equity jurisprudence; (3) that during the 32 years that have elapsed since the death of T., and the 14 years since the death of D., presumably the only parties who knew their exact relations to each other, and to this land, no sufficient diligence has been exercised by complainants to preserve their right of suit; and (4) that the impediments to a prosecution of the rights of complainants; how they were so long ignorant of them; the means of concealment adopted by respondents, and how complainants first came to a knowledge of their rights, are not sufficiently set out in the bill.

(Syllabus by the Court.)

In Equity. On demurrer to the second amended bill.

This is a bill filed by three parties claiming to be a portion of the heirs at law of Oliver Teall, deceased, and entitled to three-fifteenths of the property in question, against many defendants, said to be 336 in number, to set aside a conveyance from said Oliver Teall, by his attorney in fact, Davis Devine, to A. L. Rhodes, and a conveyance from A. L. Rhodes to said Davis Devine, made in 1857, on the ground of fraud, and to compel a conveyance of their undivided share of property, which consists of a large number of lots, said to be 1,000 or more, situate in the city of San José. The other heirs, with one exception, who is made a defendant, declined to join, and for that reason are not made parties. The bill alleges, that, the deceased, Oliver Teall, in 1852, made a power of attorney to Davis Devine, giving him full power to take possession of, and to control and sell all real estate owned by said Teall in San José, which power of attorney was duly acknowledged and recorded on March 16, 1852; and that it continued in force and unrevoked down to the time of the decease of said Teall. That said Teall died August 12, 1857; that on August 1, 1857, and down to his death, Teall owned the property in question; that at a date unknown, but by a deed bearing date August 1, 1857, said Davis Devine, as the attorney in fact of said Teall, purporting to act under the said power of attorney, conveyed said property to one, A. L. Rhodes, and thereupon, on the same day, said Rhodes conveyed the same to said Devine; that the several deeds of conveyance expressed a consideration of \$5,000 each, but that in fact no consideration was paid by either; that the conveyance by Devine was not authorized by Teall, but was made for the fraudulent purpose of obtaining the property for himself; that the conveyances, although bearing date August 1, were not, in fact, executed till September 17, 1857, on which day they were acknowledged; that they were recorded on October 3, 1857, and are still of record; that the defendants in this case are in possession of their respective portions, either under conveyances direct, or mesne, from said Devine, made subsequent to the record of said pretended,

and fraudulent conveyances; or as heirs or devisees of said Devine; that "said possession was taken by said defendants, and each of them, with full notice of the title of said Oliver Teall, and his heirs to said premises, and of the relation of principal and agent subsisting between him and said Devine, as heretofore averred at the time of the date of said pretended and fraudulent conveyances, and are not purchasers of said premises or any part thereof in good faith and for value." This it will be observed, is somewhat indefinite and evasive, as it merely alleges that at the date of those conveyances, the parties knew that Teall owned the property, and the relation of the parties, but it does not aver squarely that they or any of them knew that the conveyances were made without consideration for a fraudulent purpose, unless it can be inferred from the averment of the legal conclusion, merely, that they were "not purchasers in good faith." The bill, also, avers that the land was within the pueblo of San José, and was confirmed to the city for the benefit of its grantees; that a patent was issued to the city on June 4, 1884, and that a portion has already been conveyed by the city of San José to some of the defendants, and the legal title under the patent to the remainder is still vested in the city. In the second amended bill are the following additional allegations: That complainants are natives and citizens of the state of New York; that they have always resided in said state, *and were never in the state of California*; that Devine died *in 1876*, and during his life, and after the death of Teall, he "carefully *concealed* the truth of the facts, as alleged, from complainants, and falsely represented to them, that the said Devine was the owner of the property described," and after Devine's death, his heirs and others claiming under him, "*concealed* the truth from the complainants, and persistently, falsely, and fraudulently represented to claimants that all of said property belonged to said Devine in his life-time;" and all on record at his death belonged to him; "that none of complainants knew of said conveyances, to-wit; said conveyance from Davis Devine as agent of Oliver Teall to A. L. Rhodes, and said conveyance of A. L. Rhodes to Davis Devine, until the year 1887;" and "*that the said false and fraudulent representations made by said Devine and by his widow, and by their agents, etc., were believed by the complainants to be true, until the year 1887, when they were informed and became cognizant of the truth, as herein set forth in their bill of complaint.*"

J. B. Lamar, J. E. Foulds and W. H. Castle, for complainants.

Estee, Wilson & McCutchen and S. F. Leib, for respondents.

Before SAWYER, Circuit Judge.

SAWYER, J. The foregoing statement contains all the allegations of the bill in any way affecting the points at issue, after having been twice amended; and as the bill is unverified by the oath of any person, it must be presumed to state the case of the complainants as favorably to themselves as the facts will justify. The defendants demur, and rely mainly upon four points: (1) That the complainants have a complete remedy at law; (2) that the cause of suit is stale; (3) that the suit is barred by the statute of limitations of California; and (4) that the facts

are insufficient to constitute a cause of suit, and there is no equity in the bill.

As to the first ground it is urged, that if the conveyance from Devine to Rhodes, under his power of attorney from Teall, was not executed till after Teall's death, as alleged, then it was utterly void, for want of authority, for the power of attorney was, necessarily, vitiated, or revoked in law, by the death of Teall, and this could be shown in an action at law to recover the lands. Hence there is no necessity for going into equity, as there would be a full, speedy, and complete remedy at law. Fraud can often be made available at law, as well as in equity; but it does not follow that the remedy at law is as complete, as in equity. Thus, in this case, suppose a recovery should be had at law, by showing that these conveyances are void upon the ground alleged, the conveyances would be still outstanding of record, uncanceled, and the apparent title of record would still be in those holding under them. Though fraudulent, they would constitute a cloud upon the title. Fraud has always been one of the principal heads of equity jurisdiction, and in this case, in order to afford a complete remedy for the fraud alleged, it would be necessary to decree the conveyances to be fraudulent, and cancel them, or compel a conveyance of the apparent title in defendants to the parties entitled. No other remedy would be adequate. This point is therefore overruled.

But the points that the cause of suit is stale, upon the well-established principles of equity jurisprudence; and that the suit is barred by the statute of limitations of California, which is applicable to suits in equity, as well as to actions of law, and will therefore be enforced in the national courts, I think are clearly well taken. The principles that govern, are applicable to both points, and I shall briefly consider them together. The complainants insist, that, this is a suit "for relief on the ground of fraud," under section 338, Code Civil Proc., which is barred in three years. But the fourth clause adds: "The cause of action in such case, not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." The complainants urge that they did not discover the facts till 1887, and that they are, therefore, within this saving clause. This provision was imported into the statutes of limitations from the equity practice of restraining the setting up of the statute in actions at law, founded upon fraud, under similar circumstances, until the time had elapsed after the discovery of the facts, constituting the fraud. See *Bank v. Kissane*, 13 Sawy. 2, 32 Fed. Rep. 429; *Norris v. Haggin*, 12 Sawy. 53, 28 Fed. Rep. 275. I had occasion to consider this whole subject very fully in the last case cited, in which I said:

"To ascertain of what acts a discovery of the facts constituting the fraud affording the ground for relief consists, we must go to the principles established in equity law, whence the idea was derived. The settled principles on this point are, that the party defrauded must be diligent in making inquiry; that the means of knowledge are equivalent to knowledge; that a clew to the facts, which if followed up diligently, would lead to a discovery—is, in law * * * equivalent to knowledge. In stating the policy of statutes of lim-

itations, and in illustrating these principles of construction applicable thereto, Mr. Justice SWAYNE, speaking for the court, in *Wood v. Carpenter*, *supra*, [101 U. S. 139] together with much more to the point, said: 'Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose, by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is, constantly, destroying the evidence of rights, they supply its place by presumption, which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself, a conclusive bar. The bane and the antidote go together.' * * * 'It will be observed, also, that there is no averment that during the long period over which the transactions referred to, extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances, to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort.' * * * The discovery of the cause of action, if such it may be termed, is thus set forth: "And the plaintiff further avers, that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit." There is nothing further upon the subject. * * * "Whatever is notice enough to excite attention, and to put the party on his guard, and call for inquiry, is notice of everything, to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Kennedy v. Green*, 3 Mylne & K. 722. "The presumption is that, if the party affected by any fraudulent transaction or management, might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." *Ang. Lim. § 187*, and note. A party seeking to avoid the bar of the statute on account of fraud, must aver and show that he used due diligence to detect it, and if he had the means of discovery, in his power, he will be held to have known it. *Buckner v. Calcote*, 28 Miss. 432, 434. See also, *Nudd v. Hamblin*, 8 Allen, 130. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same in effect, as knowledge itself. He does not say that he had not full possession of means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been concealment, and the possession of such means of knowledge, is, in equity, the same as knowledge itself." *New Albany v. Burke*, 11 Wall. 107."

What have the complainants in this case done to unearth this alleged fraud? They do not inform us. They allege that neither of them has ever been in the state of California. They allege generally that all these 336 defendants, and their indefinite number of grantors, have concealed the alleged fraud, and the only means of concealment alleged, is, that they claimed to own the lands which they had purchased, and that their first grantor, Devine, owned it before them. This bill was filed June 1, 1889, and Teall died August 1, 1857, nearly 32 years before the filing of the bill. San José was then a small town. Now it is a large city. In the nature of things there must have been during that time almost

innumerable transfers of portions of this real estate. These lands are alleged to be held by defendants by direct and through *mesne conveyances* from Devine; much of it must naturally have passed through many hands, during the last 32 years, and the number of those who now hold, and who have held, them during that time, must have run up into the thousands. And all these, under the general allegations of the bill, must have concealed the great fraud by representing to these complainants that Devine once owned the land, and that they owned it by purchase from him. No one of the complainants was ever in California. Did these several defendants and their numerous grantors go to New York to give the complainants this false information, upon which they so confidently relied? All the defendants' grantors, as well as the defendants, must have purchased with notice of the fraud, or their title cannot be shaken. I presume any party who supposes he has found a clear, apparently perfect title of record to land, and purchased it on the faith of the record, would be very apt to allege that he owned it, and that his grantor before him owned it, when his right should be challenged by a stranger, who claimed it himself. Can such action alone, be concealment of the fraud in such sense as to constitute bad faith and vitiate their titles? Would such a claim alone, be any sort of evidence that he was concealing a known fraud? The first thing to do, it would seem, is to show by other satisfactory evidence, that there was, in fact, a fraud, and that he purchased with knowledge of that fraud. The pleader would seem to base his loose general allegation of notice of the fraud alleged, in making the two conveyances of August 1, 1857, by all deriving title under Devine, upon the fact, that they purchased subsequently to these conveyances having been placed upon the record—this fact being so particularly alleged; and that the record upon its face afforded them such notice of the fraud, as would vitiate their purchase for want of good faith. It may be true, that finding upon the record, the two deeds dated a few days before, but acknowledged and recorded a few weeks after the death of Teall; the first being a conveyance from Teall, by Devine, as his attorney, to Rhodes, and the next by Rhodes to Devine, on the same day, should excite suspicion. But it is not unusual for conveyances to be executed and delivered before acknowledged, and at some subsequent time be either acknowledged, or proved, by the witnesses thereto, and recorded. So that fact is by no means conclusive evidence of fraud. So, also, the law does not encourage dealings between principals and their agents, or trustors and trustees, especially through acts of the agents or trustees, but yet such transactions sometimes do occur, and are not questioned by the principals. But where they have taken place, and have not been called into question by the principals or their representatives for many years, it would seem that strangers ought to be protected from future disturbance by the principals. But however this may be, if the record upon its face afforded purchasers the means of detecting the fraud, it was equally efficacious for the suggestion of fraud to these complainants. If a consultation of the record would bring knowledge home to purchasers, a similar consultation would have brought it home to these complainants.

It is urged however, by complainants, that under the statutes of California, the record of a conveyance is *constructive* notice only to *subsequent* purchasers, and is not such to other parties. Grant it for the purposes of this case; but this is not a question of "*constructive notice*;" it is a question of diligence—whether these complainants and their ancestors, have exercised due diligence in ascertaining their rights and pursuing their remedies? In this, and in all other of the United States, the statutes provide for recording all instruments of conveyance. These laws are presumed to be known by all who are affected by them, and they are in fact, known to all citizens having the slightest degree of intelligence. A storehouse of information is here provided by law, open to all. These conveyances, were, in fact, recorded as required by law, almost 32 years ago—nearly a third of a century. The record was open to the examination of the complainants, and if, not constructive notice binding upon them, whether they examined it or not, they *knew* that if Teall or Devine had a title to these lands, that the title to them must be on the record, and that they could find it readily by looking for it; and when found, it would have given them in fact, that same information—actual information—that in law, it communicated to the defendants whether they examined it or not. In order to avoid the inconvenience of the actual notice and relieve themselves from the embarrassment of possessing the same knowledge, in fact, as that imposed by law upon the defendants as purchasers, complainants take pains to aver, that they were non-residents of the state and had never been in it; and did not know that these two conveyances were in existence and on the records of Santa Clara county till 1887. Now if they made inquiries of all these defendants, and these defendants fraudulently told them, as they allege, that Devine owned all the lands that stood in his name on the record, at, and before the time of his death, and they purchased from him, that representation of itself, must necessarily have in fact, by implication, at least, brought to their notice, the existence of these conveyances upon the record. At all events, with the knowledge they must have had that titles are required to be recorded, and that these defendants claimed the land, if they did not consult the record, to see what title Teall and Devine had to these lands, they were guilty of the grossest laches and negligence, and were unaccountably inattentive to their own interests. If they did examine it, in person, or by agents, the record afforded them the same clues to fraud, that were furnished to purchasers, and if followed up vigorously, and intelligently, it could not have failed to unearth any fraud that in fact, existed. If they failed to do this, it was their own fault. As before stated, "the party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the facts which if followed up diligently, would lead to a discovery is, in law, equivalent to a discovery—equivalent to knowledge," wholly independent, and outside of statutory constructive notice of the contents of a record. *Hecht v. Slaney*, 72 Cal. 363, 367, 14 Pac. Rep. 88; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 430-433, 9 Fed. Rep. 726.

So, also, the means by which the complainants were so long kept igno-

rant of these rights by the respondents and the impediments, etc., to an earlier prosecution of their claims, are not, sufficiently, set out in the bill. Says the supreme court, in *Godden v. Kimmell*, 99 U. S. 211:

"Courts of equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been, fraudulently, and, successfully, concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought; but the rule is that the *cestui que trust* should set forth in the bill specifically, what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights. *Badger v. Badger*, 2 Wall. 87; *White v. Parnter*, 1 Knapp, 227. When a party appeals to the conscience of the chancellor in support of a claim, says Mr. Justice FIELD, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer, or any formal plea of the statute of limitations contained in the answer. *Marsh v. Whitmore*, 21 Wall. 185."

None of these means are set out in this bill.

The same doctrine is repeated in *Richards v. Mackall*, 124 U. S. 187, 8 Sup. Ct. Rep. 437. See, also, *Sullivan v. Railroad Co.*, 94 U. S. 806-811; *Brown v. County of Buena Vista*, 95 U. S. 160; *Hume v. Beale's Ex'x*, 17 Wall. 336; *Hayward v. Bank*, 96 U. S. 611; *Speidel v. Henrici*, 120 U. S. 377-387, 7 Sup. Ct. Rep. 610. The fact that the complainants lived in "the remote and secluded" regions of the state of New York, far from means of information, and were never in California, cannot excuse them from the use of proper diligence. Says Mr. Justice BRADLEY, in *Broderrick's Will Case*:

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject." 21 Wall. 519.

Upon this passage I took occasion to observe in the *San Jacinto Tin Case*, 7 Sawy. 433, 9 Fed. Rep. 726:

"It must not be forgotten, not only that the world 'moves on,' but that in this age and country, and in this part of the country, it moves rapidly. Three years now, and especially in California, is longer in events and progress, than twenty years some centuries ago, when the statutes of limitation were adopted in England. Parties cannot lie down to sleep upon their rights, and on waking up many years afterward, find them in the same condition in which they were left."

In this case, Teall, under whom complainants claim, died nearly 32 years ago, and Devine, the other party under whom respondents claim, died in 1876, nearly 14 years ago. So the only two parties who are presumed to know, what their relation to these lands, and to each other

in fact was, have long since died. Under such circumstances several hundred citizens, who have for more than 30 years enjoyed and improved their property by their labor and expenditure of money, in a large city, should not now be deprived of it, by parties who have so long slumbered on their rights, if they had any, and been so "grossly neglectful of their own interests."

The fact that a patent was issued to San José upon confirmation of her pueblo lands, cannot affect the question. No new title has vested in the complainants thereunder unless they can derive it through the parties holding under the conveyances in question, alleged to be fraudulent. The city holds the title in trust for those who succeed in maintaining their rights under the Teall and Devine conveyances. If Teall's rights through the Devine, and subsequent conveyances and the statute of limitations have been cut off, there is no channel through which they have since returned to these complainants. The parties who have a vested title either under the two conveyances in question, or under the statute of limitations, or both, are the *cestui que trust* of the city of San José.

I am satisfied that the facts stated in the bill are insufficient to take the case out of the first clause of the fourth paragraph of section 338 of the statute of limitations of the state of California, and that the suit is barred by the statute. I am also satisfied that the cause of suit is stale, under the principles relating to the subject long established and enforced by courts of equity. So, also, the bill is insufficient because it fails to set out specifically what were the impediments to an earlier prosecution of the claim; how they came to be so long ignorant of their alleged rights, and the means used by the respondents to keep them in ignorance, and how they first came to a knowledge of their rights.

I am satisfied also, that the bill cannot be truthfully so amended, as to present a case for equitable relief. The parties have already amended twice. Some of the allegations now so, generally, made, must, necessarily, be largely overstated. How is it possible, that all the present respondents, and their numerous grantors intermediate between them and Devine, should have taken active means to conceal, and to successfully conceal from these complainants their rights, however credulous and confiding they may have been? Besides, upon these sweeping allegations embracing, *in solido*, 336 respondents, how can any individual respondent know upon what case he is to be prosecuted? Upon what point as to him, individually, will the blow fall; and whence will it come? How is each individual respondent to know how to prepare for trial under these loose, sweeping, general allegations? The demurrer must be sustained, and the bill dismissed, and it is so ordered.

LANGSTRAAT v. NELSON *et al.*

(Circuit Court, N. D. Iowa, W. D. December 31, 1889.)

QUIETING TITLE—EJECTMENT SUIT PENDING.

Under the Iowa statute giving a person in possession of land the right to bring a bill in equity to quiet title, such a bill is not demurrable because it shows that defendants, who are non-residents of the state, have sued complainant in ejectment for the land, and that such ejectment suit is still pending.

In Equity. On demurrer.

W. S. Palmer, for complainant.

Geo. Struble and Struble, Rishel & Hart, for defendants.

SHIRAS, J. The complainant herein is in actual possession of certain realty in Sioux county, Iowa. The defendants herein brought an action in ejectment against complainant, claiming to be the owners in fee of the realty in question. Thereupon the complainant filed the present bill in equity for the purpose of quieting his title, and asking that the defendants be restrained from the further prosecution of their action at law. The defendants demur to the bill on the ground that the matters set up in the bill as grounds for equitable relief are fully available to the complainant in the action at law, being, in substance, an estoppel *in pais*, and therefore claim that the bill is not sustainable because there is pending between the parties an action at law. If the law action was not pending it could not be successfully claimed that the bill was demurrable. The complainant is in the actual possession of the realty, and therefore he could not maintain an action in ejectment against the defendants. Under such circumstances, under the statute of Iowa, he would have the undoubted right to bring a bill in equity to quiet his title. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495. The bill on its face shows that there is pending an action at law for the possession of the property, brought by the defendants against complainant, and by the demurrer the point is made that the pendency of the latter defeats the right to maintain the former; or, in other words, it is maintained that the pendency of the law action should abate the suit in equity. Where a party brings an action at law and a suit in equity in furtherance of the same object, the general rule is that the one cannot be pleaded in abatement of the other, for the reason that the remedy sought is not identical. Story, Eq. Pl. § 742. The ground upon which is based the right to plead the pendency of another suit touching the same subject-matter, as an abatement of a second suit between the same parties, is that the second suit is merely vexatious, and a party ought not to be subjected to the costs and expense of a second suit, when the one already pending will fully dispose of the issue. To sustain the plea, it must appear that there is identity of parties, of subject-matter, and of relief sought. *Insurance Co. v. Brune*, 96 U. S. 588. In the case now under consideration, the two suits were not instituted by the same party. The contention of the defendants is that complainant ought not to be

permitted to maintain his suit in equity, because they have instituted an action at law against him. As already said, the complainant has the right, under the statute of Iowa, to maintain a suit in equity to quiet his title as against the defendants. This he is seeking to do. If the bill, however, should be dismissed because of the pendency of the law action, the plaintiffs therein can, at their pleasure, dismiss the law action; and, being non-residents of Iowa, it might thus be put out of the power of complainant to again get service upon them in this state, and the complainant would be practically defeated in his efforts to settle and quiet his title. This fact, in addition to the difference in the remedy attainable in the two proceedings, justifies the conclusion that the pendency of the action at law ought not to be deemed cause for abating the suit in equity, and the demurrer to the bill must be therefore overruled.

THE MAHARAJAH.

ENNIS v. THE MAHARAJAH.

(District Court, S. D. New York. November 25, 1889.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK.

A workman employed to work a particular machine, which he fully understands, takes the risk of accidents that may happen to him while using it, so long as the machine is maintained in the same condition as by his contract he has a right to expect and to rely upon. The master is not liable for accidents merely because he has not adopted recent improvements that afford some additional protection.

2. SAME.

The libellant, a longshore-man, was employed to work a winch in discharging cargo. The steam crank-bar, turned by hand, came within three inches of a cog-wheel. While turning the crank, the libellant's hand slipped, and his thumb and two fingers were crushed by the cogs. The winch was 12 years old. More recent ones have the cog-wheel protected by a covering. One winch of that kind was on the ship. No previous accident from this winch was proved, except one arising from gross carelessness. *Held*, (1) that the old winch was not of so dangerous a character as to be unfit for use; and, no weakness or disorder of the winch being shown to have contributed to the accident, *held*, (2) that the libellant took the risk, and could not recover of the ship, no negligence of respondent being proved.

In Admiralty. Libel for personal injuries.

Robert D. Benedict, for libellant.

Butler, Stillman & Hubbard, (*Wilhelmus Mynderse*, of counsel,) for claimants.

BROWN, J. On the afternoon of September 22, 1883, the libellant, while operating a winch on board the steamer *Maharajah*, lost the thumb and two fingers of his right hand, which were crushed between the cogs of the wheel and the reversing lever. The crank-bar, which let the steam on and off, was turned by a horizontal handle four and one-half inches long,

the end of which, when turned inwards, came within three inches of the cog-wheel. While turning the handle, the libellant's hand accidentally slipped off, and was caught by the cogs. The libellant seeks to hold the vessel answerable for his injuries, on the ground that the winch was an old and dangerous machine, because it had no covering or protection, like the more recent machines, and because the handle ran dangerously near the cogs. It is also alleged that the machinery was out of order.

Though the evidence shows that there was some escape of steam after the libellant had asked for more steam, the weight of proof, I think, is against the contention that the machine was out of repair or out of order, or that it had ever had any covering, or was ever in a condition substantially different from that in which the libellant was working it, and in which it had been long used. Nor does the evidence show that the escape of waste steam contributed to the accident. The libellant does not testify that the steam made the handle more slippery, or embarrassed him in his work. The moisture, for aught I know, may have made his hold more secure, rather than weaker. The winch was put in the vessel about 12 years before. It was of the kind then in ordinary use. Soon afterwards, improvements in winches were made, and during the last few years the cog-wheels in new winches have been usually provided with coverings, and are thereby safer for use. The Maharajah had one winch of the new pattern and two of the old. Though the handle on this machine came within three inches of the cogs, it is not shown to be different in this respect from the winches formerly in general use. The libellant was a longshore-man, employed by the day or hour. He was hired to work this winch. No skill was necessary, only care. Whatever liability there was to accident from the hand's slipping was visible and plain. It was not a concealed or unsuspected danger, but one as well known to the workmen as to the employer. The master can only be held liable on the ground of negligence, or for some breach of duty. The question, then, comes down to this: Is it negligence, or a breach of legal duty, for a master to hire men to work upon an old machine merely because there are newer and safer ones in use? As respects travel on steam railways, many of the courts of this country hold the carrier bound to keep pace with new inventions in the direction of safety. But this rule is an exceptional one, established upon grounds of public policy, and for the safety of human life. It has never been applied to the relation of master and servant. There the ordinary rule is that the workman takes the risks incidental to his employment. As regards machinery, it is the master's duty, say the supreme court in the case of *Hough v. Railway Co.*, 100 U. S. 213-219, "to exercise due care in its purchase originally, and in keeping and maintaining it in such condition as to be reasonably and adequately safe for use by employees." The context shows, however, that this language was used in reference to the disorder, defects, or weakness which arise from the use of machinery, or from concealed dangers which the workman has no means of knowing, rather than to such liabilities to accident as belong to the nature of the machine, and are visible and plain, and known to the workman

when he engages employment. In the case just cited the supreme court say:

"If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would, undoubtedly, have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death."

This indicates that no recovery could be had where the workman voluntarily takes work upon machinery knowing its dangers, and not expecting or relying upon any change to be made in it. This is very clearly stated by COCKBURN, C. J., in the case of *Clarke v. Holmes*, 7 Hurl. & N. 937-943, a case cited at length by the supreme court in *Hough v. Railway Co.*, referred to above. "No doubt," he says, "when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it, or, if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant, within the scope of the danger which both the contracting parties contemplate is incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept." If in any case the master could be held liable for accidents happening to a workman whom he had hired to work upon a well-known machine, in its usual condition, it could only be, I think, when it might fairly be said that, having reference to other machines, the machine in question was so hazardous as not to be fit for use, and when the employe must be deemed to have been ignorant of its dangers. See, also, *Railway Co. v. Herbert*, 116 U. S. 642, 647, 652, 6 Sup. Ct. Rep. 590.

I cannot find that this machine was not reasonably fit for use, though it had less protection to the workman than newer forms. It was of a kind long used, and the only previous accident shown to have happened in connection with it arose from gross carelessness. There is some evidence to the effect that the libelant was sitting at the time of this accident. He denies this, and I make no further reference to it. But he does not claim to have been unacquainted with the machine, or its possible danger from the hand's slipping. Whatever danger there was, as I have said, was plain. There was no promise to afford further protection against this danger, and the libelant did not expect it, or rely upon it, as the plaintiff did in *Hough v. Railway Co.*, in continuing his work. There was no concealment. He was in no way misled. The language of the court in the case last cited does not apply to cases like this. It does not abridge the liberty of contract between employer and employed, as respects work upon old and well-known machines, though newer ones may have some additional safeguards; nor does it change the burden of

the risk of accident, where the nature and danger of the machine are known to the employe, and where the use of the machine is not unreasonable, and it is kept, as this was kept, in the condition in which the employe agreed to work it. Though the accident was a severe one, entitling the libelant to much sympathy, I cannot hold that the law affords him any redress. The libel is therefore dismissed.

CHEESMAN et al. v. SHREEVE et al.

(Circuit Court, D. Colorado. December 26, 1889.)

1. MINES AND MINING—LOCATION—DISCOVERY.

It is requisite to a valid location and to the ownership of the title to a valid lode mining claim, that there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice, a discovery at least 10 feet deep from the lowest rim rock thereof, which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location.

2. SAME—LOCATION STAKES.

A location stake must be erected at the discovery of said claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the discovery.

3. SAME—MARKED BOUNDARY ON SURFACE.

The claim must have its boundaries so marked upon the surface as to be easily traced by means of six substantial stakes, one set at each corner of said claim, one at the center of each side line thereof; which said stakes shall be of substantial character, and sunk in the ground, hewed on the two sides of the corner stakes which are in towards the claim, and the side stakes hewed on the side which is in towards the claim.

4. SAME—LOCATION CERTIFICATE.

There must be made and filed by the locators of said claim a location certificate which shall contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim; also, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode.

5. SAME—ACTION FOR TRESPASS—JOINDER OF CLAIMS.

In a suit for trespass, defendants cannot, after suit brought, unite several claims, each having a portion of the outcrop, for the purpose of asserting the right to follow a vein upon its dip, when said right does not exist within the said claims, considered separately.

6. SAME—ABANDONMENT AND RELOCATION.

If ground once included within the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any rights on account of the location which has been abandoned.

7. SAME—VEIN OR LODE.

A vein or lode is a body of mineral or of mineralized rock in place, within defined boundaries, in the general mass of the mountain.

8. SAME.

Ore disseminated at intervals, or found in channels, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge, or vein, within the meaning of Rev. St. U. S. § 2322, allowing the owner thereof to follow the same beyond his side lines upon its dip.

9. SAME—CONTINUITY OF VEIN.

The vein must be continuous only in the sense that it can be traced by the miner through the surrounding rocks. Slight interruptions of the mineral-bearing rock

are not alone sufficient to destroy the identity of the vein; nor would a short partial closure of the fissure have the effect to destroy the continuity of the vein, if, a little further on, it appeared or recurred again, with mineral-bearing rock in it.

10. **SAME.**

Where both mineral and fissure close, come to an end, and are not found again in that direction, or, if found at all, are so far off from the tracing of the vein, or so diverted from its original trend or line, or appear under different geological conditions and surroundings, the jury would be warranted in finding that the continuity was broken, and that the lode, therefore, was not the same.

11. **SAME—END LINES.**

End lines as designated in the location certificate are not necessarily, in law, the end lines, unless they actually cross the actual outcrop of the vein.

12. **SAME—TRESPASS—MEASURE OF DAMAGES.**

The measure of damages in an action for trespass upon a mining location is the value of the ore taken by the defendants from within the side lines of plaintiffs' claim prior to the institution of suit.

13. **SAME.**

If the jury should believe from the evidence that defendants, after they had knowledge that plaintiffs contested their right to mine within the side lines of plaintiffs' claim, thereafter mingled the ore taken from within plaintiffs' side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, or in willful disregard of plaintiffs' rights, they would be warranted in construing such conduct against defendants in determining the damages.

14. **SAME.**

If, on the other hand, they believed that defendants, in the honest belief that they were of right pursuing their vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, they suffered it to mingle with other ore, or failed to keep it segregated, then they should ascertain the approximate value of the ore, as best they could, from all the facts before them.

At Law. Action of ejectment.

C. J. Hughes, Jr., for plaintiffs.

B. F. Montgomery and C. C. Parsons, for defendants.

PHILIPS, J., (charging jury.) Gentlemen of the jury: Before proceeding to give you the charge I have prepared, I will give you certain declarations of law, asked for by the plaintiffs, as not inapplicable to the consideration of this case:

"The court, at the instance of the plaintiffs, charges the jury that their verdict must be for the plaintiffs, unless the defendants fully establish, by a preponderance of the evidence, the following facts,—that is to say, that they are the owners of a lode mining claim located and held in compliance with the statutes of the United States and the state of Colorado, permitting and governing the location of gold mining claims; that, among the requisites to a valid location and to the ownership of the title to a valid lode mining claim, are the following: *First.* That there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice, a discovery at least ten feet deep from the lowest rim rock thereof; which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location. *Second.* The erection of a location stake at the discovery of said claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the discovery. *Third.* That said claim must have its boundaries so marked upon the surface as to be easily traced by means of six substantial stakes,—one set at each corner of said claim, one at the center of each side line thereof,—which said stakes shall be of substantial character, and sunk in the ground, hewed on the two sides of the corner stakes which are in towards the claim, and the side stakes hewed on the side which is in towards

the claim. *Fourth.* That there shall be made and filed by the locators of said claim a location certificate, which shall contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim; also, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode; it being provided by law that any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of linear feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

"The court further charges the jury, at the instance of the plaintiffs, that the defendants cannot unite several claims, each having a portion of the outcrop, for the purpose of asserting the right to follow a vein upon its dip, when said right does not exist within the said claims, considered separately: provided such union of claims was made after suit brought; and therefore this does not apply to the union of the old Champion and Nevada claims.

"The court, at the instance of the plaintiffs, further charges the jury that, if ground once included within the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any rights on account of the location which has been abandoned, and that the law makes a distinction between a relocation and an amended location certificate, although both may be designated as amendments in such location certificates.

"The court further charges the jury, at the instance of the plaintiffs, that, in addition to establishing by preponderance of testimony that they are the owners of the Champion, Widow McCree, and Peerless lode mining claims, and that the same are located and are situated with reference to the outcrop at the surface claimed by the defendants as to their side lines and end lines, and of their discoveries as hereinbefore charged, they must prove and establish to your satisfaction, by a clear preponderance of testimony, the further fact that there outcrops, within said claims as hereinbefore stated, a vein, lode, or ledge, within the meaning of the law, descending upon its dip continuously, on ore of appreciable value in gold and silver, to the ground in controversy; and that the ore from within the Battle Mountain and Little Chicago lode mining claims is a part and portion of such a lode or ledge, and not of an ore deposit or body having its source or origin higher up, within the boundaries of the Battle Mountain or Little Chicago lode mining claims, than where it was found. That, in order to the existence of such a vein, there must be proved, by a preponderance of testimony, to exist, a lode, ledge, or vein, within the meaning and purview of the statute, having lateral extent as well as extent upon its dip, and being a continuous mass of mineral, between defined boundaries, in the solid mass of the mountain, extending continuously upon its dip to the ground in controversy; and that the existence of detached or small bodies of ore upon one line, or upon or within a given stratum of rock, unless the remainder of said stratum contains the elements which constitute a vein, to-wit, defined walls and crevice, continuous ore, and mineralization of an appreciable value, throughout its extent, the same is not, within the statute, such a lode, ledge, or vein as entitles the owner thereof to follow the same beyond his side lines upon its dip.

"The court further, at the instance of the plaintiffs, charges the jury that ore disseminated at intervals, or found in channels, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge, or vein, within the meaning of the statute.

"The court further charges the jury, at the instance of the plaintiffs, that end lines, as designated in the location certificate, are not necessarily, in law, the end lines, unless they actually cross the actual outcrop of the vein."

Now, gentlemen of the jury, the plaintiffs have shown title, by patent from the United States and mesne conveyances, to the mining claims known in this trial as the "Battle Mountain and Little Chicago." By the terms of the grant under the patent, the right of possession and ownership are vested in the grantee, not only to the surface of the ground contained within the exterior lines of such surveys, but to everything beneath, within the planes lying within lines drawn downward, vertically, between such surface boundary lines. The plaintiffs have made out a *prima facie* case to recover in ejectment by proof of title through patent and subsequent conveyances to them; the answer of defendants admitting that they had, in excavating, penetrated beneath the surface location of the Battle Mountain survey. While this is so respecting the operation of the patent, the statute law of the United States (section 2322) makes this important provision respecting the rights of a locator who may not have received a patent:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States and with state, territorial, and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward, vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations."

This right of the locator has its root in the same statute that gives patentee his patent; so that, if the defendants have brought themselves within the provisions of this statute, and they reached the point of the alleged trespass by pursuing and excavating a vein of ore which had its outcrop or apex within the side lines of their location, and their location was conformable to law respecting this vein, they are not guilty of the alleged trespass. The evidence on the part of the defendants tends to show that the discovery on the Champion claim, in its original form, and the location were made in 1880, and that in 1882 a relocation of this claim was made, and in 1886 an amended location thereof was made by defendants, enlarging its extent. The evidence also tends to show that the Widow McCree claim was discovered and located in 1885, and that the title of said locators has passed, by mesne conveyances, to the defendants, or some of the parties who are operating the mine as partners. The Widow McCree claim, as located, extended north, so as to include a part of what appears on one of the maps as the "Belle of the East Claim." The locators, or those holding under them, had the right, by the local statutes of Colorado, to alter or amend the original location at any time up to the institution of this suit, and such amendments or

relocations, when made, had relation back to the time of the original location; and these plaintiffs are in no position, in this controversy, to question such amendments or relocations. And, while it is true that, in order to authorize the location of these claims, the locator should have made a discovery thereon of a vein of mineral ore, and done certain work thereon, and complied otherwise with the law regulating such locations, yet you are instructed that the certificates of location are presumptive evidence of such discovery; and that the locators had complied with the law in this respect; and that, after the lapse of many years, as in this case, every reasonable presumption should be indulged by the jury in favor of the integrity of the location; and that where, as in the case of some of these claims, the original locators reaffirmed, under oath, on the witness stand, that at the point of their workings named in their location entry they did discover such vein, then, when the plaintiffs come here, after the lapse of so many years, and undertake to show, by witnesses sent to these old openings, with their accumulated *debris*, to obtain evidence by inspection that no vein was in fact found by the original locators, such attack should be sustained by evidence so clear and persuasive as to fully satisfy your minds that such claimed discoveries were in fact false. And you are further instructed, in this connection, that, if you believe from the evidence that such locators did make such discoveries of an ore vein, the defendants, in further and later openings of such mine, would not be confined to the point where such original openings or workings were made, because, by the express terms of the federal statute, (section 2322,) such locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward, vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

If you find and believe from the evidence that, since defendants took possession of the several claims in what is called the "Champion Group" as far back as 1886, under the title-deeds in evidence, they have held and treated them as an entirety,—as one property,—and prosecuted the extent of work shown in evidence as a system of development of the whole, then said several claims may be regarded as one, for the purposes of this case, and the work prosecuted by the defendants thereon as having been done for the whole. To justify the subversion by the defendants of the territory underlying the plaintiffs' surface location, it devolves upon them to show by evidence that a vein, lode, or ledge of mineral ore had its outcrop or apex inside of the surface lines of their location, and that they so reached the point of the alleged trespass by pursuing such vein from its outcrop or apex. The statute of the United States also requires that the end lines of the claims should be parallel with each other, and, in asserting a right to follow the vein on its dip without the side lines of their location, and into plaintiffs' location, defendants must show the outcrop or apex of such vein or lode to be in their own location

throughout the ground in controversy, being the extent of the locations of defendants and plaintiffs parallel to each other.

If you find, from the evidence before you, that the end lines of the defendants' claim are substantially parallel with each other, that will meet the requirements of the law in respect to such parallelism; and, in considering this issue, you will disregard the fact that the south end of the Champion claim extends beyond, or is intercepted by, the Pacific survey; and you will also disregard the fact that the north end of the Widow McCree claim, in a contest with the Belle of the East claim, may have been adjudged by the court in favor of the latter, if you should further find the fact to be that subsequently, in 1888, and prior to the alleged trespass, the said Belle of the East quitclaimed back to defendants said interest, and that defendants have continually since, as theretofore, without any interruption of their possession, held and claimed the same as one entire claim, as formerly located, and that the workings performed and prosecuted by them on the so-called claims were done in development of their group of claims as an entirety. The statute further provides that the right of such locators of possession to such outside parts of such vein shall be confined to such portions thereof as lie between vertical planes drawn downward, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such vein.

If you are satisfied, from the evidence before you, that such end lines of the defendants' claims are substantially parallel, as heretofore defined, and that the point where the excavation was made by defendants within the side lines of the Battle Mountain claim was substantially within the planes of the end lines of the defendants' claims, drawn vertically downward, and continued in their own direction, you will then be brought to the more important controversy here, as to whether or not there was a vein or lode of mineral ore having its apex or outcrop inside of the side lines of the Champion claim, in pursuing and excavating which the defendants or their lessees penetrated within the side lines of the Battle Mountain location; and, for the purposes of this case, the west end line of the Battle Mountain claim is to be regarded as such side line. If the defendants did reach the point in question by so following up such vein, they are not guilty of the alleged trespass.

It is difficult, gentlemen of the jury, for the court to define and lay down in so many words the exact meaning of the terms "vein," "lode," or "ledge," which are employed in the statute interchangeably. It is questionable, to my mind, whether the term is susceptible of an arbitrary definition, or whether one in set phrase should be given so unvarying as to apply to every case, regardless of the differing conditions of locality and mineral deposit. The philologist would, in general terms, define a vein to be "a seam or layer of any substance more or less wide, intersecting the rock or stratum, and not corresponding with the stratification, and is often limited, in the language of miners, to such a layer or course of metal or ore." In the judgment of geologists, a fissure in the earth's crust, and openings in its rocks and *strata* made by some

force of nature, in which the mineral is deposited, is regarded as important, if not essential; "but," as has been said by an eminent judge, "to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of the opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." (*Eureka Case*, 4 Sawy. 311.)

As applied to the case on trial, I may, perhaps, safely give you in charge, in its essential substance, the general definition and rules which have been approved in this jurisdiction, and affirmed by the highest authority in our country, the supreme court of the United States. In general, it may be said that a vein or lode is a body of mineral or of mineralized rock in place, within defined boundaries, in the general mass of the mountain. The vein which the miner pursues from its outcrop must, of course, be the same which he pursues outside of his side lines. Such vein need not, however, be a straight line, of uniform dip or thickness, or richness of mineral matter, throughout its course and length. Generally speaking, veins are found, when the mineral is extracted, in what constitutes clefs or fissures in surrounding walls, with a well-defined or traceable hanging wall, or roof above and foot-wall below, of different kinds of rock. So long as the inclosing walls can be continually traced, and like mineral matter found therein, no doubt can exist that it is the same vein; but sometimes these clefs diminish so as to be scarcely perceptible, and, again, for a short distance, these fissures disappear to the eye and touch of the explorer, and then, a little further on, on the same plane, they are found again; and there may be spots or short spaces where the overhanging wall and the under-floor rock exist while the mineral deposit is not present, but on following the fissure or trend it reappears very soon. The jury will be sufficiently guided in such instances by keeping in mind that the vein or lode must be continuous only in the sense that it can be traced by the miner through the surrounding rocks; that is, slight interruptions of the mineral-bearing rock are not alone sufficient to destroy the identity of a vein; nor would a short, partial closure of the fissure have the effect to destroy the continuity of a vein, if, a little further on, it appeared or recurred again, with mineral-bearing rock in it.

Where both mineral and fissure close, come to an end, and are not found again in that direction, or, if found at all, are so far off from the tracing of the vein, or so diverted from its original trend or line, or appear under different geological conditions and surroundings, the jury would be warranted in finding that the continuity was broken, and that the lode, therefore, was not the same; but, where well-defined boundaries, characterized by a generally uniform hanging wall and floor, and extending on a like general plane or dip, exist, slight evidence of ore

may establish the existence of a lode. Such characteristic boundaries "constitute a fissure, and, if in such fissure ore is found, although at considerable intervals, and in small quantities, it is a lode or vein, within the meaning of the law." It is claimed, for instance, on the one side, that, while on the plane or line where the Champion tunnels run there may be found mineral matter permeating more or less the rock formation, and that here and there ore deposits more or less valuable may have been found, yet that such deposits of ore were only found in vugs, or, as some of the witnesses term it, "bugs," in small quantities, lying in no general direction, widely separated, and found in the excavations only after driving the tunnel for considerable distances through hard quartzite rock; and that these vugs of ore lay in detached cavities, more or less like a trough, wholly surrounded by or enveloped in such quartzite rock. If you should conclude that this was the fact respecting the condition and character of the Champion workings, then there would, in contemplation of law, be no vein of mineral ore there. A "vug" is defined by Webster to be "a cavity in a lode or vein," which would imply that such cavities were in veins; but such technical definition of the term must yield to the sense in which the witnesses employed it, and defined it, on the stand. If, on the other hand, you should find and believe from the evidence that the ore deposits were traced from the outcrop, and were deposits of like ore in cavities lying or running in a general direction or dip into the mountain, on a plane more or less uniform, and found to constitute a net-work of ore closely adjacent and near to, and often running into, each other, and within a general wall above and below, even though here and there separated in their course by quartzite rock containing like mineral matter for only short distances, this of itself would not necessarily break the continuity of the lode, as heretofore defined. In this connection, gentlemen, I appropriate part of a charge given by Judge HALLETT in *Hyman v. Wheeler*, 29 Fed. Rep. 353, which is as follows:

"In the books, and among miners, veins and lodes are invested with many characteristics,—as that they lie in fissures or other openings in the country rock; that they contain materials differing, or in some respects corresponding, with the country rock; that they are of tabular form, and of a banded structure; that some one or several things are commonly associated with the valuable ores; that they have selvages and slickensides in the fissures and openings, and the like. It is not necessary to enumerate all the features by which they are known. Some of these characteristics are said to be common to all lodes and veins, and others of rare occurrence; but, in general, witnesses will take up one or more of them as essential features of a lode or vein, and declare the fact upon the presence or absence of such elements. A party seeking to prove the existence of a lode or vein will naturally rely on any such characteristic that he can find in the ground in dispute, and call witnesses who will accept that feature as establishing the fact. The party opposed will seek to disprove the proposition advanced against him, and, in addition, to show that all other characteristics of a lode or vein are, in the case under consideration, entirely wanting. In this way, a fierce conflict of testimony is waged as to the existence of one or another distinguishing feature of a lode or vein, and the jury is asked to return a verdict upon the issue thus made. It is apparent, how-

ever, that, upon any issue touching the existence of a lode or vein in a place designated, a question whether it has one characteristic or another is a part only of the main question, and, in the presence of other unquestioned elements establishing the existence of a lode or vein, an issue of that kind becomes immaterial. To illustrate that matter, it may be said that, with ore in mass and position in the body of a mountain, no other fact is required to prove the existence of a lode of the dimensions of the ore. As far as it prevails, the ore is a lode, whatever its form or structure may be; and it is not at all necessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction, in order to establish its character. As was said in another case in this court: 'A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.' * * * Whether it is in the form of a broken mass of blue and brown lime, between regular walls of the same rocks, or a part of such *strata* in solid formation, mineralized by replacement of some of their constituents with valuable metals, the result is the same, and the name which science may apply to it is of no importance. An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of congress as any other form of deposit. In discussions at the bar, and in the opinions of witnesses, it was assumed that the character of a body of ore, as coming within or falling without the act of congress, could be determined by classifying it as a segregated or contact fissure vein, or as a bed or impregnation of ore; and that it was a matter of importance to ascertain whether the ore was separated from the country rock by planes or *strata* of that rock visible to the eye. I see no reason for such distinctions. It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen. There may be other means of determining their existence and continuance, as by assay and analysis; and, certainly, the form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the act of congress."

There has been a great variety of evidence introduced, bearing more or less upon this issue, taking a wide range in developing, grouping together, and presenting before you numerous facts designed to aid you in forming an intelligent conclusion. Some of these facts and incidents are quite remote or collateral, and some of them are almost impalpable and intangible to the common sense. The topography of the mountain, its geological formation, with its sands, its limes, its porphyry, its quartzite and granite formations, together with the mineralized rock in body and detachment, with photographs of the mountain itself, and of the tunnels and surveys, maps and drawings, have been detailed and laid before you, for your assistance and consideration. All these, both in detail and collectively, bear more or less upon the main issue. They are designed to bring before your view, as far as possible, in the courtroom, the organism of that mountain side, and the inside workings of the mine, to enable you, from your own observation somewhat, to judge of the rock formations of that locality, the stratification of the rocks, and the reasonableness, or otherwise, of the presence and direction of mineral substances and deposits on certain contacts of *strata*, and the likelihood or not of a vein or lode of ore being found and extending among such

formations. The expert witnesses for both parties are agreed, in the main, that certain geological formations and *strata*, and substances and fissures, are the usual concomitants and incidents of the presence of the ore vein. So, in tracing out the lay and trend of such ore deposits, the presence or absence of such concomitants is important for the attention of the miner, as they are for the jury in trying this issue.

Gentlemen, it would be an impossible task for the court or you to undertake to reconcile and harmonize the varying statements of all the witnesses who have testified in this case. Such diverse and positively contradictory statements respecting many palpable, tangible facts, susceptible of direct proof, I have not observed, in a long experience in court. Some of the witnesses, unquestionably, have not told the truth; and it is for you to conclude who they are, and whom you will believe. Judging from this trial, there must be something in the altitude of that mountain, or the depths of its mines, wonderfully prolific of falsifiers and orators. From the men of science, versed in geology, mineralogy, and mining engineering, to the most unlettered miner who dwells in the bowels of the mountain, many of them seem to be orators; and, immediately after taking the witness stand, they would be found on the platform, on the same plane as the judge, making a speech to the jury, with all the warmth, energy, and zeal of hired advocates. Some of them were simply partisans, and seemed to have forgotten the office which the law and the obligation of their oath imposed upon them, to speak to the truth of their knowledge, and to tell nothing but the truth. Such exhibitions are to be deplored. They tend to break down the popular respect for the solemnity, dignity, and justice of judicial trials; and, where they obtain, trials are likely to become a mockery, and justice a failure. It will be found, however, gentlemen, in this case, as in the vast majority of trials, that the prominent, controlling facts in the great mass of testimony lie within a small compass. These more conspicuous facts, and a few well-recognized principles, that score to the line of common experience and common sense, you may safely follow as your guide; never for one moment allowing yourselves, in your deliberations, to lose sight of them. This case should, as far as practicable, be stripped of all extraneous matters and mere collateral issues and incidents here and there brought into it, and decided upon the actual facts, as shown by the weight of evidence to have existed in the mine in controversy at the time this suit was instituted.

There are some collateral facts, bearing upon the question as to whether or not there exists at the point in question what is termed a "quartzite contact with a vein outcrop," which you might consider, possibly, with some profit, and that is, whether or not miners, in their explorations and excavations in the immediate locality in this mountain side, have, as a rule, worked on what was generally recognized as the "quartzite contact," and whether or not these workings, as a general rule, when pursued on a dip, have developed paying ore, as also the extent to which such workings have been prosecuted, as bearing on the fact whether or not a vein exists on that contact. Likewise, you might consider the character,

the extent, the general direction, and practical results of the workings prosecuted by the defendants and their lessees in the Champion mine; the quantity of paying ore extracted in a comparatively uniform direction and dip, as also whether or not there was any interruption of the so-called vein at the point of connection where the tunnel or excavation passed out of the side line of the Champion into that of the Battle Mountain; and whether or not the ore at this point of connection is materially different in character from what preceded might also be considered by you, as also why it was that defendants, in extending their tunnel or excavations, pursued a comparatively uniform dip, if they did so, in reaching the point of contact with the Battle Mountain claim.

You have before you, also, the testimony of men who actually dug out these tunnels, as to what they found, saw, and handled there. The testimony of such men is by no means unimportant, if it can be credited. One reason why the men who worked out the ore, and those who from time to time saw it worked out, handled it, marketed and assayed it, should have much weight is that, as shown by some of the evidence, while the ore deposited in places may not have been over one or two feet in dimensions, the openings excavated to make an accommodating passway might be three or four feet or more, driven apparently through hard rock, little mineralized, if at all, outside of the ore deposit, so that the mere after-comer would see at such points only the hard, barren walls, from which to draw his conclusion in the main. The opinions of experts, under such conditions, are principally valuable, as being based upon surrounding conditions of rock and substances, as to the reasonableness or probability of the correctness of the statements of the miner as to what he actually found in the way of ore.

You also have before you evidence respecting samples taken from these excavations for your consideration. It is remarkable that there should be such variance in the results of these samples taken, and their assay, as shown by the evidence, on the hypothesis that the men who took them were impartial and honest. With such wide differences, it would indicate that such evidence, at least in this case, is quite unsatisfactory; and it is for you to say, under all the facts and circumstances attending the taking of these samples, as to which of them is more reliable.

There is evidence before you as to the existence of cracks in the overhanging wall, in the Champion workings at certain points; the evident object of such evidence being to create in your mind the probability that the ore deposit found at such points may have come from above, through the lime or porphyry *strata*, and been so deposited where found. In determining whether such be the origin, or whether it be more likely to be a continuation of the vein, as claimed by the defendants, you should take into consideration the condition and character of the ore found at such points, as to whether they bore evidences or not of being oxidized, which is claimed by men of science, experts, to be an inseparable characteristic of ore deposited on this theory of the plaintiffs. In other words, if the ore found at such points as that near to or within the side lines on the Battle Mountain claim, was hard, sulphide ore, as claimed by

defendants, it would be evidence of its formation in place, and, of consequence, more probable that it did not come down, through such crack, from the surface.

If you should find the issues for the plaintiff, it will become necessary for you to assess the amount of damages resulting from the trespass. This is the value of the ore taken by the defendants from within the side lines of the Battle Mountain claim prior to the institution of this litigation. On this issue, you have before you the estimates of plaintiffs' witnesses, ranging from \$17,598 to \$28,200 and \$28,799, while the defendants placed it at from \$6,000 to \$8,000, gross, subject to a deduction of 40 per cent. for the net result. You must determine, between these extremes, which of them most nearly approximates the true value.

It has been insisted by counsel for plaintiffs that, after defendants had knowledge that plaintiffs contested their right to mine within the side lines of plaintiffs' claim, they should have kept the ore there extracted segregated from other ores, so that its exact measurement and valuation could have been more nearly ascertained, and that their failure to do so should be construed most strongly against them. Of course, gentlemen, if you should believe, from the evidence, that this was so,—that defendants thereafter mingled the ore taken from within plaintiffs' side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, or in willful disregard of plaintiffs' rights,—you would be warranted in construing such conduct against the defendants. If, on the other hand, you should believe that defendants, in the honest belief that they were of right pursuing their vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, they suffered it to mingle with other ore, or failed to keep it segregated, and that they have presented here the best evidence obtainable by them, of the result of the ore so excavated and shipped, then you should ascertain the approximate value of the ore as best you can, from all the facts before you bearing upon this issue.

Gentlemen, you are the sole judges of the weight of the evidence and credibility of the witnesses; and, from the close attention you have given to the evidence, and to the arguments of the able counsel engaged herein, I feel such confidence that your intelligence, judgment, and impartiality may so far be relied upon to comprehend, analyze, and properly apply the evidence to the law as to relieve the court from any further review of the evidence.

Verdict for defendants.

THE PRESIDENT *ex rel.* MORAN *et al.* *v.* MAYOR, ETC., OF CITY OF ELIZABETH.

(Circuit Court, D. New Jersey. December 17, 1889.)

1. MUNICIPAL CORPORATIONS—JUDGMENT—MANDAMUS TO LEVY TAX—CONTEMPT.

Act N. J. March 27, 1878, entitled "Supplement to an act entitled 'An act respecting executions,'" which provides that the assessors of taxes of a municipal corporation shall, upon service of a copy of a writ of execution, assess the moneys to meet it, does not disturb the charter mode of levying taxes by the common council of the city of Elizabeth, as amended by Act N. J. April 2, 1869, and the neglect of the common council to levy a tax to pay the interest on its bonds, in obedience to a writ of *mandamus* from the circuit court of the United States, is a contempt punishable by attachment.

2. SAME—OFFICERS LIABLE.

Where a city charter vests in the common council the power of levying taxes and filling vacancies, the mayor, comptroller, and treasurer cannot be attached for contempt for disobedience of a writ of *mandamus* to make such levy and fill vacancies in the board of assessors.

3. SAME.

Where there is a peremptory writ of *mandamus* to the common council of a city to levy a tax and fill vacancies in the board of assessment, disobedience of the writ cannot be justified by showing that another course of procedure preliminary to the granting of the writ could have been selected to collect the tax to pay the indebtedness for which the writ issued.

Motion to Attach for Contempt.

This is a motion to attach the mayor, comptroller, treasurer, and common council of the city of Elizabeth, for contempt for failure to obey a peremptory writ of *mandamus*.

Strong, & Mathewson, for relators.

Mr. Bergen, for respondents.

GREEN, J. From the recital in the peremptory writ of *mandamus* sued out in this cause, it appears that the relators, Charles Moran, D. Comyn Moran, and Amandee D. Moran, on the 9th of June, 1888, in the circuit court of the United States for the district of New Jersey, recovered a judgment against the city of Elizabeth for the sum of \$9,802.12 debt, and \$57.98 costs of suit; that said judgment was rendered against the city of Elizabeth for interest due by it to said relators upon bonds of the said city, held and owned by them; that a writ of execution was duly issued out of said circuit court upon said judgment against the said city of Elizabeth, directed to the marshal for said district of New Jersey; that said writ was returned unsatisfied, there being no property belonging to the said city sufficient to satisfy said writ; that a copy of said writ of execution was duly served by the marshal of the district upon the defendant; that there were at that time eight vacancies existing in the board of assessment and revision of taxes for said city of Elizabeth, on account of the resignation or failure to qualify of the persons theretofore elected as members of said board; that the said board constitute the only assessors of the city of Elizabeth, who are, by law, required to assess the taxes in and for said city; that it was the duty of the city of Elizabeth and the board of assessment and revision of taxes to assess

and levy, in addition to the regular taxes, the amount due to the said relators on their said judgment, and to collect and pay the same to said relators; that it was the duty of the common council of said city of Elizabeth to fill any vacancies which might exist in the board of assessment and revision of taxes of said city; that the city of Elizabeth and the said board of assessment and revision of taxes have neglected and refused to perform their said duties, and have neither assessed nor collected nor paid to the relators any part of their said judgment; and that the common council has not filled, or attempted to fill, the vacancies in said board. The mandate of the writ was that each of the defendants do assess and levy, in addition to the regular taxes, the amount due upon the said relators' judgment, with interest and costs, to be assessed and collected according to the form of the statute in such case made and provided; and that the president and members of the common council of said city of Elizabeth forthwith should fill any vacancies existing, or which may exist, in said board of assessment and revision of taxes for said city of Elizabeth.

This writ was duly served upon the mayor, the comptroller, the treasurer, and the common council of the city of Elizabeth on May 10, 1889. No service was made upon the board of assessment and revision of taxes. The only return made to the writ is by the common council, and it is to the effect that the common council have elected certain persons, naming them, to fill vacancies in the board of assessment and revision of taxes. There is no pretense that the amount due the relators upon their judgment, or any part thereof, has been, by either of the defendants, assessed or levied, collected or paid over to them. It further appears, in the testimony taken on this rule to show cause why the defendants should not be attached for non-obedience, that although the writ of peremptory *mandamus* was served upon the common council on May 10, 1889, no steps were taken to obey its mandate "to fill forthwith any vacancy in the board of assessment and revision of taxes" until September following, at which time the persons named in the return were elected; that not one of the persons so elected has taken the required oath of office, or in any wise legally qualified himself to perform the duties so cast upon him, but, on the contrary, each has neglected or refused so to do. It is alleged that this neglect or refusal was the result of a combination or conspiracy to avoid the performance of the act commanded by the writ of *mandamus*.

A motion is now made on behalf of the relators to attach the defendants as for a contempt, because of their failure to obey this writ, and it is claimed that their disobedience arises in two respects: *First*, in not "assessing and levying, in addition to the regular taxes, the amount due upon said relators' judgment and execution, with interest to the time when the same shall be paid to the United States marshal for said district of New Jersey, with costs of these proceedings, to be assessed and levied according to the form of the statute in such case made and provided;" and, *second*, by failing "to fill forthwith any vacancies existing in said board of assessment and revision of taxes for said city of Eliza-

beth." Are the defendants, or either of them, guilty of this alleged disobedience?

It will be noticed that this writ is directed to the mayor, the comptroller, and the treasurer of the city of Elizabeth, as well as to the common council and the board of assessment and revision of taxes. The duties commanded to be performed are the "assessment and levying of a tax," and the "filling of vacancies" in one of the municipal boards. The "mayor," the "comptroller," and the "treasurer" of the city of Elizabeth are statutory officers, exercising powers, and performing duties, clearly defined and limited by the charter of the city, or by acts supplementary thereto. Unless within them can be found, clearly and undisputably expressed, the power necessary to an obedience of this writ, it must be held that such power has not been granted. It will hardly be contended that the broadest construction possible of these statutes will result in the finding of any authority vested in the officers named to "levy taxes" or "fill vacancies." On the contrary, the power to perform these municipal acts is, by the charter of the city of Elizabeth, expressly vested elsewhere; and, had these officers attempted to obey this writ in these respects, they would undoubtedly have been guilty of an assumption of power not granted to them, expressly or by implication, and by such usurpation would have rendered themselves liable to impeachment, and to criminal indictment. As to these officers, therefore, this writ must be held to be nugatory. The law never seeks to command the impossible, and it has always been held by the courts of this country, as well as by those of England, that "impossibility of obedience" is a good and sufficient return to a writ of *mandamus*. Shortt, Mand. 390; *Rex v. Round*, 4 Adol. & E. 139; *Rex v. Railway Co.*, 1 El. & Bl. 372, 381; *State v. Perrine*, 34 N. J. Law, 254; High, Extr. Rem. c. 1, § 14.

So far, then, as this motion to attach as for contempt affects the "mayor, the comptroller, and the treasurer" it is denied, but without costs. And I think it proper to say that costs are refused to these defendants, because they are, perhaps, guilty of a technical disobedience of the writ in failing to make any return to it. As their intention was to justify their failure to obey its mandate by showing an absolute and inherent want of power, the better practice requires that such justification should be made to appear, not orally, but in a formal return to the writ itself. However, as no harm has come to the relators from the laches of the defendants in this respect, I will permit such return to be made, in this case, *nunc pro tunc*.

The charge of disobedience made against the common council of the city of Elizabeth rests upon a very different basis. The allegation is that the common council is possessed of ample power to "levy taxes," and to fill vacancies in the "board of assessment," yet absolutely refused or neglected to obey the mandate of the writ in these respects. If the allegation be well founded, the defendants, who are members of the common council, are guilty of disobedience as charged. The common council is the legislative body of the municipality. It derives its existence from the charter of the city, and by that charter it is endowed with great and

varied power, covering apparently every conceivable necessity for legislative action that could arise in the ministration of the internal affairs of a large city. Especially has been granted to it ample power for the levying of taxes. Thus in the thirty-first section of the charter of this city it is enacted "that the common council shall have power within the said city to make, establish, publish, and modify, amend or repeal, ordinances, rules, regulations, and by-laws for the following purposes: * * * (33) To adopt all legal and requisite measures for levying and collecting the taxes." Charter City of Elizabeth, tit. 3, § 31. And again, in the sixty-fourth section of the same charter, it is enacted "that the city council shall have power to raise by tax, in each year, such sum or sums of money as they shall deem expedient for the following purposes: * * * (11) For the payment of the interest upon the city debt, and upon temporary loans, and such part of the principal thereof as may be due and payable." *Vide* Charter City of Elizabeth. And that there should be no mistake as to the comprehensiveness of this power, by an act supplementary to the act of incorporation, and approved March 31, 1864, a legislative definition of the term "debt" was obtained, and it was declared that the indebtedness of the city of Elizabeth should be divided into the "general debt," in which should be included the present bonded and floating debt of said city, the amount due or to become due for the purchase of real estate, the building, completion, and furnishing of school-houses, engine-houses, almshouses, market-house, and other public buildings, and loans for the payment of bounties; and the "improvement debt," in which shall be included all liabilities incurred by the city for improvements authorized by the charter, the expenses and costs of which are payable by assessments. It was for a debt of the city of the second class or division—that is, "improvement debt"—that the judgment of the relators was obtained. It seems to me, therefore, the contention of the relators that the common council had ample power to levy a tax to pay their judgment is correct.

The defendants insist that, granting that such power was originally vested in the common council, it has been taken away from it by "A supplement to the charter of the city of Elizabeth," approved April 2, 1869. This supplementary act provides "that, for the purpose of assessing taxes required by law to be levied in the city of Elizabeth, and revising the same, a board of commissioners is hereby constituted, to be known and designated as the 'Board of Assessment and Revision of Taxes in the City of Elizabeth,'" and the insistment is that this board, solely, has the power to levy and assess, by way of tax, moneys to meet the indebtedness of the city, and hence the failure of the common council to obey the writ of *mandamus* in this respect is excusable from want of power. I do not so construe the act. This supplementary act changes the charter of the city in one important respect only: whereas, theretofore, assessors of taxes were simply ward officers, and acted, in assessing city property, independently of each other, thereafter they were officers of the city at large, and acted in all things jointly, as a board. No part of the charter of the city was repealed by this supplement, save

certain sections which referred solely to the duties and powers of ward assessors, and the power of the council to levy taxes was left wholly unimpaired. In fact, the whole effect of this supplement was simply to change a part of the machinery by which the taxes levied by the common council were thereafter to be assessed upon individual property. It will be noticed that the very first clause of the supplementary act states concisely its object, namely, "for the purpose of assessing taxes, required by law to be levied, in the city of Elizabeth." The levying of the tax, the determination of its amount annually, its imposition upon the inhabitants of the city as a corporation, generally,—all this was preliminary to any action of the board of assessment, and this preliminary action was to be taken by the common council, who, by law, were required and empowered to perform it. That this is the true construction of the act I think clearly appears from the fact that legislative authority was repeatedly given to the city of Elizabeth to borrow money, after the passage of the act calling into existence the board of assessment and revision of taxes, yet in every instance such authority was coupled with a duty imposed upon the common council to provide for the payment of the loan by levying a tax. Evidently the construction placed upon the charter and supplements thereto, by the legislature, was that full and ample power to levy taxes for the payment of debt was vested, beyond question, in the common council; otherwise both the legislature and the city would have been parties to the great fraud of borrowing money from innocent lenders, whose only chance of repayment lay in a levying of a tax by a body which was utterly destitute of power to make such levy. I am compelled, therefore, to hold that, in failing to levy a tax to meet the demands of the relators, the common council have disobeyed so much of the writ of *mandamus* as commands them "to levy, in addition to the regular taxes, the amount due upon said relators' judgment."

The other alleged disobedience of this writ consists in the failure of the common council "forthwith to fill any vacancy" existing, or which may exist in the board of assessment and revision of taxes. The return to the writ made by the common council sets forth, *in hæc verba*, "that they have elected the following persons to fill the vacancies in the board of assessment and revision of taxes," naming them. The testimony taken on this motion shows that the writ was served on May 10, 1889, upon the common council, and it was not until the 2d day of September following that any positive action was taken looking towards the filling of the vacancies in the board of revision. It is true that the writ of *mandamus* was, at the meeting of council held on May 10th, referred to the "law committee and city attorney." But for what purpose such reference was made does not appear anywhere in the case. It is to be presumed that the council desired some information, or, perhaps, legal opinion, as to their duty and their course of action. I see nothing specially improper in making such reference, if that was its object. The writ commands action "forthwith," but "forthwith" does not, in this connection, mean that the act commanded must be performed "instantly," but rather that the defendants must set about the performance of the matter com-

manded directly, and do whatever can be done. *Rex v. Commissioners*, 3 Adol. & E. 550.

If, therefore, this reference of the writ, upon its service, was made in good faith, and the law committee and city attorney had promptly made their report, and the common council had, upon that report coming in, acted as it was commanded to act, although some delay might have thereby been occasioned, I should have held it not unjustifiable, and the action of the common council would be accepted as a fair compliance with the mandate of the court. But the testimony in this case shows a very different state of facts. The writ of *mandamus* was granted after argument before the court, in which the city attorney took part. All the facts, and the principles of law involved, were well known to him, at least, if not to the law committee. It could not require much time to advise council upon their rights and their duties. The writ is precise and explicit in its terms. The simple reading of it would have made its mandate clear to every member of the council. And yet no action whatever looking to obedience was taken at the regular or special meetings of the common council held on June 1st, June 15th, June 27th, July 1st, July 24th, August 1st, and August 15th. At none of these meetings was any request made that the law committee should report on this subject, so that proper action could be taken. No call for advice and counsel, as to the duty enjoined, from the city attorney; in fact, as the clerk of the common council testifies: "No action whatever was taken by the common council between May 10, 1889, and September 2, 1889, to fill the vacancies in the board of assessment." I cannot regard this conduct in any wise excusable. Nor, indeed, is any attempt made to justify it, and, unexplained as it is, it calls for the censure of the court.

On the argument of this motion, counsel for the defendants drew the attention of the court to an act of the state of New Jersey approved March 27, 1878, entitled "Supplement to an act entitled 'An act respecting executions,'" and the contention was that by this act the power to assess and levy moneys in municipal corporations to satisfy an execution against such corporation was exclusively vested in the assessors for taxes in and for such corporation. The act, certainly, is very broad. I do not doubt that it applies to judgments recovered in the courts of the United States for the district of New Jersey, by virtue of sections 914, 916, Rev. St., and had the attention of the learned judge, who, sitting in this court, allowed this peremptory writ, been called to it, it is doubtful if the writ would have been granted, without evidence that the provisions of this statute had been followed with strictness. It presents a simple and efficacious remedy for the collection of claims by the judgment creditors of a municipal corporation, and as such it demands and is entitled to strict enforcement by the courts. But I cannot agree with counsel that this remedy is exclusive, as to the levying of the amount necessary to be raised by a municipality to satisfy a writ of execution sued out against it. It does not, either in terms or by implication, debar municipalities from levying moneys for such purpose in the same manner and through the same agencies as heretofore. It simply puts upon the assessors of

taxes of municipal corporations a new duty, arising, however, only when certain preliminary action has been taken by the judgment creditor, to-wit, the service upon him of a copy of the writ of execution. If a copy of such writ be not served as directed by this statute, then the duty to assess the moneys to meet it does not attach to the assessor. If it be served, then, without any action of the legislative body of such corporation, the assessor is bound of his own motion to assess, in addition to regular taxes, a sum sufficient to satisfy the execution. In other words, the act simply provided a new statutory remedy, without disturbing the existing procedure. If this construction of the act be sound, it affords no excuse for the failure of the defendants, the common council of Elizabeth, to obey this writ. Besides this, objection is taken too late to be efficacious. Such objection might well be urged against the granting of a peremptory writ of *mandamus*, which always depends upon the sound discretion of the court, guided and limited by fixed principles. But a peremptory writ having been granted, disobedience thereof cannot be justified by showing that another course of procedure, preliminary to the granting of the writ, could have been selected by the relators. In my opinion, the common council has been guilty of disobeying this writ, and the motion for attachment as for contempt is granted.

MITCHELL & RAMMELSBURG FURNITURE CO. v. SAMPSON.

(Circuit Court, N. D. Florida. December 30, 1889.)

1. PARTNERSHIP—ACTIONS AGAINST—LIABILITY IN SOLIDO.

In Louisiana, in a suit against a commercial partnership, where citation is issued, directed to and served on the firm, and an order is afterwards made for citation to issue to the individual partners, and an answer is filed by the defendants, a judgment may be rendered *in solido* against the individual partners.

2. SAME—SERVICE OF CITATION ON AGENT.

Under Code Prac. La. art. 198, which requires citation in suits against a partnership to be served on one of the firm in person, or at their place of business, by delivery to their clerk or agent, service cannot be made upon an agent elsewhere than at the firm's place of business.

3. JUDGMENT—REVIVAL—COURTS—JURISDICTION.

Under Const. La. 1879, which abolished the several district courts in the parish of Orleans, created one civil district court for said parish, and provided (article 261) that all causes pending in such district courts should be transferred to said civil district court, the latter court has jurisdiction to revive unsatisfied judgments rendered in said district courts, since a suit is "pending" until the judgment rendered therein has been satisfied.

4. SAME—CITATION—CURATOR AD HOC.

Under Rev. Civil Code La. art. 3547, which authorizes the revival of judgments upon issuance of citation, and provides that if the defendant be absent the court may appoint a curator *ad hoc*, upon whom the citation shall be served, a curator *ad hoc* may, by answer, acknowledge the service of citation for the revival of a judgment.

5. SAME.

Under said statute, the revival of a judgment without the issuance of a citation, or the acknowledgment of service by the curator *ad hoc*, is a nullity.

At Law. On demurrer.

Action by the Mitchell & Rammelsburg Furniture Company against Frank G. Sampson. Defendant demurred to the declaration.

H. Bisbee, for plaintiff.

C. P. Cooper, for defendant.

PARDEE, J. The plaintiff, a citizen of the state of Ohio, sues the defendant, a citizen of Florida, on three several counts, alleging as follows:

"*First.* On a judgment recovered by the said Mitchell & Rammelsburg Furniture Company, on the 1st day of March, 1875, in the sixth district court of the parish of Orleans, state of Louisiana, against the firm of Sampson Bros., composed of Chandler Sampson and Frank G. Sampson, *in solido*, for the sum of seven thousand seven hundred and seventy-eight dollars, (\$7,778,) with interest at eight (8) per cent. per annum from the first day of January, 1875, until paid, with costs of suit. Plaintiff avers that on the 28th day of January, 1885, due judicial proceedings were taken to revive the said judgment in the civil district court of the city of New Orleans, state of Louisiana, and such further proceedings were had therein that plaintiffs obtained a judgment reviving the said original judgment; all of which appears by certified transcript of the record of said cause, filed herewith. *Second.* That on the 1st day of March, 1875, the commercial firm of Johnson & Faulkner, then doing business in the state and city of New York, recovered a judgment in the sixth district court for the parish of Orleans, state of Louisiana, against the said firm of Sampson Bros., and Chandler C. Sampson and Frank G. Sampson, *in solido*, for the sum of one thousand and four and ninety-five one-hundredths dollars, (\$1,004.95,) with interest at the rate of eight (8) per cent. per annum from the first day of January, 1875, until paid, and costs of suit; and plaintiff alleges that afterwards, on the 21st day of May, 1885, by due proceedings in the civil district court for the parish of Orleans, in the state of Louisiana, a judgment of the said court was duly rendered in said cause, reviving the aforesaid original judgment in favor of said Johnson & Faulkner against the said Sampson Bros., and said Chandler C. Sampson and Frank G. Sampson, *in solido*; and that afterwards, to-wit, on the 28th day of May, 1889, the said judgments were duly assigned to the plaintiff, whereby the plaintiff became the owner of the same; and that at the time of such assignment the individual members of said firm of Johnson & Faulkner were citizens of the state of New York. *Third.* That on the 12th day of November, 1877, the firm of Charles & William Bastian, in the fifth district court for the parish of Orleans, recovered a judgment against Sampson Bros., and Frank G. Sampson and Chandler C. Sampson, *in solido*, for the sum of three thousand five hundred and fifty-one and seventy-two one-hundredths dollars, (\$3,551.72,) with eight per cent. interest per annum on three thousand two hundred dollars (\$3,200) from January 1, 1877, and five (5) per cent. interest on three hundred and fifty-one and seventy-two one-hundredths dollars, (\$351.72) from January 1, 1877, until paid, and costs of suit; that afterwards, on April 27, 1877, by certain judicial proceedings had in the civil district court for the parish of Orleans, a judgment was rendered reviving the said original judgment against the said Sampson Bros., and Chandler C. Sampson and Frank G. Sampson, *in solido*, for the aforesaid sums of money; all of which appears by the certified transcript filed with the declaration. That afterwards, on the 28th day of May, 1889, the said judgment in favor of the said Charles & William Bastian was duly assigned to the plaintiff, at which time the assignors, Charles & William Bastian, were citizens and residents of the state of Louisiana."

To the several counts of the declaration, Frank G. Sampson has filed demurrers as follows: To the first count:

"*First.* The said count is so inconsistent, and contains such variance in statements therein of the sum alleged to have been recovered in the alleged judgment therein sued on, that the same is bad in substance. *Second.* The said count and alleged record of judgment therein sued on, and made a part thereof, show that there was never any personal service of process on said defendant in the proceedings to revive the alleged judgment therein set forth, and that defendant was, at the time of such proceedings, not a resident of Louisiana, where said proceedings are alleged to have been had, but was a resident of the state of Florida, and did not appear personally or by attorney therein, and the alleged court acquired no jurisdiction of defendant therein, and the suit herein, on said judgment as revived, is not maintainable. *Third.* That the court wherein original judgment was rendered never acquired jurisdiction of the defendant, or to render judgment."

To the second count, as follows:

"*First.* The like ground as the second ground of demurrer above set forth to said first count. *Second.* That said alleged proceedings, whereon it is alleged, in said second count, judgment therein sued on was recovered and revived, appear, and the alleged judgment appears, to be by and in the name of Johnson & Faulkner; the same not appearing to be a corporation, and no individual or Christian names of said Johnson & Faulkner appearing in said proceedings, or being stated in plaintiff's said second count of his declaration. *Third.* Like ground, as the third ground of demurrer, as first count."

To the third count, as follows:

"*First.* The said third count, in the body thereof, and the alleged judgment therein sued on and referred, and made a part thereof and filed therewith, so vary in statement of the amount of money alleged to have been adjudged in favor of plaintiff against the said defendant in said alleged judgment that same is bad in substance. *Second.* Said third count, and the alleged record of judgment therein sued on, and made a part thereof, show that there was never any personal service of process on said defendant, in proceedings in which it is alleged said alleged judgment was recovered, nor did said defendant appear therein in person, or by attorney; and the court never acquired jurisdiction of defendant, to render said judgment against him. *Third.* The said last-mentioned record of alleged judgment, and alleged revival thereof, does not show that any process, summons, or citation issued to said defendant in the alleged proceeding to revive said last-mentioned judgment. *Fourth.* Said defendant assigns further like ground of demurrer to said third count as the second and third grounds of demurrer above set forth to the plaintiff's said declaration."

On the hearing of these demurrers the following questions were argued:

"*First.* Whether in Louisiana, in a suit against a commercial partnership, where citation is issued, directed to and served on a firm, a judgment can be rendered *in solido* against the individual members of the firm. *Second.* Whether, under the law and practice in Louisiana, in a suit against a commercial partnership, service can be made upon an agent, servant, or employee of the partnership otherwise than at the place of business or counting-room of the partnership. *Third.* Whether, under the constitution and laws of Louisiana, the civil district court of the parish of Orleans, under the constitution of 1879, is the successor of the former district courts of the parish of Orleans, having jurisdiction in civil matters, and whether said civil district court has jurisdiction to revive judgments rendered in said district courts of the parish of Orleans prior to the adoption of the constitution of 1879. *Fourth.* Whether, under the law of the state of Louisiana relating to the revival of judgments, a curator *ad hoc* can be appointed in case a judgment debtor is an absentee

of the state; and, if so, whether said curator *ad hoc* can waive service of citation by appearing and filing answer."

The decision of these questions settles the judgments to be entered on the said demurrers.

1. "Where the petition alleges the defendants are trading under a firm name, and it appears the transaction was a commercial one, they will be considered as liable *in solido*, and judgment given accordingly, without any express allegation or prayer for a judgment *in solido*." *Chapman v. Early*, 12 La. 230. In this case, plaintiff sued the firm of Early & Amelung. The defendant Early only was cited or appeared. Judgment *in solido* against both defendants was rendered in the lower court, and the same was affirmed in the supreme court.

"The evidence shows that the firm sued here is composed of six individuals, one of whom only, to-wit, John Cummings, was served with process of citation. This would have been sufficient, had the firm been a commercial one. Code Prac. art. 198. *McGehee v. McCord*, 14 La. 362."

"While a commercial partnership is in existence, service of citation on one of the members of the firm is good against all of them; but after its dissolution every member intended to be sued and made a party must be served with citation separately." *Gaiennie v. Akin's Ex'r*, 17 La. 42.

"Persons associated together for carrying personal property for hire, in vessels, are commercial partners, and may be cited in the manner prescribed for the citation of such associations; but it is only where they are associated together under a title, or as a firm, that the service of a citation addressed to the partnership in its social name, made on one of its members only, is sufficient." *Heffernan v. Brenham*, 1 La. Ann. 146.

2. "The service of citation of appeal is to be made in the same manner as is required by law in courts of ordinary jurisdiction. So the service on a commercial firm must be made on either of the partners in person, or by leaving a citation at their store or counting-house and delivering it to their clerk or agent." *Huntstock v. His Creditors*, 10 La. 488. In this case, service upon a clerk of the firm, not appearing to have been at the store or counting-house, was held bad.

"The Code of Practice, article 198, requires citations in suits against a partnership to be served on one of the firm in person, or at their store and counting-house, by delivery to their clerk or agent. The return here shows the service to have been made at the house of one of the partners, and does not state the citation was delivered to a clerk or agent of the firm. It was therefore contrary to law, and could not be the basis of a judgment, unless the want of it has been waived by some act of the defendants." *Abat v. Holmes*, 8 Mart. (N. S.) 145.

"In the case of a mercantile firm, the citation may be left with the clerk, at the counting-house; and we have held that service on the clerk elsewhere is bad. *Huntstock v. His Creditors*, 10 La. 488. In this case, the service was made at the proper place, to-wit, the domicile of

the defendant, but not on a proper person, to-wit, one living there." *Kendrick's Heirs v. Kendrick*, 19 La. 36.

3. Previous to the constitution of Louisiana of 1879, there were several district courts in the parish of Orleans having general jurisdiction in civil matters. By the constitution of 1879, said courts were superseded, and in lieu thereof one civil district court for the parish of Orleans was created. Article 261 of the constitution provides for the transfer of all causes taken or pending in the supreme court of the state under the constitution of 1868 to the supreme court and courts of appeal created by the constitution of 1879, and then provides as follows:

"All causes that may be pending in all other courts under the constitution of 1868, upon the adoption of this constitution, and the organization of the courts created by this constitution, shall be transferred to the courts, respectively, having jurisdiction thereof under this constitution."

The question here is almost exactly the same question before the supreme court of the state of Louisiana in the case of *Scherrer v. Caneau*, 33 La. Ann. 314, arising under the constitution of 1868, where it is argued and held as follows:

"The contention is that the case in which the judgment of 1867 was rendered was not a 'pending' suit, and that, although the record thereof was 'removed,' still the jurisdiction which the court which rendered the judgment could have exercised to revive it, had not the removal taken place, was not transferred to or vested in the court by which it was superseded. This is a mere play upon words,—an attempt to make a distinction without a difference. The object of the framers of the constitution of 1868, when they enacted article 151, was to have the legislature to provide for the bridging over of all proceedings had before the late to the new courts, fully and completely, so as to preserve, in their integrity, all acquired rights, and to avoid all *hiatus* in the administration of justice, by continuing in the recent the anterior judicial organization. The legislature so truly realized that purpose that they passed the required law, taking good care to say that the cases would be proceeded with, in all respects, as if no change had been made. Had not such been the object in view, the consequence would have been that the plaintiff, a judgment creditor, would have had no forum to which to apply for an enforcement, or for a renewal, of his judgment, and that in the course of time her judgment would have been perempted, notwithstanding any effort on her part to keep it alive. Although the rule be that the judgment to revive must be rendered by the court which rendered the judgment sought to be revived, still it lies in the discretion of the legislature to modify it as public convenience may require; but, unless the legislature uses negative language, the jurisdiction to revive continues, necessarily, either in the original court, as long as it exists, or passes to the court superseding it. We have taken the pains, in view of the intrinsic importance of the question, to retrace our steps, and to inquire into previous legislative action on similar subjects, and we have ascertained, to our satisfaction, that in Act 43 of 1845, which was passed in furtherance of article 148 of the constitution of that year, and which is identical with article 151 of the constitution of 1868 and that in Act 229 of 1853, which was passed, for a like purpose, after the adoption of the constitution of 1852, the word 'remove' was employed as a channel of transmission, and that the word 'transfer' was not at all used. The word 'remove' has a technical meaning, fixed by legislation, jurisprudence, and practice, state and federal. It is synonymous with 'transfer,' possibly, more comprehensive. When it

is used under a constitutional requirement that 'causes pending be removed' from one judicial organization to another, and no clear negative terms are employed to the contrary, it must be considered as meaning that the cases decided or not, and, necessarily, the records embodying them, shall be transmitted from one court to another, and that the jurisdiction which the former court possessed over them shall vest in the new court, which shall have the same right and power to proceed with all matters therein involved, actually or prospectively, as effectually as could have been exercised by the court whence it comes, had not the removal occurred. The words, 'removal of causes now pending,' found in article 151, and the like, in the second section of Act 7, apply to all cases, determined or not, in which the demand had not been satisfied, in which something remained to be done, either to obtain, to execute, to annul, to enjoin, to regulate, or to revive a judgment. The object of a suit is not merely to procure a barren judicial recognition of a legal right, but it is to preserve and to enforce that right, whether it has reference to the payment of money, to the ownership or possession of property, or to the enjoyment of some privilege or advantage. It is not possible to conceive of a case, decided on its merits, in which numberless questions may not arise and be determined by judgments either interlocutory, final, or definitive. To say that a suit is ended, that a cause is not pending, when the claim is still alive and unsatisfied, when its purpose has not been accomplished; to consider, when a record is removed from one court to another, that the law intends only to provide for a physical, manual delivery of a bundle of papers from a custodian to another, means to abstain, to refuse conferring jurisdiction for further action touching matters susceptible of arising therein,—would be to do violence to language having a legal import; to write such away from the statute, and wantonly to sacrifice and destroy completely, valuable rights, for the mere gratification of contemplating the unjust and hurtful operation of implausible, incorrect, and deceptive verbal criticism. At all times has this theory been acted upon, *Banking Co. v. Pike*, 28 La. Ann. 896; *Watt v. Hendry*, 23 La. Ann. 594; *La Chambre v. Cole*, 30 La. Ann. 961. A review of the annals of our jurisprudence from 1845 to the present day, unless in a solitary instance, signally proves that the question of jurisdiction and power in the new court has never been even mooted. If the isolated expression of judicial opinion on the subject said to be found in *Chapman v. Nelson*, 31 La. Ann. 345, mean differently, then we regret our inability to indorse the views there enunciated, and prefer to determine the question for ourselves, as though it were one entirely novel. In our interpretation of the word 'pending,' a reference to the jurisprudence of sister states touching it fully sustains us. Thus, in New York, we find that it was expressly decided that, although a judgment has been recovered in a suit, the action is still 'pending' as long as such judgment remains unsatisfied. *Wegman v. Childs*, 41 N. Y. 159. In Pennsylvania it was held that the word 'pending' applies to a decided case, in which successive *fi. fa.'s* or *venditionis* have been issued, but not fully satisfied. *Ushafer v. Stewart*, 71 Pa. St. 170. Had the interpretation contended for been placed upon the previous legislation, all the cases on the dockets in 1845 and 1852 would have stood as doleful mementoes of the past, and remained as humiliating monuments to the impotency or indolence of the framers of the constitutions of those years, and of the members of succeeding legislative bodies."

4. "All judgments for money, whether rendered within or without the states, shall be prescribed by the lapse of ten years from the rendition of such judgments: provided, however, that any party interested in any judgment may have the same revived, at any time before it is prescribed, by having a citation issued, according to law, to the defendant

or his representative, from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived; and, if such defendant be absent, and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served." Article 3547, Rev. Civil Code La.

"It is now well settled in our jurisprudence that, until regular process is served upon the curator *ad hoc*, he has no capacity to act as such; that he cannot waive any of the legal proceedings required for the protection of the rights of the absentee he is called upon to defend; that his powers must be strictly limited to those conferred by law; * * * and that, as a general and fixed rule, a curator *ad hoc* cannot be permitted to waive any of the legal rights of the party he is charged to represent and defend. *Stockton v. Hasluck*, 10 Mart. (La.) 474; *Durnford v. Clark's Estate*, 3 La. 203; *Edmonson v. Railroad Co.*, 13 La. 284; *Collins v. Pease*, 17 La. 117; *Hill v. Barlow*, 6 Rob. (La.) 142; *Hyde v. Craddick*, 10 Rob. (La.) 387; *Kræutler v. Bank*, 12 Rob. (La.) 456. Here, therefore, it is clear that the proceedings had in this suit from the day of the appointment of the curator *ad hoc* are irregular and illegal; that said curator, not having been cited, had no right to appear for the absentees; that he could not waive the production of the legal evidence upon which the plaintiff's claim is based; that he could not consent to the rendering of any judgment against said absentees for the amount claimed; nor any part thereof; and that all said proceedings, and the judgment appealed from, are mere nullities." *Carpenter v. Beatty*, 12 Rob. (La.) 540.

"A curator *ad hoc* cannot directly or indirectly waive citation." *Ticknor v. Calhoun*, 28 La. Ann. 258.

"A curator *ad hoc*, appointed to represent an absentee, may acknowledge service of citation and petition. Such an acknowledgment is not a waiver of any right of the absentee." *Millandon v. Beazley*, 2 La. Ann. 916. In this case, the defendant being an absentee, a curator *ad hoc* was appointed by the judge, to represent him in defense of the suit. The curator acknowledged service of the petition and citation. The court, citing *Hill v. Barlow*, 6 Rob. (La.) 142; *Carpenter v. Beatty*, 12 Rob. (La.) 540; *Hyde v. Craddick*, 10 Rob. (La.) 387,—says: "With regard to the questions touching the authority of curators *ad hoc* determined in those cases, we express no opinion. None of the cases cited decide the point presented in this suit. The curator, in the present instance, so far as appears from the record, waived none of the rights of the party whom he was appointed to represent. There was no waiver of citation, nor of service of the petition; but the written acknowledgment of the curator is that both were served upon him. The service thus acknowledged * * * brought the defendant into court, and operated an interruption of prescription."

"A curator *ad hoc* can validly acknowledge in writing service of petition and citation addressed to him as such; and such acknowledgment brings the defendant into court, and interrupts prescription." *Bartlett v. Wheeler*, 31 La. Ann. 540. The acknowledgment in this case was an

answer filed as curator *ad hoc*, in which the curator acknowledged that he had been duly cited.

(a) An inspection of the transcript filed with, and made a part of, the declaration in the instant case shows that the judgment sued on in the first count was rendered in a case in which the petitioner, the Mitchell & Rammelsburg Furniture Company, declared against Sampson Bros., a commercial firm composed of Chandler C. Sampson and Frank G. Sampson, and the individual members thereof, *in solido*; that citation therein was issued, and directed to Sampson Bros.; that, on a supplemental petition filed therein, an order was made for citation to issue to the individual members of the firm of Sampson Bros.; that thereafter was filed an answer in the following terms: "And into this honorable court come defendants, by their undersigned counsel, who, for answer to plaintiffs' demand, deny all and singular the allegations in their petition contained,"—which answer was signed by counsel; that, in the suit to revive the said judgment, citation was issued to Sampson Bros., the sheriff returning thereon that after due and diligent inquiry and search he was unable to find Sampson Bros., defendants; but was credibly informed that they were out of the state of Louisiana, and resided in the state of Florida; that thereupon, on suggesting the citation and return thereof, the court appointed a curator *ad hoc* to represent the absent defendants; and that eight days thereafter the said curator *ad hoc* filed an answer acknowledging the service of petition and citation, and pleading general denial. These proceedings seem to be regular and valid. The demurrer to the first count should be overruled.

(b) An inspection of the transcript of the judgment on which the second count is based, shows that, in the original suit, *Johnson & Faulkner v. Sampson Bros.*, defendants appeared and filed answer, without any citation issuing; that, in the suit brought thereafter to revive the said judgment, there is no mention whatever made of any citation to the defendants, nor to the curator *ad hoc*, nor any acknowledgment made by the curator *ad hoc* as to the service of petition and citation upon him. The proceedings to revive were null, for want of citation. The demurrer to the second count should be sustained.

(c) An inspection of the transcript of the judgment upon which the third count is based shows that the suit was brought by Charles & William Bastian against Sampson Bros., alleged to be a commercial firm doing business in the city of New Orleans, and composed of Chandler C. Sampson and Frank G. Sampson, and the individual members of the said firm, *in solido*. Citation was issued thereon, directed to Sampson Bros., on which the sheriff made the following return:

"Copy of petition and citation to be served on Sampson Bros. received on the 11th day of April, 1877, and, on the 2d day of July, 1877, served a copy of the within citation and accompanying petition on Sampson Bros., through G. A. Fouce, agent, in person."

Thereupon judgment by default was taken, and confirmed; the defendants making no appearance whatever. Afterwards, in the suit to revive the said judgment, it does not appear that any citation was issued

or served upon the defendants, although there is a recital, in the motion and order appointing a curator *ad hoc*, that, "on showing the court that defendants cannot be found, as sheriff's return shows," etc. Neither does the record show that any citation was issued or served upon the curator *ad hoc*, nor does it appear that the curator *ad hoc* acknowledged the issuance and service of any citation.

These proceedings were invalid from the beginning, for want of citation. The demurrer to the third count should be sustained.

MCKINSTRY v. UNITED STATES.

(Circuit Court, S. D. Alabama. December 24, 1889.)

1. STATUTES—CONSTRUCTION.

When the words of a statute prescribing compensation for a public officer are loose and obscure, and admit of two interpretations, they should be construed liberally in favor of the officer, and not strictly in favor of the United States.

2. UNITED STATES COMMISSIONER—FEES—STATEMENTS IN CRIMINAL CASES.

A commissioner of the circuit court must, in Alabama, begin a criminal case by a complaint sustained by sworn statements of the complainant and his witnesses; and, there being no specific fee provided therefor in the fee-bill, he may charge for such necessary statements as depositions.

3. SAME—ACKNOWLEDGMENTS TO RECOGNIZANCES.

The acknowledgments for which a fee is provided in Rev. St. § 847, embrace acknowledgments to recognizances in criminal cases as well as acknowledgments of conveyances.

4. SAME—DOCKET FEES.

The provision in the deficiency appropriation bill of August 4, 1886, (24 St. at Large, 256, 274,) denying docket fees to commissioners, is general legislation, and cuts off all right thereafter to claim docket fees.

On Motion for New Trial. See 34 Fed. Rep. 211.

The petitioner brought suit in the United States circuit court, S. D. Alabama, against the United States for fees due him from the United States as one of the commissioners of that court. The itemized bill sued on amounts to the sum of \$1,823.45, and is the aggregate of several accounts which petitioner had made out, and which had been formally approved by the court and presented to the department, and upon which various sums had been allowed, amounting in the aggregate to \$666.46, leaving as a balance due to the commissioner, disallowed fees, the sum of \$1,156.99. On the trial of the case, the petitioner proved by his own testimony and documentary evidence that he had rendered the services for which he claimed fees, and upon this evidence the case was submitted. The court rendered an opinion with regard to the law of the case, and thereupon referred the matter to a special master, to report the state of the account in accordance with the opinion of the court. *McKinstry v. U. S.*, 34 Fed. Rep. 211. The master made report in accordance therewith, finding that for certain services rendered by the petitioner, as com-

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

missioner, he was entitled to the sum of \$893.05, which was subject to a credit of \$666.46, leaving a balance due the petitioner of \$226.59. This report was confirmed by the court, and thereupon the court entered the following findings of fact and conclusions of law:

"This case having been heard by the court, the court, upon the evidence, finds the facts to be as follows:

"FINDINGS OF FACTS.

"(1) The claimant, William D. McKinstry, was a commissioner of the circuit court of the United States for the southern district of Alabama on and before February 10th, 1887, and is now such commissioner.

"(2) That said commissioner actually performed the following services during the period covered by the accounts sued on, viz.:

131 oaths to complaint, ea. 10c., and filing complaint, ea. 10c.,	\$ 26 20
180 warrants issued, ea. 1.00, and filing warrants, ea. 10c.,	143 00
2 warrants issued, ea. 1.00, but not filed,	2 00
58 warrants filed only, ea. 10c.,	5 80
116 subpoenas issued, ea. 25c., and filing subp's, ea. 10c.,	40 60
16 subpoenas issued, ea. 25c., but not filed,	4 00
55 subpoenas filed only, ea. 10c.,	5 50
76 days hearing and deciding crim'l charges, \$5.00 per diem,	380 00
824 oaths administered to witness on trial of cause, ea. 10c.,	32 40
156 bonds of defendants, drawing same, 4 fol., ea. 60c.,	93 60
82 oaths of justification to bonds, ea. 10c.,	8 20
195 certificates to witnesses for attendance, ea. 15c.,	29 25
195 oaths to witnesses as to travel and attendance, ea. 10c.,	19 50
191 copies of transcript of proceedings, 2 fol., ea. 20c.,	38 20
187 certificates to transcript of proceedings, 1 fol., ea. 15c.,	23 05
32 copies of process 4 fol., ea. 40c.,	12 80
Making report for the month of March in duplicate, 12 fol., 15c.,	1 80
Making report for the month of April in duplicate, 19 fol., 15c.,	2 85
Making report for the month of May in duplicate, 49 fol., 15c.,	7 35
Making report for the month of June in duplicate, 24 fol., 15c.,	3 60
Making report for the month of July in duplicate, 24 fol., 15c.,	3 60
Making report for the month of August in duplicate, 34 fol., 15c.,	5 10
Making report for the month of Sept. in duplicate, 31 fol., 15c.,	4 65

Total, - - - - - \$893 05

"His said accounts for fees were duly verified by oath, and presented to the proper court and approved, and were duly presented for payment to the accounting officers of the treasury, and \$666.46 allowed and paid thereon,

"CONCLUSION OF LAW.

"Upon the said findings of fact the court decides, as conclusion of law, that the claimant is entitled to recover the sum of two hundred and twenty-six and fifty-nine one-hundredths dollars."

A motion for a new trial has been entered in the case, accompanied with the following stipulation of counsel:

"All findings against claimant in opinion 34 Fed. Rep., in *McKinstry's Case*, pages 211-216, following *Strong's Case*, pages 17-25. In omitting to find as a fact whether the services that were not allowed had or not been rendered. The undisputed testimony of claimant showing that claimant had rendered all the services charged, and that his accounts containing charges therefor had been duly approved by the court. The accounts under oath and disallow-

ances, and papers and dockets showing entries charged for, being in evidence. In disallowing charges for the items of: Complaint, as certificates at 15 cents per folio; as depositions, at 20 cents per folio. Acknowledgments to recognizances. Docket fees. Docket entries. Copies, except of warrant, under charge for copy of 'process.' Entering returns of warrants and subpoenas, Per diem charges. Certificates payment of witnesses [pay-rolls] in duplicate. It is stipulated and agreed that the above shall be considered as the propositions involved in the application for rehearing, and that the services charged for were duly proven on the trial to have been rendered, except as specifically found differently in the opinion of the court.

[Signed]

"GREGORY L. & H. T. SMITH,

"GEORGE H. PATRICK,

"Att'ys for Claimant, W. D. McKinstry.

"M. D. WICKERSHAM, U. S. Attorney.

[Signed]

"June 17th, 1889.

"It is further agreed that the question of the jurisdiction of the said circuit court to hear and determine causes based upon claims or demands against the government, like the claims or demands embraced in this suit, shall be considered as if duly pleaded and at issue on the original trial of the case.

[Signed]

"GREGORY L. & H. T. SMITH,

[Signed]

"GEORGE H. PATRICK, for Claimant.

[Signed]

"M. D. WICKERSHAM, U. S. Atty, for Defendant.

"June 17th, 1889."

G. L. & H. T. Smith and G. H. Patrick, for the motion.

M. D. Wickersham, U. S. Dist. Atty.

Before LAMAR, Justice, and PARDEE, J.

PARDEE, J., (*after stating the facts as above.*) The motion for a new trial has been submitted upon briefs, on the one side as to the merits, and on the other as to jurisdiction. At the outset, I desire to say that the whole investigation has been rendered more complex and difficult from the fact that the petitioner sued upon his claim as upon a general running account against the United States, allowing credits as payments had been made thereon, instead of suing on the disallowed items. So far as I have the record before me, it seems to be impossible to tell what items of the petitioner's account were allowed by the department and what were rejected. On this motion for a new trial, the counsel for the United States has interposed a sort of plea to the jurisdiction. Its exact pertinency is not apparent. If well taken, it would be in aid of the motion for a new trial; because, prior to dismissing the suit for want of jurisdiction, it would be necessary to grant the motion for a new trial. Further than this, I must confess that I do not exactly understand the points sought to be made by the district attorney.

The first clause of the first section of the act, approved March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," provides—

"That the court of claims shall have jurisdiction to hear and determine the following matters: *First*, all claims founded upon the constitution of the United States, or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or un-

liquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same."

The second section of the said act provides—

"That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section, where the amount of the claim does not exceed one thousand dollars; and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars."

It seems to be perfectly clear that the petitioner's claim is one embraced within the provisions of the first clause of the first section, and is not included within the proviso thereto. It is well understood that in passing the said act of March 3, 1887, the congress was making a direct and decided innovation in regard to allowing suits to be brought against the government; and that, for purposes of relieving the court of claims, and to relieve suitors from the expense of going to the capital, the jurisdiction was conferred upon the circuit and district courts.

AS TO FINDINGS OF THE COURT.

The petitioner urges that he was entitled to a finding of fact as to whether the services he sued for, and which were not allowed by the court, had or not been rendered. The evidence on the subject is full and clear. The law provides for the trial of this class of cases by the court without a jury, and that the court shall cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case. The law also provides, to a certain extent, for an appeal or writ of error, and in a contingency, for the examination and action of the attorney general. Whether the petitioner has rendered the services for which he demands fees from the government, seems to be a question of the utmost importance in the determination of the case, and for an intelligent review thereof by an appellate court, or by the department of justice.

COMPLAINTS.

Section 1014 of the Revised Statutes provides as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of the circuit court to take bail, * * * and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of

such court, together with the recognizances of the witnesses for their appearance to testify in the case."

The Code of Alabama (1876) provides as follows:

"Sec. 4647. The complaint is an allegation made before a proper magistrate that a person has been guilty of a designated public offense. Sec. 4648. Upon a complaint being made to any one of the magistrates, specified in section 4026, that such offense has, in the opinion of the complainant, been committed, the magistrate must examine the complainant, and such witnesses as he may propose on oath, take their depositions in writing, and cause them to be subscribed by the persons making them. Sec. 4649. The depositions must set forth the facts stated by the complainant and his witnesses tending to establish the commission of the offense, and the guilt of the defendant."

From these sections, it is clear that a commissioner of the circuit court of the United States in the state of Alabama, in order to proceed agreeably to the usual mode of process against offenders in such state, must receive the complaint when presented, must examine the complainant and such witnesses as he may propose, on oath, take their depositions in writing, and cause them to be subscribed by the persons making them; and it follows that if the petitioner in this case has done and performed these services in connection with his office, in complaints brought of violations against the laws of the United States, he has performed necessary duties imposed upon him by his office, under the statutes. Section 847 of the Revised Statutes provides, with regard to commissioners' fees, as follows:

"For taking and certifying depositions to file, 20 cents for each folio; * * * for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services."

The petitioner claimed for 130 complaints, 5 folios each, at 15 cents; 130 oaths at 10 cents, and 130 filings, 10 cents each, and the court rejected the claim, holding on the point as follows:

"There is no authority found in the statutes for a charge for a complaint. Neither section 828 nor 847 prescribes a fee for drawing a complaint in a criminal prosecution, nor for any like service; but, as a complaint is sworn to and filed, I think the petitioner is entitled to the fee prescribed for administering an oath, and for filing a paper in a case. While it was admitted in the argument by plaintiff's counsel that there is no fee allowed for complaint *eo nomine*, it was urged that he should be allowed compensation for taking depositions at the rate of 20 cents a folio, under section 847, Revised Statutes, inasmuch as he is required, in the preliminary examination of a criminal charge, to reduce to writing the testimony of the complainant and such witnesses as he may propose in support of his complaint. The Criminal Code of this state requires this, and calls such testimony 'deposition.' Code Ala. vol. 2, §§ 4256, 4257. But it does not require such testimony to be certified and filed by the magistrate, nor does it require such testimony to be taken with the same formalities as is required by the statute in the taking of depositions. Code Ala. §§ 2807, 2808. The Criminal Code only requires that the testimony shall be signed by the witness. Id. §§ 4256, 4286. That such examination, reduced to writing by a commissioner, is not a deposition, in contemplation of section 847, Revised Statutes, which prescribes a fee for taking and certifying depositions to file, see *Nail Factory v. Corning*, 7 Blatchf. 16, and also opinion in v.40f.no.14—52

the case of *Strong v. U. S.*, in the district court for the southern district of Alabama, 34 Fed. Rep. 17, (filed February 21, 1888.)"

As shown above, the taking of the complaint was necessary and proper to the performance of the petitioner's duties. It is conceded that he cannot be paid for services unless it is provided for in that part of the fee-bill quoted above. If the provision in relation to taking depositions is taken and construed strictly and technically, presuming everything for the government and nothing for the petitioner, the finding of the court on the claim for complaints was right. On the other hand, if the provision is taken and construed liberally, and on the theory that the government does not require the services of commissioners of the circuit court without compensation, then the petitioner would seem to be entitled to compensation for taking complaints, and reducing them to writing, as for taking and certifying depositions to file.

"Depositions, in the most general sense of the word, are the written statements, under oath, of a witness in a judicial proceeding. "Deposition" is used in a special sense to denote a statement made orally by a person on oath before an examiner, commissioner, or other officer of the court, [but not in open court,] and taken down in writing by the examiner, and under his direction." *Rap. & L. Law Dict. verbo "Deposition."*

"Where the words of the statute prescribing compensation to a public officer are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer." Judge STORY, in *U. S. v. Morse*, 3 Story, 87.

In view of the fact that the government requires the commissioner to take the complaint in writing, and has not otherwise provided compensation for the service, I think that a construction of the statute that will allow payment to be made therefor, as for taking and certifying depositions, should be adopted.

ACKNOWLEDGMENTS TO RECOGNIZANCES.

The reasoning with regard to complaints, and to the construction of the statute allowing compensation therefor, seems to apply with equal force with regard to acknowledgments of recognizances. The service is necessary, and no provision is made for the payment, except that the commissioner is authorized to charge, under section 847, for taking an acknowledgment, 25 cents. It may be that the acknowledgment referred to in the statute was originally intended for an acknowledgment of the execution and signature of conveyances; but it appears that it is the duty of the commissioner to take acknowledgments of recognizances for appearances in criminal cases, and, as there is little difference in fact between the two sorts of acknowledgment, it is not considered as forcing the statute to hold that the fee-bill, as quoted above, covers the case. In fact, I take it from the record in this case that the first comptroller has never declined to allow such a fee, but has practically held that, no matter the number of bail, only one acknowledgment could be allowed for in a case. For adjudged cases holding that commissioners are entitled to fee for acknowledgment to recognizance, see *Barber v. U. S.*, 35 Fed. Rep. 886; *Rand v. U. S.*, 36 Fed. Rep. 671; *Heyward v. U. S.*, 37 Fed. Rep. 764.

DOCKET FEES.

Under the provisions of Rev. St. §§ 828, 847, commissioners of the circuit court, in certain cases, are entitled to docket fees. *U. S. v. Wallace*, 116 U. S. 398, 6 Sup. Ct. Rep. 408. In the act of congress entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1886, and for prior years, and for other purposes," (chapter 903, 24 St. at Large, p. 274,) is the following provision:

"For fees of commissioners, and justices of the peace acting as commissioners, \$50,000: provided, that for issuing any warrant or writ, and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services; but they shall not be entitled to any docket fees."

The construction and effect of this provision has been before the court of claims and several of the district and circuit courts, and conflicting decisions have resulted. Several very able district judges have held that the said legislation does not take away the right of commissioners to receive docket fees, but only excepts their payment out of the sum appropriated by the said act. See *Bell v. U. S.*, 35 Fed. Rep. 889; *Rand v. U. S.*, 36 Fed. Rep. 671; *Hoyne v. U. S.*, 38 Fed. Rep. 542. The contrary ruling, *i. e.*, that the proviso of the said act, quoted above, was positive amendatory legislation, and enacted for the purpose of cutting off docket fees, is held by the court of claims in *Faris v. U. S.*, 23 Ct. Cl. 374; by Judge TOULMIN of this district, in *Strong v. U. S.*, 34 Fed. Rep. 17; and by Judge SIMONTON, of South Carolina, in *Calvert v. U. S.*, 37 Fed. Rep. 762. The one construction denies any substantial effect to the legislation; the other gives full effect to it as general legislation, amending the commissioners' fee-bill. There is no question of the power of congress to inject general legislation as a rider upon an appropriation in an appropriation bill. It has been too often done to be questioned at this day. The point for determination now is, what was the intention of the law-maker in the provision under consideration? Looking to the act itself, I find that congress therein made five specific appropriations for the payment of commissioners' fees,—*i. e.*, for the year 1883 and prior years, for 1884, 1885, 1886; and in the general appropriation act, approved the same day, I find still another appropriation for the same purpose for the year 1887. To the appropriation for 1886 the proviso is attached. The other appropriations are unconditional in every respect.

It is hardly to be supposed that congress intended to provide an amended and restricted fee-bill for commissioners for the year 1886, leaving prior and subsequent years for which provision was made at the same time, to the operation of the old fee-bill. As to docket fees, the language of the legislation is peremptory,—“but they shall not be allowed docket fees.” The legislation in point of time follows so closely the decision of the supreme court in *U. S. v. Wallace*, *supra*, to the effect that in certain cases commissioners are entitled to docket fees, an allowance which theretofore had strenuously been resisted by the treasury department; that we can almost say that “the mischief to be remedied is apparent.” I have

consulted the text-books and the adjudged cases, and have noticed the hardships of the law,—the courts on one side requiring commissioners to keep dockets, and the congress, on the other, refusing to pay therefor,—but, for the reasons aforesaid, and those given by Judge TOULMIN in *Strong v. U. S.*, *supra*, I am constrained to hold that the legislation in question was general, and not restricted, and that thereby the commissioners' fee-bill was so amended as not to allow docket fees under any circumstances.

On the other points submitted on this motion for a new trial, I agree with the trial judge in his opinion on file in this case and in the case of *Strong v. U. S.* As certain findings of fact and allowances have been refused the petitioner to which, according to this opinion, he is entitled, it is necessary that a new trial should be granted in the case.

An order to that effect will be entered.

LAMAR, Justice. Having sat with the circuit judge on the hearing of this motion, after due consideration and consultation we agreed in the general conclusions, and I assigned to him the preparation of the opinion. I have examined the above opinion prepared by him, and concur fully with the views therein presented.

UNITED STATES *v.* CHAIRES *et al.*

(Circuit Court, N. D. Florida. December 19, 1889.)

1. JURY—JURY COMMISSIONER—QUALIFICATION.

21 U. S. St. at Large, 43, requiring the court to appoint a jury commissioner, who shall be a citizen of good standing, and shall reside in the district in which the court is held, and who shall be a well-known member of the principal political party in the district opposing that to which the clerk belongs, is directory merely, and not mandatory.

2. SAME—SELECTING FROM PART OF DISTRICT.

Rev. St. U. S. § 802, permitting jurors to be returned on an order of court from parts of a district, a plea that the jurors were drawn from an alleged division of the district, and not from the entire territory within the district, is bad, there being no injury or prejudice averred.

3. SAME.

A plea is also bad under this statute, which, in effect, set forth that the defendants are, and were citizens of L. county, in said district; that the offense charged was committed, if at all, in said L. county; and that none of the names placed in the jury-box from which the grand jury was drawn were citizens of said L. county.

4. SAME—SELECTION WITH REGARD TO POLITICAL AFFILIATIONS.

Defendants' second plea was to the effect that the jury commissioner and the clerk, in selecting names to be placed in the jury-box from which the grand jury which found the indictment against defendants was drawn, did not comply with the law, and select such names without regard to party affiliations, but did select such names with regard to the party affiliations of the persons selected. No injury or prejudice was averred. *Held* that, while the plea was defective in form and substance, the matters set forth were so pleaded as to put the court on inquiry, and the demurrer thereto would be overruled, and the district attorney ordered to traverse the same.

Indictment for Violation of Election Laws, Brought against Benjamin Chaires, J. L. Agnew, and Doc Wooten.

Cockerell & Son, for defendants.
Mr. Stripling, Dist. Atty.
Before PARDEE and SWAYNE, JJ.

PARDEE, J. The defendants have filed several pleas in abatement, hereinafter more fully set forth, to which the district attorney for the United States has demurred, assigning as grounds therefor that the same are bad in substance, in that the said pleas do not allege that the defendants are prejudiced in any way, and that the matters alleged in said pleas do not in law constitute any ground of abatement. Counsel for the defendants and for the United States have argued the questions of law thus raised, and the court has considered the same.

The first plea is to the effect that the jury commissioner, appointed by the court on July 2, 1889, and who acted in placing the names in the box from which was drawn the jurors composing the grand jury finding the indictment against the defendants, is not now, and was not when appointed, a well-known member of the principal political party in the district opposed to that political party to which the clerk of the court belongs. The said plea contains no averment of injury or prejudice to the defendants, resulting from the fact alleged, and constituting the substance of the plea. At the hearing, we were under the impression that the plea was good in substance, and that injury and prejudice to the defendants might be inferred from the non-compliance with the requirements of the law, considering the same to be mandatory as to the qualification of the jury commissioner; but an examination of the law, and a consideration of the nature of the case, have forced us to the contrary conclusions. The statute provides as follows:

"And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong; the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein." 21 St. at Large, 43.

An inspection of this statute shows that the work of preparing the names of the persons possessing the qualifications of jurors, and placing them in the box, is to be done by the clerk of the court and a jury commissioner to be appointed by the judge. The duty to be performed by these parties is clearly and specifically prescribed in the statute. It may be considered, and probably is, mandatory; but it is entirely distinct from the duty devolving, under the statute, upon the judge. The plea under consideration relates entirely to the performance of the duty of the judge. By the statute, the judge is to appoint a commissioner, who shall be a citizen of good standing, who shall reside in the district in

which the court is held, and who shall be a well-known member of the principal political party in the district opposing that to which the clerk belongs. The question is whether this part of the statute is mandatory or directory; whether, in appointing a jury commissioner, the judge, while endeavoring to comply with the law, must make no mistake of fact or of judgment, but must, at the peril of all subsequent proceedings, be sure to appoint a citizen, not only of standing, but of good standing, and not only a known, but a well-known, member of the principal political party opposed to that to which the clerk belongs. The statement of the question, and the nature of the case, satisfies us that the statute in this particular is directory, and not mandatory. What is the standard for a citizen in good standing? By what rule is it to be determined who is a well-known member of a political party? Considering that the judge has knowledge, judicial or otherwise, as to the political party of the clerk, by what rule is the judge to determine which is the principal party opposed? Suppose that the clerk is an independent or a prohibitionist? In case of a challenge to the array of jurors, or a plea in abatement, who is to try the issue? All matters and questions come back to the judge. The judge, in the exercise of a sound discretion, under the responsibilities of his office, directed by the statute, passes upon the qualifications of the jury commissioner he appoints, and his action would seem to be final and conclusive, except, perhaps, in the court that can call the judge to account for misbehavior in office. Particularly must this be the case where neither injury nor prejudice nor oppression is apparent nor is averred.

We have examined the case of *U. S. v. Ambrose*, 3 Fed. Rep. 283, relied upon by counsel for defendants as holding that the statute, as to the qualifications of the jury commissioner, is not directory merely, but is mandatory. We find no such question in issue in that case, nor any holding or language of the presiding judge therein to warrant the conclusion that such ever was his opinion. The matter presented by this plea is naturally an interesting and tender subject to the court, (one of the judges having made the appointment in question,) and we would be disposed, *ex propria motu*, to suspend ruling on this plea, and direct an issue thereon, and an investigation thereunder, but for the fact, of which we take judicial notice as a part of the history of this and the preceding term, that upon the identical question the court has had and allowed the fullest investigation; that the real issue therein was not as to whether the jury commissioner was a Democrat, and a known Democrat, but whether he was a well-known Democrat; and thereafter, upon the evidence, the court has held and decided that the jury commissioner was and is a well-known member of the principal political party in the district opposing that to which the clerk belongs, (*U. S. v. Ewan*, ante, 451;) and a further investigation is not necessary, either for the vindication of the court or the protection of parties.

The third plea is to the effect that the names of the persons placed by the jury commissioner and the clerk in the box were not drawn from the entire territory within the northern district of Florida, but were drawn

from an alleged division of the district. No injury or prejudice is averred. Section 802, Rev. St., permits jurors to be returned on an order of court from parts of a district. No injury or prejudice can therefore be inferred. We think this plea is bad in form and substance.

The fourth plea is to the same effect, and, in addition, sets forth that the defendants are, and were, citizens of Leon county, in said district; that the offense charged was committed, if at all, in said Leon county; and that none of the names placed in the box from which the grand jury was drawn were of citizens of said Leon county. No injury or prejudice is averred, and as jurors can be drawn, under section 802, Rev. St., from a part of the district, no injury can be inferred. The plea is faulty in form and substance, and the demurrer thereto is well taken.

The fifth and sixth pleas were withdrawn on the hearing.

This disposes of all the pleas but the second, which is to the effect that the jury commissioner and the clerk, in selecting names to be placed in the jury-box from which the grand jury which found the indictment against defendants was drawn, did not comply with the law, and select such names without regard to party affiliations, but did select such names with regard to the party affiliations of the persons selected. No injury or prejudice is averred. We regard this plea as defective in form and substance, and containing argumentative and irrelevant matter; but we are inclined to the opinion that matters therein set forth might be so pleaded as to put the court on inquiry. We consider that the charge is, practically, that the jury-box was packed for political purposes.

We are disposed to agree with the case of *U. S. v. Ambrose, supra*, that the duties of the jury commissioners, in preparing the jury-box, are mandatory; but we do not think it necessary to so decide in this case. The imputation sworn to, and presented by reputable counsel, as it is, we regard as of such importance to the court, as well as to the administration of justice, as to demand inquiry.

An order will be entered sustaining the demurrer to the first, third, and fourth pleas, declaring the fifth and sixth pleas withdrawn on the hearing, overruling the demurrer to the second plea, and directing the district attorney of the United States to traverse the said second plea, with a view to a hearing thereon.

SWAYNE, J., concurs.

In re MORRIS.

In re CISSON.

(Circuit Court, E. D. Tennessee. December 6, 1889.)

HABEAS CORPUS—CONVICTION BEFORE UNITED STATES COMMISSIONER.

Upon an application for a writ of *habeas corpus* by one jailed, in default of bail, upon a conviction before a United States commissioner, under a warrant charging counterfeiting the coin of the United States, the court will not inquire into the merits of the decision of the commissioner, but only as to whether an offense is charged, and whether the commissioner has power to inquire into and adjudge the complaint.

Application of George Morris for *habeas corpus*.

W. H. Harbison, for petitioner.

H. M. Wiltse, Asst. U. S. Dist. Atty.

KEY, J. The petitioner has presented his application for a writ of *habeas corpus*. He alleges that he was arrested under a warrant issued by a commissioner of this court in which he is charged with counterfeiting the coin of the United States; that he was tried before the commissioner, and found guilty; and, failing to give bond, was committed to jail to await trial at the next term of the court. It is not insisted that the offense charged is not a crime against the United States, or that the commissioner had no authority to hear the case. The petition alleges that the proof heard by the commissioner was insufficient to justify the judgment rendered; that it fails to show probable cause of the petitioner's guilt. The case is of considerable importance, not only to the petitioner and those similarly situated, but to the government. There are several hundred criminal offenses tried in the federal courts of the eastern and middle districts of Tennessee in every year, and four-fifths of them, I presume, are commenced before commissioners of the courts. If it be the duty of the court or judge to grant and hear applications for writs of *habeas corpus* upon the ground of the character or weight of the proof upon which the commissioners act in these cases, there will be scope and opportunity for an extensive business and great expenditure of the public money in this field of operations. But if the law imposes such a duty, or gives such a right, it must be met and enforced. Proceedings on *habeas corpus* in the federal courts are not governed by state legislation, but must conform to common-law rules. *Ex parte Kaine*, 3 Blatchf. 1. We must look to the common law, to the legislation of congress, and the decisions of the federal courts for the principles which should control the determination of this case. There is not absolute uniformity in the decisions of the circuit and district courts in regard to these principles, as applicable to the case under consideration. In *Re Stupp*, 12 Blatchf. 507, it was held that the court issuing the writ will not retry the case, but will inquire into the jurisdiction and the regularity of the proceedings. In *Ex parte Parks*, 14 Alb. Law J. 339, it was said that it is only when the proceedings below are entirely void that the prisoner is entitled

to a discharge. *Ex parte Shaffenburg*, 4 Dill. 271, decides that a decision of a court of competent jurisdiction cannot be questioned for error upon *habeas corpus*. In *Ex parte Van Aernam*, 3 Blatchf. 160, it was held that, in proceedings under *habeas corpus*, the court will not inquire into the merits of a decision of the committing magistrate. It will only inquire whether the prisoner was charged with a criminal offense, and whether the magistrate has power to inquire into and adjudge upon the complaint. The decisions or principle are supported by the authority of adjudications of the supreme court of the United States. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Carll*, 106 U. S. 521, 1 Sup. Ct. Rep. 535; *Ex parte Parks*, 93 U. S. 18. These principles, when applied to the case in hand, lead to the conclusion that the petition, on its face, fails to state facts sufficient to authorize the issuance of the writ, and should be dismissed. If, however, this were not so, I should feel bound to reach the conclusion that the writ should be dismissed upon the proof made before the commissioner. This proof shows that the petitioner was at a blacksmith shop when moulds were being made for making counterfeit money. That Colbert Kerley, about Christmas or New Year's, 1888-89, was in the night-time making counterfeit money, at petitioner's house, and that the petitioner held a light for him. That, after a few dollars were made, petitioner said that he would not have any more of it made about his house. Petitioner had some of the money in his hand looking at it; and that Kerley had been seen at his house several times. I cannot say that the opinion of the commissioner in holding that probable cause was shown, and that he should be held to answer, is erroneous. But one of the witnesses examined before the commissioner, and whose testimony was reduced to writing, and signed by the witness, and who is charged with engaging in the same offense, is brought before the court, and states that the language of his written statement is somewhat erroneous, he thinks. He now thinks that he (said petitioner) might have held the light; that he does not remember positively that he held it. If this change were made in his statement of his testimony, I am not prepared to say that it would change the commissioner's conclusion, or ought to do so. I do not believe that this supplemental or modified statement can now be entertained. My conclusion is that the petition and writ should be dismissed, and the petitioner remanded to jail, unless he gives bond and surety for his appearance, as required by the commissioner, and it is so ordered.

In *Re Cisson* the same result is reached and the same order made.

BRUSH ELECTRIC CO. v. FORT WAYNE ELECTRIC LIGHT CO. *et al.*

(Circuit Court, D. Indiana. December 24, 1889.)

1. PATENTS FOR INVENTIONS—ELECTRIC LAMPS—PATENTABILITY.

The claims of letters patent No. 219,208, issued September 2, 1879, to Charles F. Brush, for improvement in electric lamps, consisting of two or more pairs of carbons in combination with mechanism to separate such pairs successively and independently, so that the light will be established between but one pair at a time, while the other pairs are maintained in a separated relation, and so that when their members are in contact the current may pass freely through all said pairs alike, substantially as shown in the specifications, are valid, not being for mere functions or results, but being limited to the means described or its equivalent.

2. SAME.

The claims of said patent for the lifter and clamps which move the carbons, "substantially as and for the purpose shown," is for such lifter and clamps in combination with the other mechanism described in the specifications, and is valid.

3. SAME—INFRINGEMENT.

Said patent is infringed by a lamp so constructed as to cause two pairs of carbons to be successively separated in identically the same way as the Brush lamp, though the infringing device uses a hinge clamp, instead of a ring clamp, to hold the carbons.

4. SAME—ANTICIPATION.

Letters patent No. 147,827, issued February 24, 1874, to Matthias Day, Jr., for an electric lamp in which each carbon is split vertically for a slight distance from the outer end, but is so rigidly connected at the clamp end as to act solely as a pair of separate carbons, and not as two or more independent pairs of carbons, is not an anticipation of the invention described in said Brush patent.

5. SAME—GENERAL SPECIFICATION—DISCLAIMER.

Where a patentee describes certain mechanism in his specifications, and then declares that he does not limit himself to such mechanism, or its equivalent, but refers in his claim to the mechanism "substantially as shown" he need not disclaim the broad language of the specification in order to validate his patent, since the scope of the patent is measured by the terms of the claim, and the general statement in the specifications is mere surplusage.

In Equity.

M. D. & L. L. Leggett and H. A. Seymour, for complainant.

R. S. Taylor, for defendants.

GRESHAM, J. This suit is brought for alleged infringement of letters patent No. 219,208, granted to Charles F. Brush, September 2, 1879, for improvement in double carbon electric lamps of the arc type. Brush assigned the patent to complainant before suit was brought.

When two ordinary, pointed, carbon sticks are in contact in an electric circuit, the circuit is closed, and the current freely passes through the carbons, without the production of any appreciable amount of heat or light at the point of contact. If, however, while the electric current is passing through them, the carbons are slightly separated, the current will continue to flow, and in crossing or leaping the small space intense heat and light will be produced. This is known as the electric arc lamp, and the one generally used for illuminating large buildings and halls, and for lighting streets. The incandescent electric light is produced by causing a current of electricity to pass through a filament in a glass bulb, from which the air has been exhausted. In its passage the current encounters great resistance, and, as a consequence, the filament is heated

to a degree producing a bright, white light throughout its entire length. This light is well adapted to use in-doors. As early as 1810, Sir Humphrey Davy, with a battery of 2,000 cells, succeeded in producing an arc light between two horizontal charcoal pencils, insulated, except a small portion at their ends; but, owing to the rapid combustion of the soft points, the great cost of the battery, and the short duration of the light, it was of no practical or commercial value. But little progress was made in the improvement of this light or lamp until 1844, when Foucault substituted pencils made of hard gas carbon for the charcoal pencils of Davy, and thereby, for the first time, produced a persistent, but short-lived, electric arc light. By a clock-work mechanism, Foucault fed the pencils toward each other, but imperfectly regulated their burning. The voltaic battery did not generate electricity on a sufficiently large scale. The light was expensive, and it did not go into general use. Later, the dynamo electric machine was developed, in which a powerful current of electricity was produced by revolving coils of wire in a field of magnetic force furnished by powerful, permanent magnets, after which the arc electric light was successfully used in light-houses in England, and later (1867) in France. But up to this time no means had been devised for producing an adequate current of electricity for illumination at practicable cost; and it was not until the invention of the Gramme dynamo electric machine, in 1872, that electricity was produced in a manner, and of sufficient strength, to render electric lighting practical and useful. This machine was afterwards improved in details of construction. In this state of the art, Brush entered the field of invention, and on May 7, 1878, obtained patent No. 203,412 for his arc lamp, which was superior to any lamp that had preceded it. This lamp, however, was not capable of burning continuously more than 8 or 10 hours, and, when used for all-night lighting, it was necessary to extinguish the light and renew the carbons; and, in order to obviate this defect, Brush invented the lamp in suit. His invention, and the means by which it is carried out, are thus described in the specification:

"My invention relates to electric lamps or light regulators; and it consists—*First*, in a lamp having two or more sets of carbons, adapted by any suitable means, to burn successively,—that is, one set after another; *second*, in a lamp having two or more sets of carbons, each set adapted to move independently in burning and feeding; *third*, in a lamp having two or more sets of carbons, adapted each to have independent movements, and each operated and influenced by the same electric current; *fourth*, in a lamp having two or more sets of carbons, said carbons, by any suitable means, being adapted to be separated dissimultaneously, whereby the voltaic arc between but a single set of carbons is produced; *fifth*, in the combination, with one of the carbons or carbon holders of a lamp employing two or more sets of carbons, as above mentioned, of a suitable collar, tube, or extended support, within or upon which the carbon or carbon holder to which it is applied shall rest, and be supported. * * * I desire to state, at the outstart, that my invention is not limited in its application to any specific form of lamp. It may be used in any form of voltaic arc light regulator, and would need but a mere modification in mechanical form to be adaptable to an indefinite variety of the present forms of electric lamps. My invention comprehends, broadly, any lamp or light regulator,

where more than one set of carbons is employed, wherein—say in a lamp having two sets of carbons—one set of carbons will separate before the other. For the purpose, merely, of showing and explaining the principle of operation and use of my invention, I shall describe it, in the form shown in the drawings, as applied to an electric lamp of the general type shown in United States letters patent No. 203,411, granted to me May 7, 1878, reissued May 20, 1879, and numbered 8,718. The leading feature of this type of regulator is that the carbon holder has a rod or tube which slides through or past a friction clutch, which clutch is operated upon to grasp and move said carbon rod or holder, and thus to separate the carbons and produce the voltaic arc light; and I shall refer to such a lamp in my following description: A represents one set of carbons; A¹, another set, each carbon having an independent holder, B, B¹. The carbon holders, B, B¹, may either be in the form of a rod or tube, and each of them is made to pass through a clamping and lifting device, C, C¹, respectively. These clamps and lifters, C, C¹, are shown in the present instance in the shape of rings surrounding their respective carbon holders, B, B¹. This form, while I have found it for general purposes the best, is not necessarily the only form of clamp that may be used in carrying out my present invention. Each ring clamp, C, C¹, is adapted to be lifted from a single point, thus tilting it, and causing it to grasp and lift its inclosed carbon holder. This tilting and lifting movement is imparted to the clamps, C, C¹, by any suitable lifter, D; and this lifter may have its movement imparted either by magnetic attraction, due to the current operating the lamp, or by the expansive action of heat upon any suitable apparatus connected with the lamp; said heat generated by the electric current operating the lamp. I do not in any degree limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points, or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished. The lifter, D, in the present instance, is so formed that when it is raised it shall not operate upon the clamps, C, C¹, simultaneously, but shall lift first one and then the other; preferably, the clamp, C, first, and C¹, second, for reasons which will hereinafter appear. This function of dissimultaneous action upon the carbons or their holders, whereby one set of carbons shall be separated in advance of the other, constitutes the principal and most important feature of my present invention. In the lamp shown in the drawings the lifter, D, is actuated and controlled through the agency of magnetic attraction due to the influence of the current operating the lamp, and this is accomplished as follows: One, two, or more spools or hollow helices, E, of insulated wire, are placed in the circuit, within whose cavities freely move cores, E¹. The electric current, passing through the helices, E, operate to strongly draw up within their cavities their respective cores, E¹, in the same manner as specified in my former patent, above referred to. The cores, E¹, are rigidly attached to a common bar, E², and the upward and downward movement of this bar, due to the varying attraction of the helices, E, is imparted by a suitable link and lever connection, E³, E⁴, to the lifter, D. By this connection the lifter will have an up and down movement, in exact concert with the cores, E¹; and it is apparent that this connection between magnet and lifter may be indefinitely varied without any departure from my invention, and therefore, while preferring for many purposes the construction just specified, I do not propose to limit myself to its use. The lifter, D, may be so constructed and applied as to separate the carbons, A and A¹, successively or dissimultaneously, by being so balanced that any difference, however slight, between the weights of the carbons, A, A¹, or their holders, B, B¹, shall result in one being lifted and separated before the other. In order properly to balance the attractive force of the magnets, a coil spring, F, or its equivalent, may be employed, substantially as shown; and, to insure a steady motion to the magnets and to the

carbon points, A, A¹, a dash-pot, G, or its equivalent, should be employed, as this prevents any too sudden, abrupt, or excessive movement of parts. H, H¹, are metallic cables, through which the current is conducted from above the clamps, C, C¹, to the carbons, A, A¹. By this provision is not only insured a good connection between the upper carbon points and the mechanism above it, but another important advantage is obtained, and that is the prevention of sparks due to any interruption of the current between the carbon holder, B, B¹, and its clamp or bearings. This spark, if occurring too frequently, is liable to burn and roughen the rods, B, B¹, or their bearings or clamps, and thereby render their operation uncertain, because it is important that a free movement to any degree, however minute, may be allowed the carbon holder. These cables, H, H¹, while operating as just specified, are sufficiently flexible and yielding not to interfere with any movement of their respective carbons or carbon holders. The operation of my device, as thus far specified, is as follows: When the current is not passing through the lamp, the positive and negative carbons of each set, A, A¹, are in actual contact. When, now, a current is passed through the lamp, the magnetic attraction of the helices, E, will operate to raise the lifter, D. This lifter, operating upon the clamps, C and C¹, tilts them, and causes them to clamp and lift the carbon holders, B, B¹, and thus separate the carbons, and produce the voltaic arc light; but it will be especially noticed that the lifting and separation of these carbons are not simultaneous. One pair is separated before the other. It matters not how little, nor how short a time before. This separation breaks the circuit at that point, and the entire current is now passing through the unseparated pair of carbons, A¹; and now, when the lifter, continuing to rise, separates these points, the voltaic arc will be established between them, and the light thus produced. It will be apparent by the foregoing that it is impossible that both pairs of carbons, A, A¹, should burn at once; for any inequality of weight or balance between them would result in one pair being separated before the other, and the voltaic arc would appear between the last-separated pair. This function, so far as I am aware, has never been accomplished by any previous invention; and, by thus being able to burn independently, and one at a time, two or more carbons in a single lamp, it is evident that a light may be constantly maintained for a prolonged period without replacing the carbons, or other manual interference. In the form of the lamp shown, I can, with twelve-inch carbons, maintain a steady and reliable light, without any manual interference whatever, for a period varying from fourteen to twenty hours. It is for some reasons desirable that one set of carbons,—say the set A,—should be consumed before the other set commences to burn, although it is not essential, in carrying out my invention, that the carbons should be consumed in this manner, inasmuch as, if desirable, they may be arranged to burn alternately, instead of successively. It is apparent, however, if one set of carbons can be made to entirely consume before another set begins to burn, that there will be less interruption of the light than if the different pairs were allowed to consume in frequent alternation. I have therefore shown, in the present invention, one method of securing a consumption of one set of carbons before another shall begin to burn. This I accomplish through any suitable support, K, and in such a construction of the lifter, D, that it shall be positive in its function of separating one set of carbons before the other, or, in case where more than two sets of carbons are employed, to separate said sets successively. In the lamp as shown in the drawings, the support, K, is in the form of a tube surrounding the carbon holder, B; and this support, K, is made of such a length that when the carbon, A¹, shall have been sufficiently consumed, a head upon the carbon holder, B, will rest upon the top of the support, K, whereby the weight of the carbon holder, B, and its support, K, shall at all times and under any circumstances be supported by the lifter, D. Besides

the carbon holder, B, with its carbon, and the support, K; the lifter, D, (when the lamp is in operation,) should also be made to carry the carbon holder, B¹, and its carbon. The lamp is primarily adjusted so that the magnets through the lifter, D, shall always carry a definite load, to-wit, (in the lamp shown,) the carbon holders, B and B¹, and support, K. The desirability of this construction and arrangement may be explained as follows: Supposing, as is designed in the present instance, the carbons, A, are first consumed. During that time, of course, the magnets are lifting both carbon holders, B, B¹. Now, when the carbons, A, are consumed, if no provision was made to the contrary, the carbon holder, B, would not be lifted during the consumption of the carbons, A¹; and this diminishment of the weight carried by the magnets would be liable to materially disturb the adjustment of the lamp, and impair its operation accordingly. To obviate this difficulty, I have provided the support, K, by which provision the magnets shall be made to carry both carbon holders, B, B¹, and the support, K. The difference in weight, owing to the consumption of the carbons, is a practically unimportant matter, and does not materially interfere with the operation of the lamp. In the case of a lamp where the carbon holders, B, B¹, are very light, and where the weight of one might be relieved from the magnet, or other moving agent, without material disturbance, the support, K, might be dispensed with. Said support, K, might also be omitted, if desired, in a lamp where the lifter is actuated through the agency of the expansion of a metal wire or bar, by the action of heat generated by the current operating the lamp, inasmuch as, the force due to said expansion being practically irresistible, it would not be so necessary to obtain a balance between various parts, as is the case with a lamp as shown in the drawings. * * *

"Thus far, I have mentioned but two ways of imparting dissimultaneous motion to the carbons of an electric lamp, viz., through magnetic attraction, and through the expansive action of heat. This function of my device may be accomplished by clock-work, or equivalent mechanical contrivance; and in this respect, as before stated, I do not limit my invention. L, L¹, are metallic hoods or protectors for inclosing and shielding the upper projecting ends of the carbon holders, B, B¹. In the form of lamp shown in the drawing, I obtain very satisfactory results by constructing the helices, E, according to letters patent No. 212,183, granted to me February 11, 1879. In each helix, E, two independent wires surround the lifting magnets, E², one of fine and one of coarse wire, and each placed in the general circuit operating the lamp. These two wires, the fine and the coarse, are constructed and connected in such a manner as to carry current in opposite directions around the inclosed core, thus exerting a neutralizing influence upon each other, whereby a governing function is secured; for a better description and understanding of which reference is made to said patent No. 212,183. The poles of the lamp shown in the drawings are constructed in the form of suspending hoops or loops, from which the lamp is suspended, and the corresponding hooks or loops with which they engage in the ceiling, or other locality where the lamps are used, are the positive and negative poles of the current-generating apparatus. Thus, by the simple act of suspension the lamp is placed in circuit.

"I will now specify a construction whereby the protecting globe surrounding the light can be raised and lowered for convenience in renewing carbons and handling the lamp. This I accomplish by making the platform or gallery, O, upon which the globe rests, vertically adjustable upon a rod, O¹, attached to the lamp frame in any convenient manner. A set-screw should be provided whereby the globe can be adjusted to any desired position. By this arrangement, the work of renewing carbons and the reliable adjustment of the globe in relation to the voltaic are materially assisted. In order to accommodate

long sticks of carbon, the platform or gallery, O, should be perforated, to allow passage down through it of said carbon sticks. I prefer making the platform or gallery, O, of metal, and of such shape as that globules of molten copper from the covering of the carbons, in dropping away, shall not escape, to do damage. It will be particularly observed that in the form of dash-pot employed the cylinder is the movable, and the piston or plunger the stationary, element. This construction implies more than a mere reversal of the usual make and operation of the dash-pot; for, by making the cylinder the movable element, the general construction of a lamp can very often be materially simplified, as in the present instance. This form of dash-pot is designed to be employed in connection with any of the moving parts of the mechanism of an electric lamp, where it is desired to retard a downward movement."

The lamp covered by patent No. 203,411 is referred to only for the purpose of illustrating the operation of the invention in suit, and the complainant's right to the relief prayed for does not depend upon the validity of that patent. The lower carbon of this lamp is held in a fixed position, and its upper carbon is carried by a sliding rod, which passes through a ring clamp just large enough to permit it to slide freely through when the clamp lies flat on the floor of the regulator case, but which binds upon the rod when it is lifted by one edge. The lifter which is upon the edge of the clamp is attached to a soft iron core, which plays inside a wire helix, through which the current producing the light circulates. The attracting strength of this coil is proportionate to the strength of the current flowing through it. When there is no current flowing through the lamp the coil has no attraction; and the core consequently rests at the lowest limit, and the ring clamp lies flat on its floor. In that situation the carbon rod slips freely through the clamp, and the upper carbon rests in contact with the lower. Upon the establishment of the current through the lamp, it passes through the carbons with little resistance, because they are in actual contact. The current is therefore a strong one, and energizes the coil strongly; and it, in turn, powerfully attracts the core, and pulls it downward. This movement being communicated to the lifter, it, in turn, first lifts the ring clamp by one edge, which causes it to impinge closely upon the rod, and then lifts the rod and carbon, and so separates the carbon points. This establishes the arc. But the arc introduces a resistance to the current which diminishes its strength; the resistance increasing as the arc grows longer. Hence, as the arc lengthens by the consumption of the carbons, and the increase of the space between them, the current grows weaker; and the attracting power of the coil diminishes until it lets the core move downward sufficiently to release the grasp of the clamp on the rod, so that it slips downward. As the upper carbon approaches the lower, and so shortens the arc and diminishes its resistance, the current's strength increases; the coil again pulls the core upward, and so tightens the clamp upon the rod, and thus holds the upper carbon suspended at its normal distance from the lower. This process goes on until the carbons are consumed.

It will be observed from the description of the lamp in suit that when the current is first passed through it the current divides at the lamp, and

passes through both pairs of carbons, and instantly energizing the solenoids, draws upwardly the cores, and, through the bar, E^2 , link, E^3 , lever, E^4 , and lifter, D, separates the pairs of carbons, A. The separation of this pair of carbons does not operate to break the circuit and form an arc between them, but simply diverts the entire current through the remaining and unseparated pair of carbons, A. The lifter, D, continuing to rise, next separates the carbons, A, thereby interrupting the circuit, and establishing the arc between the last-separated pair of carbons, A. After the arc has been established between one pair the carbons of the remaining pair are held separated by the ring clamp; their initial separation being such that the idle pair will be retained in their separated relation while the regulator automatically moves and adjusts the burning pair, to separate or approximate them, as the conditions may require to regulate the length of the arc, and also to automatically feed them to maintain the arc. When the burning pair of carbons has been consumed the effective pull of the solenoids is diminished to such an extent that the carbons of the idle pair are brought into contact, which causes the entire current to be instantly diverted through them; the effect of which is to strengthen the solenoids, and separate the carbons again, and automatically establish the arc between them. The separation of the two pairs of carbons, so that the arc is established between one pair and maintained between the carbons of that pair until they have been consumed, and then automatically established between the carbons of the other pair and maintained between them until they have been consumed, is a dissimultaneous and successive arc-forming separation; and it is this feature which distinguishes the lamp in suit from all prior lamps.

The six claims of the patent which it is alleged are infringed read:

"(1) In an electric lamp, two or more pairs or sets of carbons, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, substantially as and for the purpose specified. (2) In an electric lamp, two or more pairs or sets of carbons, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, and establish the electric light between the members of but one pair, to-wit, the pair last separated, while the members of the remaining pair or pairs are maintained in a separated relation, substantially as shown. (3) In an electric lamp having more than one pair or set of carbons, the combination, with said carbon sets or pairs, of mechanism constructed to impart to them independent and dissimultaneous separating and feeding movements, whereby the electric light will be established between the members of but one of said pairs or sets at a time, while the members of the remaining pair or pairs are maintained in a separate relation, substantially as shown. (4) In a single electric lamp, two or more pairs or sets of carbons, all placed in circuit, so that when their members are in contact the current may pass freely through all said pairs alike, in combination with mechanism constructed to separate said pairs dissimultaneously or successively, substantially as and for the purpose shown. (5) In an electric lamp wherein more than one set or pair of carbons are employed, the lifter, D, or its equivalent, moved by any suitable means, and constructed to act upon said carbons or carbon holders dissimultaneously or successively, substantially as and for the purpose shown. (6) In an electric lamp wherein more than one pair or set of carbons are employed, a clamp, C, or its equivalent, for each said pair or set, said clamp, C, adapted to grasp and move said

carbons or carbon holders dissimultaneously or successively, substantially as and for the purpose shown."

It is admitted by the defendants' counsel that the patent in suit describes a new and useful mechanism for which Brush was entitled to a patent; but it is urged that the first, second, third, and fourth claims are for functions or results without regard to mechanism, and are therefore void. The claims are not open to this objection. The specification describes mechanism whereby a result may be accomplished, and the claims are not for mere functions; nor, fairly construed, can it be said that they cover other than equivalent means employed to perform the same functions. The first claim, construed in connection with the means described in the specification, is for an electric arc lamp in which two or more pairs of carbons are used; the adjustable carbons of each pair being independently regulated by one and the same mechanism, and in which there is a dissimultaneous or successive separation of the pairs, so effected as to secure the continuous burning of one pair prior to the establishment of the arc between the other pair. Thus construed, the invention claimed is limited to the particular means described in the specification, and their substantial equivalents. The second, third, and fourth claims also refer to the particular mechanisms described in the specification for the accomplishment of results covered by those claims. They are for combinations of specific mechanisms, and their substantial equivalents, and not for results irrespective of means for their accomplishment. It is true that in the specification Brush declared:

"I do not in any degree limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points, or their holders, so long as the particular functions and results hereinafter to be specified shall be accomplished."

He did not say, however, that he claimed all mechanisms, irrespective of their construction and modes of operation. By this language he simply notified the public that he did not restrict himself to the particular lamp described in the patent, but that his invention embraced that and all other lamps operated in substantially the same way, by equivalent mechanism.

It is urged that the fifth claim covers the lifter simply, and that the sixth claim covers nothing but the clamps, and, being only for detached parts of the lamp, incapable of separately performing the function ascribed to them, these claims are void. The fifth claim is for a combination of which the lifter, D, is an element, and, thus construed, the claim is for a novel and useful invention. The sixth claim is not for the two clamps aside from other connected mechanism. It is for the two clamps in combination with the mechanism described in the patent for actuating the clamps, and causing them to grasp and move the carbons dissimultaneously, substantially as and for the purpose described in the specification.

Patent No. 147,827, issued to Matthias Day, Jr., February 24, 1874, is relied on as an anticipation of the first, second, and fourth claims of the patent in suit. This defense is based upon a construction of these

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claims that gives no effect to their concluding restrictive language; which construction, we have seen, is not authorized. The patent in suit describes mechanism which designedly and positively effects a dissimultaneous separation of the carbons, and Prof. Barker, the defendants' expert, testified that the Day lamp was not so constructed, and did not so operate. It is true that the Day patent describes a lamp which contains two or more pairs of carbons, but not such a double carbon lamp as Brush invented. In the Day lamp, each carbon is split or divided vertically for a slight distance from the outer end, but so rigidly connected at the clamp extremity as to act solely as a pair of separate carbons, and not as "two or more independent pairs or sets of carbons." Owing to the constant and frequent shifting of the arc from one pair of carbons to the other in this lamp, it produced an irregular and unsatisfactory light. It was unlike the Brush lamp, both in construction and mode of operation.

The answer also denies infringement; but that defense, like the last one, is based on the theory that the claims are not at all limited by their concluding language. It is plain, from the evidence, that the defendants' lamp was designedly constructed so as to insure the dissimultaneous separation of the two pairs of carbons for the purpose of forming the arc between one pair only of the carbons, and that both lamps operate in identically the same way, and for the same purpose. The patent describes a ring clamp, and the defendants use a hinged clamp; but there is not the slightest functional difference between them. Both operate by grasping and holding, with varying pressure, the smooth rod which carries the carbons, thus allowing the rod to slide so as to secure a continuous feed by inappreciable degrees; while, under other conditions, the rod is allowed to slip suddenly, by gravity. The ring clamp was old, and Brush simply employed it, as suitable for his purpose, in combination with other elements with which it co-acts; and the substitution of the hinged clamp, without any change in the mode of operation or function, did not change the combination. In the Brush lamp the clamps rest on a flat floor, and the arms of the lifter are of unequal length, so that when the lifter is raised one clamp is tilted in advance of the other, and the carbons are separated dissimultaneously. In the defendants' lamp the same result is accomplished by supporting the clamps in different planes, and employing a lifter with arms of the same length, so that in the operation of the lifter it will tilt one clamp in advance of the other. Brush did not claim that there was invention in the lifter and clamps, disconnected with other parts in the operation of the lamp; and the defendants cannot escape infringement by showing that they use a lifter and clamps not identical in construction with the lifter and clamps described in the patent. It is admitted that, if the claims are construed as embracing the mechanism described in the specification, the defendants use a lamp covered by the patent in suit; and that renders a further description of defendants' lamp unnecessary.

It is finally contended that, while the patent describes particular mechanism by which the functions stated in the claims can be per-

formed, the patentee expressly declared in his specification that he did not limit himself to this mechanism, or its equivalent, but claimed that his invention comprehended all means capable of accomplishing the results stated, and that, having thus claimed more than he was entitled to, the complainant cannot recover until he disclaims everything in the specification except the specific mechanism. An application for letters patent is accompanied by a specification giving a full general description of the alleged invention; and this is followed by what is known and well understood in the courts, as well as in the patent-office, as a "claim." What the patentee invents and describes in his specification, but fails to embrace in his claim, he abandons to the public, unless, by timely application, he obtains a reissue for it; and if, in the descriptive part of his invention, he inadvertently, or otherwise, includes as part of his invention that which is old, but does not claim it, his claim is not thereby invalidated. Such part of the specification is surplusage. It is only when the claim following the specification is too broad, in the sense of embracing something as new which is not new, that the patentee is required by section 4922 to disclaim. He is not required to disclaim anything in the specification not covered by his claim. The word "specification" is obviously used in the first clause of section 4922 as synonymous with "claim." I am aware of no decision holding that a patentee is required to disclaim anything in the descriptive part of his invention which is not fairly embraced within his claim. In *Railroad Co. v. Mellon*, 104 U. S. 118, the court said:

"In view, therefore, of the statute, the practice of the patent-office, and the decisions of this court, we think that the scope of letters patent should be limited to the invention covered by the claim, and that, though the claim may be illustrated, it cannot be enlarged, by the language used in other parts of the specification. We are therefore justified in looking at the 'claim' with which the specifications of the appellee's invention conclude to determine what is covered by his letters patent."

It is not material, for the purposes of this suit, whether Brush was a pioneer, or a mere improver. It is sufficient that he described and illustrated, in his patent, specific mechanism, or double carbon lamp, adapted to burn its carbons independently and successively; that he was the first to accomplish this result; and that the claims are for mechanism substantially as described in the patent, in combination with two or more pairs of carbons, or sets of carbons, for producing the result specified. We have already stated that what is claimed is not functions and results, but mechanism for producing functions and results. A decree will be entered in accordance with the prayer of the bill.

THE ALERT.¹

(District Court, S. D. New York. November, 1889.)

1. SHIPPING—DAMAGE TO CARGO—LIBEL IN REM—THIRD PARTIES—CHARTERERS—FIFTY-NINTH RULE.

In an action *in rem* against a chartered ship for negligent damage to cargo, the charterers may, on the claimants' petition showing cause therefor, be made parties defendant, on the analogy of the case of *The Hudson*, 15 Fed. Rep. 162, and of rule 59 in admiralty.

2. SAME—PRACTICE—NEW REMEDIES.

It is the duty of courts of admiralty, under their inherent and statutory powers, to adapt their practice and proceedings to new emergencies, so as to secure, as far as possible, the speedy, complete, and convenient administration of justice.

In Admiralty. On motion that charterers be made co-defendants with the ship.

North, Ward & Wagstaff, for libellant.

Goodrich, Deady & Goodrich, for claimants.

R. D. Benedict, for charterers.

BROWN, J. The Alert was a chartered ship, and, being sued *in rem* for negligent damage to cargo, by the breaking of her tackle while discharging, under the charterers, her owners in their answer say that the tackle was furnished either by the shipper or by the charterers, under a special agreement between them, and not by the ship, and they now move that the charterers be made co-defendants. Unless this is done, there may be three independent suits on the same question. Most of the considerations mentioned in the case of *The Hudson*, 15 Fed. Rep. 162, are applicable; and I think the motion should be granted upon the analogy of that case, and of the fifty-ninth rule in admiralty. In several instances, where the language of that rule was not literally applicable, it has been applied by analogy, where the same or similar reasons have existed for its application, and where no substantial harm could arise therefrom to the plaintiff. The defendants must, of course, give the necessary additional stipulations for costs, both to the libellants and to the new parties brought in.

ON REARGUMENT ON EXCEPTIONS.

(January 15, 1890.)

The charterers, having been served with process, have appeared specially, and upon exceptions moved to set aside the process issued against them as unauthorized. Subsequent reflection confirms my judgment of the propriety of the order heretofore granted. Its propriety does not depend upon the form of the action, whether it be in contract or in tort, but on the essential reasons for it, viz., the due administration of justice; to prevent circuity of action and a multiplicity of suits upon the same question; to secure a thorough hearing upon full evidence as to the facts; to prevent diverse or contradictory decisions upon the same subject,

¹Reported by Edward G. Benedict, Esq., of the New York bar.

involving, necessarily, injustice to some of the parties. The difficulties in the way of such a procedure as the present, in cases arising on contract, where the third parties brought in may be liable to indemnify the others, are less than in cases of tort, where, for the most part, there is no right to compel contribution. The case of *The Hudson*, *supra*, was based upon the existence of such a right upon the facts as stated in the petition. The papers on which the present order against the charterers was issued show that the contract sued on was the charterers' contract. The libel is for damages upon the breach of this contract, through a negligent delivery of cargo. The charterers were in possession of the ship; they were the owners *pro hac vice*; they were the principals in the contract. The bill of lading was their obligation, not that of the master, who protested against such cargo, and no fault appears in the ship or master. The owners of the ship, who have been obliged to interpose as claimants to prevent the sacrifice of their property, and the master, are under no personal responsibility. They are strangers to the contract sued on, and without any certain means of ascertaining the facts, or producing the evidence of them. Upon the case, as thus far presented, if the ship is liable, the charterers are also liable, and bound to indemnify the claimants. Yet the claimants, if defeated in this suit, when they sue the charterers for indemnity may be again defeated through the difference in the proofs; and the libelants, if defeated here, may again sue the charterers. If the charterers admitted their obligation to indemnify the claimants for the results of the present action, or if there were any express contract imposing this obligation on them, the need of such an order as the present would be less, since notice to the charterers of the pendency of this action, and an opportunity to defend it, would bind them by the result, (*Chicago City v. Robbins*, 2 Black, 418; *Clark v. Carrington*, 7 Cranch, 308; *Village of Port Jervis v. Bank*, 96 N. Y. 550, 557; *Heiser v. Hatch*, 86 N. Y. 614; *Dubois v. Hermance*, 56 N. Y. 673; *Konitzky v. Meyer*, 49 N. Y. 571;) though this would not prevent the injustice to the ship-owners of being compelled to pay the damages on the charterers' contract before the latter were called on for payment.

The charterers, however, do not admit their liability to indemnify the ship-owners. There is no express contract covering the point. The obligation of the charterers to indemnify is directly involved in the question to be tried in this suit, viz., whether the charterers agreed to supply the tackle, and depends on the same evidence. The charterers, if not made parties now, might litigate the same question anew in any subsequent suit. *Chicago City v. Robbins*, 2 Black, 418, 423. Under the former practice in equity, the charterers would be brought in as defendants as a matter of course. Under the present practice in England, since 1873, the introduction of third persons in such cases is in the ordinary course of procedure, even in common-law suits. *Benecke v. Frost*, L. R. 1 Q. B. Div. 419; *Fowler v. Knoop*, 36 Law T. R. (N. S.) 219; *Coles v. Association*, L. R. 26 Ch. Div. 529; *Carshore v. Railroad Co.*, L. R. 29 Ch. Div. 344; *The Cartsburn*, L. R. 5 Prob. Div. 35, 39.

The present case could not arise in England, since no suit *in rem* lies

there for breach of a contract of affreightment. The remedy would be only against the charterers personally. In France there is no privilege on a chartered ship for breach of a contract not made either with the master or the owners, but made with known charterers in possession of the ship. 1 Valroger, Droit Mar. 281; Court of Cassation, Dall., 1845, Part I., 279. And, aside from that, where a maritime claim is sought to be enforced through a suit against the master, (as the practice in Europe generally is, not, as with us, by a suit *in rem* directly against the ship alone,) if the principals are not made co-defendants in the first instance, they may be brought in, if within jurisdiction, upon the master's suggestion. 1 Rev. Int. du Droit Mar. 118, 556; *The Gyptis*, 2 Id. 182, 664; *Blondiaux v. Pavot*, 4 Id. 22. And, more broadly still, in the enforcement of civil rights, generally, in the majority of European countries, the practice by what is termed, "*L'assignation en declaration de jugement commun*," or, more briefly, "*Intervention passive ou forcee*" or "*La mise en cause*," permits the defendant, in the absence even of any express provisions of the Codes, to bring into the cause any third person who might afterwards litigate the same question with the defendant, and who ought to be bound by the judgment, but who, if not in the case, might dispute its validity as to him. 3 Carre et Chauv. Proc. Civ. Qu. 1271, and note; 1 Berriat St. Prix Cours de Proc. Civ. p. 293. Dalloz says this right is incontestable, and founded on necessity and the nature of things. Repertoire, Vo. "Intervention," § 3, No. 142; Bonnier, Elem. Proc. No. 723; Italian Civil Code, §§ 203-205; Sebire et Carteret, Biblioteca del Diritto, tit. "Intervento," art. 2, § 38. See 17 Revue Critique de Leg. (N. S.) 462.

In the present case the charterers, as I have said, are the principals. If there is any liability, they are liable, and liable to indemnify the ship; and whether there is any liability cannot be determined as to them without their presence. If the maritime law and the practice of this country allow a suit *in rem* on the contract of known charterers solely, there is no lack of power in the court to regulate its procedure so as to promote speedy and substantial justice. Both the statutes and the admiralty court rules, in cases not provided for, authorize the court "to regulate its practice as is fit and necessary for the advancement of justice." Rev. St. §§ 913, 918, rule 46; *The Hudson*, 15 Fed. Rep. 175. This authority is a power held in trust for the benefit of litigants, and it is the duty of the court to exercise it in proper cases, by adapting its procedure to the practical needs of justice. On this point, BENEDICT, J., in the case of *The Epsilon*, 6 Ben. 378, 389, says:

"The admiralty creates its own forms of proceeding, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the admiralty. 'The principles, rules, and usages which belong to courts of admiralty' (Process Act 1792) enable these courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other courts, and for many of which it were vain to look in any statute. Stripped of the power to pursue these methods, there would be little left to distinguish a court of admiralty from a court of equity or of law.

* * When cases arise which have not been provided for in the rules prescribed by the supreme court, the district courts, as the only courts of original jurisdiction in admiralty, have the power, and are bound, to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer."

The case of *The Hudson*, *supra*, and the fifty-ninth rule in admiralty, though not literally applicable, furnish also an analogy for this order. A similar practice has been occasionally followed, where necessary, in cases not literally within the rule. *The City of Lincoln*, 25 Fed. Rep. 835; *The John Cottrell*, 34 Fed. Rep. 907; *The Doris Eckhoff*, 32 Fed. Rep. 555; *Joice v. Canal-Boats*, Id. 553. This case is one in which the libelants may proceed *in rem* and *in personam* in the same action, under the long-standing practice of this circuit. *The Monte A.*, 12 Fed. Rep. 336, 337, and cases there cited; *Joice v. Canal-Boats*, 32 Fed. Rep. 554. He might, therefore, originally have made both the ship and the charterers defendants. He should not be suffered to proceed capriciously against one only, to the certain prejudice of the other. This can be remedied by the joinder of the charterers as defendants now; and this will create no material embarrassment or inconvenience to the libelant. It is the charterers who have brought the ship into this situation. It is their contract that is sued on. It is they who have the means of defense, if there is any defense; and it is they who ought to pay, if there is anything to be paid. I have no doubt of the authority of the court to bring in the charterers as defendants. To refuse to do so, under such circumstances, would, it seems to me, be a denial of justice. The motion to set aside the additional process is therefore denied. The process should require the defendant to answer the libel and petition, and the petition should set forth all that is needed in connection with the libel to constitute a cause of action against the charterers.

BOUKER v. SMITH, (two cases.)

(District Court, S. D. New York. December 31, 1889.)

1. TOWAGE—STRANDING—IMPRUDENT START—INCOMPETENT HELMSMAN.

The respondent hired the libelants' scows to be used in moving the Rockaway life-saving station about two and a half miles to the eastward along the beach. In coming out from the inlet into the open sea, the tug grounded on a falling tide, and could not be got off; and before the next tide the scows, with the house upon them, having been anchored in the inlet, were driven by a storm on the shore, and were lost. The start was made about 5 p. m., the water being smooth at the time; but the wind for some time previous had been to the north-east, and there were other indications of a coming storm. The tug, in coming out of the inlet, was in the immediate charge of a helmsman who was not acquainted with the handling of tugs, and had not attempted to steer her before that day. Held that, the navigation out of the inlet with such a tow being attended with known difficulties, and with liability to stranding, it was negligence in the respondent's agents to start on the eve of an approaching storm, which would prevent extricating the tow in case of stranding; that the helmsman was incompetent at the time of grounding; and that for both reasons the respondent was answerable for the loss of the scows.

2. SAME—WARRANTY OF SEAWORTHINESS OF TOW.

In consequence of the pounding of one of the scows after they were driven ashore she sprang a leak, so as to sink in the sand, and not rise with the rising tide; thus preventing the possible extrication of the stranded boats. The scow was sufficient for navigation in ordinary weather, and for the purposes for which it was let. *Held*, that the letting imported no warranty of her sufficiency to withstand the stranding without leakage.

In Admiralty.

Libels by Dewitt C. Bouker and George A. Bouker against Francis H. Smith, for wreckage.

Wing, Shoudy & Putnam, for libelants.

Moore & Wallace, for respondent.

BROWN, J. The above libels were filed by the owners of two scows, to recover for their being wrecked through the alleged negligence of the respondent while they were let out to him and in his employ. The respondent had undertaken to remove the wooden building used as a life-saving station on Far Rockaway beach, to a point about two and a half miles to the eastward, by the use of scows, on which the building was to be placed and transported. The libelants' boats were hired for this purpose in the early part of March, 1889. At the time of the agreement it was stated that it was designed to transport the building through an inside passage; but liberty was reserved to go outside, in the open sea, if the weather were calm and the sea smooth. The two scows were accordingly sent to Far Rockaway beach by the libelants, and there delivered to the respondent. They were taken a few hundred yards up Rockaway inlet, near to the station building, and the building was moved, and put upon the two scows, and got in readiness for transportation by the afternoon of the 14th. It had been previously ascertained that the inside passage to the eastward had become so obstructed as to make it unwise to attempt that course. The respondent had previously engaged the small tug-boat *Kapella* to take the scows with the building in tow by a hawser. The afternoon of the 14th was mild, the wind light, and the sea smooth; but the wind was to the north-eastward, and there were signs of a storm to be expected before long. After the tow should get out of the inlet, which was only a few hundred yards in length, one or two hours would be a sufficient time to take the tow to Debbs' inlet, near its destination. The respondent's agent in charge of the work, and the officers of the life-saving station, thought it advisable to make the trip that afternoon, at high water, which was from 4 to 5 o'clock; and the tug was accordingly sent for to come from Debbs' inlet, where it had been stationed. It arrived a little before 5 P. M., and proceeded to pull the tow by a hawser out of Rockaway inlet. Before starting Capt. Jaycox vigorously protested against starting at that time, on account of the signs of a coming storm, declaring that he would take no responsibility for the result. The general opinion of the other persons present being different, the respondent's agent required him to proceed. When two-thirds out of the inlet, after rounding one of the sharp curves of the channel, in crossing the outer bar, outside of the line of

the beach, the Kapella grounded by the stem, the scows drifted past the tug, and hauled her somewhat about. But the tide was already falling, and the tug could not be got off, though she backed strong. After several vain attempts to get the scows back up the same inlet, it was found that the best that could be done was to anchor them there, and wait for the next high tide. During the night the wind increased, especially upon the flood-tide after midnight, when the scows were blown ashore, and one of them, pounding in the rising sea, began to leak. Between 1 and 2 o'clock A. M. they were abandoned by the respondent's men and those belonging to the life-saving service, who up to that time had been on board. The gale proved to be a severe one, and during the following day, in the pounding of the surf, the scows and the building upon them were broken apart. One of the scows was carried a long distance up the beach to the westward, and all proved a total loss.

The respondent was not an insurer, nor a guarantor of the safety of the scows. In letting them out for this service, the libelants took the risk of all sea perils, and of all other dangers naturally incident to that service, except in so far as they might be brought about by the negligence and want of proper care and skill of the respondent or his agent, having reference to the nature of the enterprise. For such negligence, or want of due care, the respondent would be answerable; and the question here is whether the loss is fairly attributable to such negligence, or to other causes for which the respondent is not answerable. The immediate cause of the loss was the storm. The next anterior cause was the grounding of the tug, in coming out of Rockaway inlet, in consequence of which the scows, with their burden, could not be taken to a place of safety. Had the tug not grounded, there being, as I think from the weight of evidence, plenty of water in Debbs' inlet, the trip might have been safely made before the storm came on, and before dark, provided that the tug had sufficient power to tow the scows up Debbs' inlet against the ebb-tide after reaching it. Although a doubt is suggested on this point by Capt. Jaycox, there is no very satisfactory evidence on the subject. If the tug had not sufficient power to pull the tow up against the ebb, she would be obliged to wait outside in the open sea till the next flood-tide. That would involve such an unjustifiable exposure of the tow as to make the respondent answerable for the result; because all agree that, before starting to leave Rockaway inlet, there were signs of an approaching north-east storm, and the tow was only fit for a calm sea.

Assuming, however, that the entrance to Debbs' inlet might have been safely effected before dark, but for the grounding of the tug before she got out of Rockaway inlet, the grounding of the tug becomes the *causa causans* of the loss; and the question is whether this is or is not attributable to the negligence of the employees. On this point there is considerable testimony, but it fails to show satisfactorily why the tug should have run aground if properly handled. In fair weather and a calm sea, and in a buoyed channel, stranding presumably occurs only through lack of care of some kind. The burden of proof is upon the defendant to excuse it by showing that it did not arise through any lack of care, skill, or diligence in

navigation, including, in a case like this, the preparations therefor. The channel of Rockaway inlet was narrow, shoal, and winding. Hults had marked it out by three buoys. The tug grounded on the port side of the channel, between the first and second buoys, because, as is stated, of her small power, and consequent inability to obey her helm under her slow speed, with only a few inches of water beneath the rudder, and with the great lateral strain of the hawser behind. Her helm, it is said, was hard a-port when she grounded, but she would not mind it.

I am not satisfied with this explanation, as evincing due care and skill in navigation, when the other circumstances are taken into account. The place of grounding, as marked upon diagram B, by two of the respondents' witnesses, is shown to be, not at the sharpest turn nor at the "elbow," as might be inferred from other parts of Hults' testimony, but at a point considerably beyond that turn, and beyond the first buoy below it, and after both had been safely passed, and the tug had got headed to the westward. If the cause assigned were the true one, its operation would have been perceived at the previous turn, which was not the case. The wheel, moreover, was not at the time in the hands of a person either proper or competent for the purpose; it was managed by Hults, who was wholly unacquainted with the handling of tugs, and with the *Kapella*, and had never tried to steer her until that day. Capt. Jaycox says he gave the helm to Hults because Hults was supposed to know the channel. Hults says Jaycox asked him to take the helm for a few minutes, while he went into the engine-room; that he did so, and that Jaycox was not in the pilot-house when the tug grounded. Others say that Jaycox was there at the time. The fact remains that the helm was in the hands of a man unacquainted with the handling and management of the tug, at a time and place that specially required all such skill and care as could be expected from the master alone. It was Jaycox's duty to keep the helm; to receive such information about the channel-way as Hults could give him; and to proceed with such caution that even touching the ground with the stem should not pin him fast. Hults says the tug was going very slowly,—slower than a slow walk; but Capt. Abrams, who was on the tug, estimates the speed at three knots, with which her fast grounding better agrees. If that was the speed, it was a very incautious rate. The fact that after a few moments the tug could not be backed off, and that only "a couple of seconds" before grounding the tug was going right, as Hults says, seems to show not only that the tug was going too fast, but that the porting of the wheel was so short a time before grounding as to give it no time to operate. If the strain of the hawser was such as to prevent the tug from duly minding her helm upon any necessary change of heading, it was but the work of a moment to ease that strain, and to enable the tug to obey her helm. If Jaycox had been at the helm, as he ought to have been, I do not think the tug would have grounded.

If, however, there was no fault in the handling of the tug, and if the grounding were regarded as unavoidable, under the complicated circumstances of the case, as the respondent claims it was, still all these com-

plications and liabilities were well known and understood beforehand. It was the respondent's duty to provide—*First*, precautions against them, so far as practicable; and, *second*, a reasonable means of escape if the grounding should occur. These dangers were no part of the libelants' risks. If the liability to ground in that inlet from such causes was real, it was negligence to start out at a time when any such grounding was certain or likely to prove fatal, through the approaching storm. The respondent should have waited for weather that would give opportunity to extricate the tow from such probable mishaps. The tug was in the employ of the respondent, hired by the day. There was no independent contract between the tug and the defendant, such as to free the latter from the legal responsibility of a principal for the acts of the tug as respects the scows which he had hired. The respondent is therefore answerable to the libelants for the loss of the scows, either for starting at an improper time, in view of the difficulties, liabilities, and mishaps naturally attending such an enterprise, or for want of proper care and skill in the navigation of the tug to avoid grounding. The alleged agreement by the libelants to insure is not sufficiently proved. Even if established, it would not meet the case; since such insurance could cover only perils of the seas, not the lack of proper care on the part of the respondent's representatives and employes.

The defense that one of the scows was weak, and unable to withstand the stranding, so as to rise with the rising tide, and be thereby carried up on the beach without much injury, cannot be sustained. A stouter boat might, perhaps, have escaped in that way. But these scows were both open to examination before they were hired, and were seen by the respondent's agent. They were not let for the purpose of going safely through a process of stranding on the beach in a north-east storm, with a house upon them, nor was there any implied warranty of their sufficiency for such a trial. There is nothing to indicate that they were not sound enough and strong enough to transport the station-house through any water and sea that the respondent expected them to encounter, or to which he had any right to expose them. They were seaworthy for such purposes, and this is the extent of the libelants' implied warranty. The condition of the scows is, of course, a material one on the question of damages. The libelants are entitled to decrees in both cases, with costs.

WESTERN ASSUR. Co. v. THE SARAH J. WEED.

(District Court, S. D. New York. December 28, 1889.)

1. TOWAGE—NEGLIGENCE OF TUG—PRESUMPTION.

Though a tug is not an insurer of her tow, if the tow is run against a wharf in clear weather, negligence in the tug is legally presumed.

2. COLLISION—WITH PIER—EVIDENCE—CREDIBILITY.

The libellant's coal-box was one of a tow of seven boats in charge of the tug S. J. W., bound around the Battery and up the East river. The tow was unwieldy, and moved through the water at the rate of only about one mile an hour, and was carried with the tide against the end of pier 45, about a half a mile above the Brooklyn bridge. The excuse of the tug was that a schooner sailing past them, on the right, prevented the tug from going as near the Brooklyn shore, a little below the bridge, as was necessary in order to avoid the effects of the cross-tide towards the New York shore. The pilot testified that the schooner, with a ferry-boat coming in the opposite direction a little later, threw him from four to six hundred feet to the westward of the usual course, and that the subsequent collision was thereby unavoidable. *Held*, that the circumstances showed that the pilot's estimate was a gross exaggeration, and that there would have been no difficulty in keeping the tow from pier 45, had the tug ported sufficiently in time. The estimates of witnesses, and statements as to the effects of tide, though uncontradicted, go for nothing, when contrary to the laws of nature and to well-known facts of navigation otherwise appearing in the testimony.

In Admiralty.

Carpenter & Mosher, for libellant.

Wilcox, Adams & Macklin, for claimant.

BROWN, J. On January 1, 1889, the box known as "N. E. T. No. 54," loaded with coal, while in tow of the steam-tug Sarah J. Weed, came in contact with the corner of pier 45, East river, and was so injured thereby as to sink shortly thereafter, and, with the cargo, become a total loss. The libellant, as insurer of the cargo, having paid the loss, brought this suit for indemnity, alleging that the collision was by the negligence of the tug. The box was one of seven taken in tow by the Weed at Jersey City, bound through the East river to ports on Long Island sound. As the weather was fair, the presumption is that the tug was negligent in suffering the tow to come in contact with the pier. The defense is that the master of the tug was thwarted and obstructed in his proper course, when just below the Brooklyn bridge—*First*, by a schooner, which came up with the flood-tide, sailing wing and wing, and ran between the tow and the Brooklyn shore, so as to prevent his getting as near to the Brooklyn shore as was necessary; *second*, by a ferry-boat, which, immediately after the schooner had passed the tug, came down the river from under the bridge, and, instead of going on the New York side of the tug, crossed the tug's bow, towards the Brooklyn side, and so continued to force the tug towards the New York shore. The tide from Buttermilk channel sets from the Brooklyn shore towards the New York shore all the way up to and above pier 45; and it is said that by the above-named obstruction the tug was so prevented from getting near Jewell's wharf, and so carried by the set of the tide towards the New York shore, that, despite anything the tug could do from that time, the

box in question was unavoidably carried over against pier 45. It is claimed that the tow was driven out of her proper course, by these obstructions, from 400 to 600 feet towards the New York shore, and so forced to pass under the bridge on the New York side of the river, instead of going 600 feet nearer to the Brooklyn shore; and that, from that position, in the strong flood, collision with the pier 45 was unavoidable. I have no doubt, from the evidence, that the tug was a boat of sufficient power, in ordinary navigation, to handle the tow, cumbersome and unwieldy as the tow was; and, if the above contention is fairly sustained, the tug should be absolved from blame. But I find it impossible to accept the theory of the defense.

As respects the ferry-boat, the evidence is that the pilot of the tug first noticed her right ahead, coming down under the bridge nearly end on, just after the schooner had passed the tug abreast of Martin's Stores; that no signal was given to the ferry-boat by the tug, and that she passed on the Brooklyn side, contrary to the expectation of the pilot of the tug. It is enough to say that, if it had been necessary to the safety of the tow that the ferry-boat should go on the New York side of the tug, there was special reason, in addition to the general obligation imposed by the supervising inspectors' rules, why the appropriate signal should have been given by the tug. Had such a signal been given, it cannot be supposed that the ferry-boat would not have observed it, and acted accordingly. So far as the course of the ferry-boat affected the navigation of the tug, the latter is to blame for not having given the necessary signal. *The Connecticut*, 103 U. S. 710, 712; *The C. H. Seuff*, 32 Fed. Rep. 237.

It is urged, however, that the change in the tow's position caused by the schooner was of itself sufficient to make it impossible for the tug to keep the tow clear of pier 45. This is founded, however, upon what is a very great overestimate by the pilot of the tug of the deviation caused by the schooner, viz., about 400 feet; and, even if the schooner had crowded the tow so much out of the way, I am satisfied there was no difficulty in overcoming it by timely porting.

The evidence leaves no doubt that the usual and proper course of tugs with such tows on the flood-tide is to proceed up the East river, steering for Martin's Stores, so as to pass within about 200 feet of Jewell's wharf, (about three or four hundred feet below Brooklyn bridge,) and from that point to steer towards pier 50, near Corlear's hook. These courses, it is stated, would bring the flood-tide on the starboard side of the tow before reaching Jewell's wharf, and on the port side, from that point, to Corlear's hook. A line from a point 200 feet off Jewell's wharf to pier 50 is shown by the chart to form an angle of not over two points with the New York shore above the bridge; and, as this course brings the flood-tide on the port side, it is evident that the flood-tide runs crosswise towards piers 45 and 50, by an angle of less than two points. As the schooner, moreover, according to the testimony, was moving through the water about five times as fast as the tow, and at the rate of about five or six miles an hour, and as the whole line of the tug and tow was but 437 feet long, and the tug did not haul to port until the schooner reached

the stern of the tow, (some witnesses say later than that,) it follows that the schooner was not more than three-quarters of a minute in passing the tug, nor was the tug hauling to port more than that time. The schooner did not threaten the tow, but the tug only, and the only effect of the tow's porting was to let the tow sag with the tide towards the New York shore; and, if the angle of the tide across the river were fully two points, the sagging towards the New York shore during this time, (reckoning the tide at two and a half knots,) must have been only about 40 feet, instead of 400, as estimated by the master of the tug. The tug did not pull the tow towards the New York shore, because the schooner only forced the tug to port enough to head "about straight up river." From Martin's Stores, moreover, it is more than a half a mile to pier 45; and if the tug, before reaching Martin's Stores, had followed the usual course, so as to have run, if unobstructed, within 200 feet of Jewell's wharf, and if, from that point, she could safely steer direct towards pier 50 on the New York shore, as the testimony shows she could, thereby actually crossing the tide somewhat towards the New York shore, it is manifest that the Weed, by heading more to starboard, could, in going a half a mile, have overcome, not merely a displacement of 40 feet, but many times that displacement.

Again, the line of the usual course from off Jewell's wharf to pier 50 runs at least 600 feet distant from pier 45; and, as the flood-tide, according to the testimony, strikes boats, while on that course, upon the port side, the effect of the tide must be to set a tow still further away from the pier than that line runs, *i. e.*, more than 600 feet from it, even without any help from a port helm. If, instead of following the usual course from off Jewell's wharf, *viz.*, heading two points towards the New York shore, the tug had headed two points towards the Brooklyn shore, even if she were making only a half mile per hour through the water, instead of a mile or three-quarters of a mile, as the master elsewhere estimates, and as is more probable, from the usual time to Norwalk, she must have gone 400 feet more towards the Brooklyn shore than the usual course would take her, *i. e.*, over 1,000 feet from pier 45. As soon as she got above the bridge, moreover, if she was much out of her usual course, there was nothing to prevent her heading three, or even four, points towards the Brooklyn shore, until she had gained her usual place in the river, which she would have done before reaching pier 45. Even, therefore, had the tow been crowded by the schooner 400 feet out of place, instead of about 40 feet, there would have been no difficulty in keeping well off from pier 45, had the tug ported sufficiently in time. The master, indeed, testifies that he did head towards the Brooklyn shore all that was prudent, and did all in his power, etc.; but what he did in this way was evidently done too late. Such general testimony, and the various statements, also, that the tide causes, or would cause, this thing or that thing,—statements that are in part hypothetical and in part contrary to the laws of nature,—go for nothing, against the undoubted facts concerning the navigation of the East river that appear in the testimony and are familiar to the court, from which it is plain that

if the proper course was taken originally there could have been no difficulty, despite the acts of the schooner, in keeping clear of pier 45 a half a mile above, had seasonable measures been taken to do so. The libellant is entitled to a decree, with costs.

EARNMOOR v. CALIFORNIA INS. CO.

(District Court, S. D. New York. January 6, 1890.)

1. MARINE INSURANCE—ACTION ON POLICY—PARTIES.

Upon a marine insurance policy issued to "A. E., upon account of whom it may concern, in case of loss, to be paid to him or order," where the insurance was effected for the benefit of the libellant, the owner at the time, *held*, that the suit was rightly brought in the name of the libellant, who was the insured under the policy.

2. SAME—PLEADING—INSURABLE INTEREST.

The libel should show insurable interest in a vessel at the time the policy purports to take effect.

3. SAME—SEAWORTHINESS.

It being settled in this circuit that seaworthiness is presumed, a libel on a marine policy need not allege seaworthiness. What need not be proved need not be averred. This rule promotes simplicity and certainty as to the real issue intended to be tried. The plea of unseaworthiness, if that issue is desired to be raised, comes more properly from the defense.

In Admiralty. Action on a policy of insurance.

Wing, Shoudy & Putnam, for libellant.

George A. Black, for respondent.

BROWN, J. The libel is filed to recover upon a maritime policy insuring "Alfred Earnshaw, on account of whom it may concern, in case of loss, to be paid to him or order." Exceptions are taken that the libel does not allege (1) any order or transfer from Earnshaw; nor (2) that the libellant had any interest in the policy when issued; nor (3) that the vessel was seaworthy.

1. The libel alleges that the libellant, at all times hereinafter mentioned, was the owner of the ship, and that "said insurance was made for and on behalf of the libellant." As the policy is expressed to be issued "on account of whom it may concern," the libellant, under that allegation of the libel, is the real party assured, if he was then the owner. Earnshaw is but the agent; and the action, in such case, may be brought in the name of the principal, without any written transfer, as was long since adjudged. *Sargent v. Morris*, 3 Barn. & Ald. 277, 280; *Farrow v. Insurance Co.*, 18 Pick. 53, and cases there cited. 1 Phil. Ins. 199. Subsequent provisions in this policy, moreover, expressly state that payments are to be made to the "assured;" and the assured, under a policy in this form, is the person for whom the insurance was effected, *i. e.*, the person who is the real party in interest. The word "him," in the phrase "him or order," includes the "assured" as well as Earnshaw; and no written order or transfer is needed, except to enable some third party

to claim payment. The principal may sue on such an insurance contract, made for his benefit. Story, Ag. §§ 160, 160a, 394.

2. I think the libel should show that the assured had an interest in the vessel when the policy was issued and purported to take effect. The word "hereinafter" does not strictly cover this point; doubtless by inadvertence.

3. It is the rule, in this circuit, at least, that in actions on marine policies of insurance the presumption is of the seaworthiness of the vessel, and that the *onus* of the defense of unseaworthiness is upon the underwriter. *Lunt v. Insurance Co.*, 6 Fed. Rep. 562, and cases cited; *Batchelder v. Insurance Co.*, 30 Fed. Rep. 459. See *Pickup v. Insurance Co.*, L. R. 3 Q. B. Div. 594. The primary rule in pleading is that what must be averred must be proved; and, conversely, that what the law presumes and need not be proved, need not be averred; also, that the plaintiff need not aver what more properly comes from the other side. 1 Chit. Pl. *221, *222. When, then, it is determined that no proof of seaworthiness need be given, all reason for requiring an averment of seaworthiness in the libel disappears. The defendant, if he wishes to raise that issue, can do so by his answer with equal convenience, and more properly; and this rule, in admiralty practice, tends to simplify the pleadings, to dispense with needless technicalities, and to promote certainty as to the real issues intended to be tried. All the references in adjudged cases to the need of averring seaworthiness proceed upon the supposed need of supplying some *prima facie* evidence of it. When the legal presumption dispenses with such proof, it should be held to dispense with the averment also; and, as I have said, this rule is a desirable and beneficial one in practice. *Guy v. Insurance Co.*, 30 Fed. Rep. 695. The first and third exceptions are therefore overruled; the second, sustained.

BROWN *et al.* v. CRANBERRY IRON & COAL CO.

(Circuit Court, W. D. North Carolina. November Term, 1889.)

PARTITION—DISPUTED TITLE—STAY OF PROCEEDINGS.

Where defendant in partition denies complainant's title, it is proper to stay proceedings in the suit for a year, so that complainant may establish his title by an action in ejectment.

In Equity. On motion to stay proceedings.

Suit by John E. Brown and W. B. Carter against the Cranberry Iron & Coal Company.

Moore & Merrick, for complainants.

W. A. Hoke and *J. W. Bowman*, for defendant.

DICK, J. This suit in equity was instituted for the purpose of obtaining partition of the mineral interests in the lands described in the bill of complaint. The plaintiffs assert a legal title to such minerals, as tenants in common with the defendant company. In its answer the defendant company denies the title of the plaintiffs, and avers that for many years it has had sole ownership and seisin of the soil and of the minerals of the lands mentioned in the bill of complaint; and further insists that, if the plaintiffs ever had any legal or equitable interests as claimed, they have lost their right to institute this suit by lapse of time; and they are also bound by the matter of equitable estoppel set up in the answer. Replication was filed, and proofs have been taken by the parties on both sides. On the rule-day in November, 1889, a motion was duly entered on the order-book in the clerk's office by the counsel of the defendant, to set down this case for hearing upon the pleadings and the proofs. Objections to this motion were entered by the counsel of the plaintiffs, and they also entered a motion for an order to suspend further proceedings in this suit, and to allow the plaintiffs a reasonable time to establish their legal title, and regain joint possession by an action at law in the nature of an action of ejectment,—and that the defendant be required to admit an ouster on the trial at law. These motions are now before me for hearing.

There can be no doubt that minerals in place in the earth may be owned and conveyed as real estate, and the owner have a freehold in the same. Such interest may be held by different persons as tenants in common, even if one of them had a fee-simple title to the soil in which the minerals are imbedded. If the plaintiffs had commenced special proceedings for partition in a court of this state, they could have had a speedy and adequate remedy, as such court has ample jurisdiction to adjust and determine all questions at law and equity in one proceeding. As the plaintiffs are non-residents, they have an undoubted right to institute their suit in this court, and are under no obligation to seek remedy and relief in a state court. They could not, on the law side of this court, avail themselves of the proceedings for partition provided for by

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the local laws, as such proceedings blend legal and equitable questions and modes of procedure. If such proceedings were instituted against them in a state court, and were removed to this court upon their application, the case thus removed would be placed on the equity side of the docket.

The concurrent jurisdiction of a court of chancery to entertain suits for partition of lands has long been established, and has often been exercised, both in England and in this country, where the legal title is undisputed. When the defendant denies the title of the complainant, and his right of joint possession, it is the usual course and practice of a court of chancery to retain the bill, stay proceedings, and allow the complainant a reasonable time for trying his title, and re-establishing the unity of possession with his alleged co-tenant by an action of ejectment. Questions pertaining to a legal title and the nature of possession are matters of law, and should be decided by a judge and jury in a legal tribunal. This was the method of practice and procedure that prevailed in the courts of equity in this state before the abolition of such courts by our new constitution, and the adoption of a code system, which required all legal and equitable remedy and relief to be sought by civil action or special proceedings. *Garrett v. White*, 3 Ired. Eq. 181; *Ramsay v. Bell*, Id. 209; *McBryde v. Patterson*, 78 N. C. 478. These state statutes cannot limit or regulate the jurisdiction of a federal court sitting in this state, enforcing and administering the rights of non-resident litigants, although such rights subsist, or have been acquired, under the laws of the state. There is no doubt as to the jurisdiction of this court in the case before me.

The plaintiffs have not set forth their own and the title of the defendant with that particularity and detail that would entitle them to a decree of partition of the property in controversy. This defect could be cured by an amendment, which I would readily allow on account of the peculiar features of this case. In allowing the plaintiffs time and opportunity for bringing an action on the law side of this court, to establish their legal title and unity of possession, no injustice or hardship will result to the defendant company or its legal title. Its sole seisin and long adverse possession, and the alleged matter of equitable estoppel, can be employed in defense in such action at law. *Kirk v. Hamilton*, 102 U. S. 68-79. If the plaintiffs should succeed in their action at law in establishing their legal title as tenants in common with the defendant, some difficulty may arise as to how partition is to be effected, as mineral interests in lands are necessarily of unknown value, and not capable of partition without a sale; and a sale may result in depriving the owner of the soil of its possession in the minerals, or forcing it to pay an exorbitant price for such property. I will not anticipate other difficulties that may be encountered until they arise on hearing this case upon further directions.

Let an order be drawn staying proceedings in this case, and granting the plaintiffs one year to bring and prosecute their action at law, and allowing the depositions taken in this case to be read in evidence on the

trial of such action. No formal order is necessary, requiring the defendant to admit an ouster on the trial, for the claim of the defendant of sole title and exclusive adverse possession amount to an ouster for the purposes of the action at law, which will be tried on the law side of this court.

CENTRAL TRUST CO. OF NEW YORK v. IOWA CENT. RY. CO. *et al.*

(Circuit Court, N. D. Illinois. December, 1889.)

SALE—CONDITION—FORFEITURE—RES ADJUDICATA.

The intervenors, being the owners of certain railroad property, sold the same to the railway company, taking in payment transportation certificates of said road. The agreement of sale provided that the road so purchased should be completed within two years; otherwise, the agreement to be void. The road was not completed within that time, and the intervenors gave notice of their election to declare the agreement void. Meantime the rights of the company had passed to the defendant, who brought suit against the intervenors, in the state court, to compel a specific performance, bringing into court the transportation certificates. The intervenors filed a cross-bill, asking for a forfeiture of the agreement of sale; which bill was dismissed, the decree reciting that it was without prejudice, except as to the right to claim or assert a forfeiture of the agreement. This decree was not appealed from. *Held*, in an action to foreclose a mortgage upon defendant's property, that the right of the intervenors to claim a forfeiture of the agreement was concluded by the decree of the state court, which is still in full force and effect, and their petition, asking for such forfeiture, must be dismissed.

In Equity. Bill to foreclose.

In the matter of the intervening petition of Thomas B. Cabeen, Robert J. Cabeen, and George Seaton.

H. Bigelow and *J. C. Pepper*, for intervenors.

Anthony C. Daly and *Gardner, McFadon & Gardner*, for Iowa Central Railway Company.

GRESHAM, J. The Keithsburg & Eastern Railroad Company was organized to construct and operate a railroad between Keithsburg, in Mercer county, Ill., and Monmouth, in Warren county. It acquired right of way, depot grounds, and some terminal facilities, mainly in Mercer county. The company became embarrassed. Judgments were entered against it, and its property was bought by the intervenors, in 1878, at sheriff's sale. The Peoria & Farmington Railway Company was organized to build and operate a railroad from Peoria to a point on the Mississippi river, and on February 22, 1881, this company had extended its road to a point near Monmouth, and, desiring to still further extend it to Keithsburg, on the Mississippi river, bought through its officers, E. P. Phelps and William Hanna, from the intervenors all of the property they had purchased at sheriff's sale, in consideration of \$25,000 in transportation certificates of the Peoria & Farmington Company, to be delivered upon the completion of the line from Peoria to Keithsburg. The agreement of sale provided that the purchaser should take immediate possession; that the line should be completed by February 22, 1883,

and, if not so completed, the entire agreement should be void. A copy of the transportation certificates was attached to the agreement, and reads thus:

"OFFICE PEORIA & FARMINGTON RAILWAY COMPANY.

"The holder hereof is entitled to freight transportation over the line of the Peoria & Farmington Railway, at regular tariff or contract rates, to the amount of \$25, on presentation of this certificate: provided, that said certificate shall be good and receivable in payment of but one-fourth of any single bill of freight, but may also be used in payment of one-fourth the price of one thousand mile tickets."

The Peoria & Farmington Company at once went into possession of the property so purchased by it and proceeded to fulfill its contract, but did not complete its road to Keithsburg until March 25, 1883, which was one month beyond the time prescribed in the contract. While the work was progressing, but before the road was completed to Keithsburg, the Peoria & Farmington Company changed its name to the Iowa Central Railway Company of Illinois. At the expiration of the two years provided in the contract, the intervenors notified the Iowa Central Company of their election to declare the agreement void, because it was not performed within the time specified. In March, 1883, and a few days before the completion of the road, the Iowa Central Company and Hanna and Phelps commenced a suit in the circuit court of Warren county against the intervenors, for specific performance of the agreement of February 22, 1881, and brought into court, for the intervenors, transportation certificates amounting to \$25,000. The intervenors filed an answer and cross-bill, in both of which they averred that the agreement had not been completed within two years, and that it had been forfeited. The cross-bill prayed for a decree declaring the agreement forfeited and void, and that the property be returned to the intervenors. This suit was heard on the bill and cross-bill on the 11th of July, 1885. The bill was dismissed without prejudice, and the cross-bill was dismissed "without prejudice, so far as any action at law upon the contract is concerned, and without prejudice to any equitable rights or defenses the defendants may have in any case hereafter arising between the parties hereto, on, or growing out of, the contract set up in this case, except the right to claim or assert a forfeiture of said contract." Neither party appealed from this decree, and it remains in full force, and the transportation certificates are still in the state court, where the intervenors can, at any time receive them. On December 1, 1886, the Central Trust Company of New York commenced a suit in this court against the Central Iowa Railway Company to foreclose mortgages executed by it upon its line of railway, after the making of the agreement of February 22, 1881; and in that suit a receiver was appointed, who took possession of the property. A decree of foreclosure was entered, and the property embraced in the mortgages was sold, and \$25,000 of the purchase money was paid into the registry of the court, to abide the result of the issue raised by the intervenors. In June, 1887, the intervenors filed their petition of intervention, in which they set up the agreement of Feb-

ruary 22, 1881, the failure of the railway company to fulfill the contract within two years, and prayed that it might be declared forfeited and void, and the property returned to them, or that the receiver be directed to pay them \$25,000 and interest. Pleas and answers were filed setting up the decree in the state court, and the case was referred to a master, who took testimony and reported, recommending that the intervenors be paid \$25,000 in cash. The purchasers at the foreclosure sale assigned the certificate of purchase which they received from the master to the Iowa Central Railway Company of Illinois, to which the master executed a deed of conveyance. The receiver surrendered possession to the railway company; and, in passing his accounts and discharging him, the court ordered "that all claims against said receiver pending in this court, whether debts or other liabilities, shall be presented to the said Iowa Central Railway Company for adjustment and settlement; and, for the purpose of enforcing payment thereof, if need be, the court hereby retains jurisdiction and full power to enforce such payments, without other action or independent proceedings." The Iowa Central Company filed exceptions to the master's report, which have been argued by counsel.

The decree of the state court established against the intervenors the continued existence and validity of the agreement of February 22, 1881; and there is no evidence in the record showing, or tending to show, that the intervenors were denied the right to receive and use the transportation certificates in part payment of freight bills and 1,000-mile tickets. The intervenors sold the property described in the agreement for transportation certificates, to be used upon the completion of the road, in part payment of freight and 1,000-mile passenger tickets. Certificates in form agreed upon, and amounting to \$25,000, were deposited in the state court, for the intervenors, as soon as they were entitled to use them; and they still remain at their disposal.

There is no evidence in the record showing, or tending to show, that the railway company, before or after it changed its name, refused, on demand of the intervenors, to carry freight or passengers over its road or any part of it, and receive in part payment therefor transportation certificates. The intervenors cannot now assert that, because the railroad was not completed within two years after February 22, 1881, the agreement of that date became void, and that they are entitled to recover the property sold, or its value in money. That question was settled against the intervenors by the decree of the state court, which dismissed, for want of equity, so much of their cross-bill as counted upon forfeiture of the agreement for failure to complete the road within two years. For anything appearing in the record, the intervenors have been denied nothing that the agreement entitled them to; and their petition must be dismissed, without prejudice, however, to their right to seek redress by any appropriate proceeding at law or in equity, should the Iowa Central Railway Company hereafter refuse to comply with the agreement.

COLEMAN *et al.* v. FLAVEL *et al.*

(Circuit Court, D. Oregon. December 26, 1886.)

TRADE REPRESENTATIONS—INJUNCTION.

Where complainants have built up a business as agents for the sale of canned salmon, and in such business have been in the habit of using a printed label placed on the cans, giving their firm name and a statement that they were the sole agents for such brand of canned salmon, injunction will lie to restrain the false and fraudulent use by defendants of that part of a label which represents that complainants are the sole agents for defendants' salmon, whether defendants' salmon be of an equal or inferior quality to those sold by complainants.

In Equity. On bill for injunction.

C. W. Fulton, for plaintiffs.

Robert L. McKee and George W. Yocum, for defendants.

DEADY, J. This suit was commenced on November 8, 1886. It is prosecuted by the plaintiffs, William T. Coleman, F. S. Johnson, C. C. Coleman, and Richard Delafield, citizens of California, to have the defendants, George Flavel and Samuel Elmore, citizens of Oregon, enjoined from using a certain label on salmon packed by them, or so much of the same as represents that the plaintiffs are the agents for the disposition of such article.

On the filing of the bill an order was made requiring the defendants to show cause why a provisional injunction should not issue, and that the defendants be restrained in the mean time.

The matter was subsequently heard on the bill and sundry affidavits produced by the plaintiffs and one by the defendants.

The material facts appear to be as follows:

That long prior to the year 1881, and ever since, the plaintiffs have been, and now are, engaged at San Francisco, under the firm name of Wm. T. Coleman & Co., in the business of selling Columbia river canned salmon, as the agents of a large number of persons engaged in packing said salmon. That in the conduct of said business the plaintiffs are accustomed to guaranty the good packing and merchantable quality of said salmon to the purchasers thereof, and to have printed on a label placed thereon the said firm name of Wm. T. Coleman & Co., as the sole agents of such brand of canned salmon. That during said time the plaintiffs have disposed of such salmon in all the markets of the world; and at great expense to themselves in establishing agencies, advertising, and by fair and honorable dealings, have introduced into such markets and established there a demand for the brands of salmon represented by them. That what is known as the "Columbia river spring salmon," which is taken between April 1st and August 1st of each year, is the most in demand, and commands the highest price in the markets; and all salmon taken after that time on said river, or at any time elsewhere, is inferior in quality, and less in demand, and commands less price, than said spring salmon.

On August 1, 1881, a corporation, the Union Packing Company, was formed under the laws of Oregon, to engage in canning and packing

salmon at Astoria, and soon after entered into a contract with the plaintiffs whereby the latter agreed to make advances to the corporation to enable it to carry on its business, and also became its sole agent for the sale of its fish. That thereafter said corporation, through the agency of the plaintiffs, had lithographed a parti-colored label, nine and three-quarters inches long and four inches wide, to be placed on the cans of salmon put up by it, which contained the following:

In the left-hand division, a tree and a salmon,—the latter on a dish, as if prepared for the table; and on three sides of it the words, "Union Packing Co., Astoria, Oregon. Fresh Columbia River Salmon." In the right-hand division, which is only two inches long, the words, "Wm. T. Coleman & Co., Sole Agents, San Francisco, Cal., U. S. A.," with directions in the lower half thereof for opening and serving; which labels were used by said corporation in its business, until the assignment of its property for the benefit of its creditors, on July 31, 1884; and that in said year, and prior to said assignment, said corporation procured 500,000 of said labels to be printed for its use in said business.

In August, 1884, a compromise and final settlement was had between the plaintiffs and the company, contained in a written offer by the latter, dated August 9th, to deliver the former 5,000 cases of salmon, they to repay it certain drawbacks and premiums, and a written acceptance thereof by the plaintiffs, dated August 23d. The offer of the packing company contained the following clause: "And said Union Packing Company claim the right to use the labels they now use on all canned salmon they shall have packed in the year 1884."

On December 2, 1885, the company and its assignee, by separate deeds, conveyed certain real property in Astoria, presumably the cannery, to the defendants, and on the same day the former made a bill of sale to them of a lot of personal property and material, such as usually pertains to a cannery, including "one hundred thousand salmon labels, more or less, (used by Union Packing Company on salmon canned;) also all and singular our right, title, and interest in and to corporation's trademark, box-brand, and label used in packing salmon."

It is charged in the bill that the defendants, on November 5, 1886, placed at least 1,350 cans of salmon, with these labels on the cans, in a warehouse at Astoria, for export to domestic or foreign ports, as opportunity might offer; and that, if the defendants are permitted to export said fish, the reputation and value of the brands of salmon represented by the plaintiffs will be much injured and depreciated in the markets of the world, and plaintiffs thereby greatly and irreparably damaged; and it is admitted in the affidavit of the defendant Elmore that 654 cases of salmon have been labeled by the defendants with copies of the label above described, and stored for export as alleged; and it was also admitted on the argument that the fish therein were taken in the Tillamook river, and not the Columbia.

The defendants contend that the label, as a whole, constitutes a trademark, in which they have the exclusive property, but that the words on the right hand of the label do not constitute such mark; and that, if they

might, not having been recorded as provided by statute, (Gen. Laws Or. 659,) the plaintiffs cannot claim any right to the exclusive use of them.

Generally, words in common use may be adopted as trade-marks, if at the time of their adoption they were not employed to designate the same or like articles. The office of a trade-mark is to indicate with certainty the origin or ownership of the article to which it is affixed. *Canal Co. v. Clark*, 13 Wall. 322; *Browne, Trade-Marks*, §§ 39, 144.

But the plaintiffs do not and need not claim that the words "Wm. T. Coleman & Co., Sole Agents, San Francisco, Cal., U. S. A.," constitute a trade-mark, or that, abstractly considered, they have any exclusive right to the use of them. Their claim is that by means of these words, so placed and used, the defendants are guilty of a false and fraudulent representation, to their injury as well as that of the public.

After a careful examination of the subject, and particularly the discussion contained in the interesting work cited by counsel for defendants, (*Browne, Trade-Marks*,) I am satisfied that my impression at the argument is correct. This is not a case of trade-mark at all, but one of a false use of a label, with intent to injure the plaintiffs as well as the public.

No one ever had or could have the right to use so much of this label as represents that the plaintiffs are the agents for the sale of the fish in the can on which it is placed without the plaintiffs' consent. The right of the Union Packing Company to the use of these labels originated in the contract with the plaintiffs, by which the latter were constituted the sole agents for the fish packed by the former; and when the relation terminated, and the accounts between the parties were settled, as appears by the agreement of August 9 and 23, 1884, the corporation, in effect, acknowledged that its right to the use of this label ceased, when it stipulated therein for the right to use the same after the cessation of such agency for the pack of that season, which was then probably already labeled.

By the sale to them on December 2, 1885, of the labels on hand, the defendants acquired no more right to the use of them than the corporation had. Doubtless they acquired the right of property in the material, and might make any lawful use of them. By cutting off the right-hand part relating to the agency of the plaintiffs, they might use the remaining or descriptive part on cases of Columbia river salmon; but to use even that part of it on Tillamook salmon would be a fraud on the public as well as all persons engaged in the packing and sale of the former fish; and, if the left-hand part of this label constitutes the lawful trade-mark of the Union Packing Company, the defendants, under the sale aforesaid, may have the exclusive right to the use of it, unless the failure to record it under the Oregon statute will prevent them.

The two parts of this label are distinct and separate. The plaintiffs make no claim to restrain the use of the descriptive part, and the agency part no one has any right to use without their consent.

The only purpose the defendants can have in using the plaintiffs' part of this label is to avail themselves of the reputation the plaintiffs have established in the markets of the world, as dealers in canned salmon; and,

even if their fish were in all respects equal to those sold by the plaintiffs, still they would, by means of false representations as to the plaintiffs' agency in the matter, so far divert or appropriate the good-will of plaintiffs' business, that has cost them time, money, and good conduct to establish.

However, the fact is the defendants' use of this label—at least, the agency part of it—on the fish in question involves a false and fraudulent representation calculated and intended to deceive the public, and injure the plaintiffs, by palming off on the former, in the name of the latter, an inferior article of salmon for a superior one. The defendants are not only seeking, by this means, to appropriate or trade on the good-will of the plaintiffs' business, but their conduct tends inevitably to injure or destroy such business.

The defendant Elmore, in his affidavit, says that since the commencement of this suit he received an order from a merchant in Chicago for 450 cases of this salmon; and adds that the party sending the order knew that it was not the Columbia river salmon. But he does not state that such party was also aware that the plaintiffs were not, in fact, the agents for its sale; that the label was false in this particular, as well as in the origin and character of the fish; and, if the party was truly informed on both these points, does it follow that he would inform the retail dealers and customers, to whom he might dispose of the fish, that it is not what it purports to be, but a spurious article, with which the plaintiffs have nothing to do? As was said by the chancellor in *Coats v. Holbrook*, 2 Sandf. Ch. 597, in answer to a like attempt to palliate the immorality of a similar transaction: "The idea is preposterous. * * * Labels, etc., are not forged, counterfeited, or imitated with any such honest design or expectation."

The law of this case, considered as one of an unauthorized and fraudulent use of this label, including the representation that the plaintiffs are the sole agents of the fish on which it is placed, is well stated in *Association v. Piza*, 24 Fed. Rep. 149.

The plaintiff was a brewer in St. Louis, and exported to South American ports beer in bottles, labeled "St. Louis Lager-Beer," where he had established a profitable trade in that article. The defendant shipped beer from New York to the same ports, labeled in the same way, and there made sales thereof under the impression on the part of the purchasers that it was really the beer of the plaintiff.

On motion for an injunction, (Circuit Court, S. D. New York,) the court held that while the plaintiff could not "have an exclusive property in the words 'St. Louis,' as a trade-mark, or an exclusive right to designate its beer by the name of 'St. Louis Lager-Beer,' yet, as its beer has always been made at that city, its use of the designation upon its labels is entirely legitimate; and if the defendant is diverting complainant's trade by any practices designed to mislead its customers, whether these acts consist in simulating its labels, or representing in any other way his products as those of the complainant, the latter is entitled to protection. It is unnecessary, for present purposes, to consider whether the complainant has

a valid trade-mark, or can have a technical trade-mark, in the name of 'St. Louis.' It is sufficient that it was lawful for the complainant to use that name to designate its property; that, by doing so, it has acquired a trade which is valuable to it; and that the defendant's acts are fraudulent, and create a dishonest competition, detrimental to the complainant."

As to the right of a party to be protected by injunction against an unlawful competition in trade by means of a simulated label, see, also, *Browne, Trade-Marks*, §§ 93, 95, 96, 538.

The defendants have no right to the use of this label, as against the plaintiffs, so far as it represents them as being the sole agents for their fish; and it is not only a fraud on the plaintiffs, but a gross imposition on the public, for them to do so.

The injury to the plaintiffs arising from the conduct of the defendants in this respect is one that cannot be compensated for in damages, for they cannot be computed, and therefore they have no plain, adequate remedy at law, and are entitled to relief in equity by injunction. Let an injunction issue restraining the defendants from using the right-hand division of the label, or so much thereof as represents the plaintiffs as being the agents for the disposition of the fish contained in the can on which it may be placed.

CARY & MOEN Co. v. McKey.

(*Circuit Court, N. D. Illinois.* January 6, 1890.)

1. CONTRACTS—PUBLIC POLICY.

A declaration averred that W., being solvent, and in no expectation of insolvency, in order to secure an extension for payment of a debt, and to obtain credit in a further amount, gave plaintiff judgment notes for \$10,000; that, by agreement of plaintiff and W., the notes were deposited for plaintiff's benefit with T.; that defendant, who was W.'s attorney, and knew his financial condition, and was present at the time as W.'s counsel, agreed that, "in case W. should become involved in financial troubles, or endeavor to secure other creditors," he would notify T., in order that he might cause judgment to be entered on the notes; that five months afterwards, by the advice of defendant, W. made an assignment under the laws of Illinois for the benefit of his creditors, under which assignment his creditors received only 95 per cent. of their claims; that for a month prior to the assignment defendant knew W. was in financial difficulties, but failed and refused to notify plaintiff or T., thus preventing judgment from being entered upon the notes. *Held*, that the declaration showed a right of action against defendant, and was not demurrable on the ground that the agreement between plaintiff and defendant was contrary to public policy.

2. INSOLVENCY—PREFERENCES.

The common-law right of an embarrassed or insolvent debtor to prefer one or more creditors to the exclusion of all others still exists in Illinois, except as restricted by the statute governing voluntary assignments.

At Law. On demurrer to declaration.

Sheldon & Sheldon, for plaintiff.

James R. Doolittle, for defendant.

GRESHAM, J. The declaration avers that in November, 1888, H. W. Wetherell, a merchant of Chicago, was indebted to the plaintiff, for goods

sold and delivered, in the sum of \$6,870.63; that he was then solvent, and continued to be solvent for more than five months thereafter; that he was possessed of property largely in excess of his debts, and had no expectation of insolvency; that in order to obtain an extension of the time of payment of his debt to the plaintiff, and credit for the further sum of \$3,129.47, he executed and delivered to the plaintiff his judgment notes for \$10,000, payable one day after date, which notes, by agreement between the plaintiff and Wetherell, were deposited for the the plaintiff's benefit with E. B. Tolman, of Chicago; that the defendant, who for some time had been Wetherell's attorney, and was familiar with his business and financial standing, was present as Wetherell's counsel at the time the notes were executed, and agreed, "in case said Wetherell should at any time thereafter become involved in any financial troubles, or should endeavor to secure any other creditors," that he would immediately notify Tolman, in order that he might at once cause judgment to be entered on the notes; that on May 2, 1889, by the advice of the defendant, Wetherell executed a deed of assignment, he being then insolvent, by which he conveyed to an assignee all of his property for the benefit of creditors, in accordance with the statute of Illinois governing assignments by insolvent debtors, under which assignment the plaintiff and other creditors have received not more than 25 per cent. of their demands against Wetherell, and cannot receive more; that, for more than 30 days prior to the assignment, the defendant well knew the financial difficulties in which Wetherell was involved, and yet failed and refused to notify either the plaintiff or Tolman of the same, and thereby prevented judgment from being entered in the plaintiff's favor upon the notes deposited with Tolman; and that, if the defendant had given prompt notice of Wetherell's condition, judgment would have been entered against him in time to secure a lien upon property amply sufficient to have paid the entire amount due the plaintiff. Judgment is demanded for \$10,000.

The defendant demurred to the declaration, and in support of the demurrer his counsel urged that the contract set out in the declaration provided for a secret lien, of which the other creditors were ignorant, and that the defendant was not bound to observe a contract which obliged him to do what was contrary to public policy, and in violation of the statute of Illinois governing voluntary assignments. The demurrer is based upon a misapprehension of the averments in the declaration. The common-law right of an embarrassed, or even an insolvent, debtor to prefer one or more creditors to the exclusion of all others still exists in Illinois, except as it is restricted by the statute which governs voluntary assignments. By that statute, assignments by insolvents of all their property are required to be for the equal benefit of all creditors. Preferences in such instruments are expressly prohibited. There is nothing in that or any other statute of the state which makes it illegal for a person involved in financial trouble to secure a creditor by a mortgage or other lien upon all, or only part, of his property. Certainly it is not illegal in this state for a debtor possessed of property largely in excess of all his liabilities, with no expectation of insolvency, to execute and

deliver to one of his creditors, or to a third party for the creditor's benefit, a judgment note for the amount due, upon which judgment may be entered in case the debtor thereafter "becomes involved in any financial troubles, or endeavors to secure any other creditors." In order to obtain further extension upon his existing indebtedness, and additional credit, Wetherell executed the notes, and he and the defendant entered into the agreement with the plaintiff. Wetherell was then solvent, and remained so for more than five months thereafter. The defendant then was, and for some time had been, Wetherell's counsel, and, as such, had become acquainted with his business affairs, and would, presumably, continue to be acquainted with them. It was not contemplated that Wetherell would become insolvent, and the defendant stood in such a relation to him that the latter would not probably become involved in any financial trouble without the defendant's knowledge, for which reason the plaintiff naturally accepted and relied upon the defendant's agreement to inform Tolman, should anything thereafter occur which would make it Tolman's duty to the plaintiff to cause judgment to be entered upon the notes. If, in pursuance of the agreement, judgment had been entered before Wetherell's insolvency, there could have been no doubt of its binding force. If judgment had been entered after Wetherell became insolvent, and the plaintiff had demanded the entire assets in payment, a question might have arisen between the plaintiff and the other creditors. But we are not dealing with a controversy between the creditors of Wetherell. The defendant's agreement was part of the consideration for which the plaintiff extended the time of payment, and granted additional credit to Wetherell; and, instead of keeping his agreement as the defendant should have done, he deliberately broke it, and now endeavors to escape liability on the ground that the arrangement entered into at the time the notes were executed was contrary to law. Courts cannot be expected to regard with favor such defenses, especially when set up by members of the bar. It is not at all probable that Wetherell became insolvent in a day, or that the defendant was kept ignorant of the embarrassments that preceded ultimate insolvency. By failing to give timely notice to Tolman, the defendant violated his agreement, for which the plaintiff has a right of action. What will be the proper measure of damages need not now be considered. The demurrer is overruled.

McVICKER v. AMERICAN OPERA Co., (NATIONAL OPERA Co., Intervenor.)¹

(Circuit Court, N. D. Illinois. December 5, 1889.)

CORPORATIONS—INSOLVENCY—RIGHTS OF CREDITORS.

Where an insolvent corporation reorganizes under a new charter and a different name, its property is still liable for its debts, though transferred to the new corporation for a valuable consideration.

At Law.

Condee & Rose, for plaintiff.

Isham, Lincoln & Beale, for defendant.

GRESHAM, J. On August 5, 1886, James H. McVicker commenced his action in *assumpsit* against the American Opera Company for breach of its contract for the use of his theater. On September 8, 1886, at a meeting of the directors of the American Opera Company, the question of forming a National Opera Company was discussed, and the following preamble and resolutions were unanimously adopted:

"Whereas, for the purpose of promoting a higher musical education in the United States, it is desirable that the principal cities should co-operate upon a uniform and equitable plan for establishing a national opera, Resolved that a National Opera Company be formed, in which each city having a local American Opera Company shall be represented by directors in proportion to its capital, and have proportionate ownership and voice in its direction; Resolved that the present American Opera Company, Limited, will co-operate in this movement by appropriate reorganization, transferring its property to the National Company; and Resolved that a local company be formed for New York city on the same basis in the National Company as the local American Opera Companies in all the other cities."

In pursuance of these resolutions, the National Opera Company was organized, under the laws of New Jersey, with a capital stock of \$500,000, and a certificate of organization was filed in the office of the secretary of state on November 26, 1886. At a meeting of stockholders of the American Company on November 29, 1886, two contracts, which had been approved at a meeting of the directors on the 22d, were submitted. One of these contracts provided for a lease of the entire property of the American Company to the National Company for one year for \$25,000, and the other provided for the sale of the same property to the National Company, at any time within one year, for \$375,000, namely, the \$25,000 already referred to as rental, and \$350,000, to be paid, either in cash, or the stock of the National Company at its par value. On the last-named day, namely, November 29th, at a meeting of the directors of the National Company, a resolution was adopted approving of the proposed agreements, and authorizing and directing the executive committee to pay the \$25,000 under the lease, and take possession of the property. The lease was accordingly executed by the offi-

¹Reported by Louis Boisot, Jr., of the Chicago bar.

cers of the respective companies on the same day, and on the following day the optional agreement was also executed. All the costumes, scenery, and other property of the American was embraced in the lease, and the National undertook to perform all the contracts of the American, and for that purpose continued in its service the employes, singers, artists, etc., of the American. The capital stock of the American was \$250,000, and with a few exceptions its stockholders and officers became stockholders and officers of the National. On December 7, 1886, the general manager of the American Company was at Chicago, with its property, to give an opera, and two days later the lease was presented to him, and he was requested to furnish an inventory of the property embraced in it, and stencil on the same, or the packages containing it, the name of the National Company. Up to this time Gottschalk had been the custodian of the property of the American Company, and he was now employed to serve in the same capacity for the National. The \$25,000 rental was paid at Chicago at or about this time. On December 13, 1886, McVicker sued out an attachment in aid of his then pending suit, and the writ was levied on part of the property embraced in the lease, and on the next day he commenced a second suit for breach of another similar contract, and sued out an attachment in aid of that suit, which, on the same day, was levied on other property embraced in the lease. On December 14th the National Company fully exercised its option to purchase the property, and notified the American Company of that fact, and delivered to it \$350,000 of the stock of the National.

The American Company was insolvent when the resolutions were adopted on September 7th, and the evidence shows that it remained so until March following, when, in a suit brought against it in New York, a receiver was appointed. It transacted no business after the National Company was organized, which also became insolvent, and in a suit commenced against it in New York in the fall of 1887 a receiver was appointed. Instead of holding its assets as a fund for the payment of creditors, it being insolvent, the American Company caused the National Company to be organized for the purpose of transferring to it all of the former's property. Indeed, the resolutions adopted on September 7th contemplated a reorganization of the American Company under another name, without essential change in object or purpose, which was done, and the business proceeded just as before.

The language of the resolutions adopted on September 7th leaves no room for doubt as to what was contemplated by the directors of the American Company. By the second resolution it was declared that the company "will co-operate in the movement by appropriate reorganization, and transfer of its property to the National Opera Company;" and by the third resolution it was declared "that a local company be formed for New York city, to be on the same basis in the National Company as the local opera companies in all the other cities." The new company, when organized, was expected to take the place of the insolvent American Company, and succeed to all of its rights, and the latter become defunct. If it was contemplated that the American Company should con-

tinue in business as a local company in the city of New York, in co-operation with the new company, why provide in the third resolution for the organization of another local company for the same place? The evidence clearly shows that after the reorganization of the new company, the American transacted no business. An insolvent corporation cannot thus reorganize, and hold its property against creditors. Even if this scheme was not intended to hinder or delay McVicker in the prosecution of his suit and the collection of his debt,—and I do not hold that it was,—it had that effect, and the law presumes that the necessary consequences of an act are intended. On the theory that the American Company and the National Company were distinct legal entities, the latter was not ignorant of the condition of the former. By the lease, the American Company disposed of all its property for 12 months; and, whether the \$25,000 was a fair rental or not, the insolvent lessor could not thus place its property beyond the reach of creditors. Instead of holding its assets in trust for creditors, as it should have done, it being insolvent, the American Company endeavored to place them where the creditors, for a time at least, could not so readily reach them. The first attachment appears to have been levied before the sale was consummated under the optional agreement; but, however that may be, the property was properly seized under both writs. Findings have already been announced of the amount due McVicker for breach of the two contracts.

CLEAVER v. TRADERS' INS. CO.

(Circuit Court, E. D. Michigan. December 30, 1889.)

1. COSTS—IN FEDERAL COURTS—COSTS BEFORE REMOVAL.

In cases removed from the state court, costs accrued prior to such removal are taxable upon final judgment here.

2. SAME—DOCKET FEE.

The docket fee of \$20, taxable upon a trial or final hearing, is taxable but once, and then only upon that examination of the law or facts which results in the final disposition of the case. It is not taxable where the jury has disagreed.

(Syllabus by the Court.)

On Appeal from Clerk's Taxation of Costs.

C. P. Black, for plaintiff.

L. D. Norris, for defendant.

BROWN, J. Defendant appeals from the following items of costs taxed against it by the clerk :

1. Costs accrued in the state court prior to the removal of the case here. The action was originally begun in the circuit court for Tuscola county, was tried there twice, was twice carried to the supreme court, (32 N. W. Rep. 660, 39 N. W. Rep. 571,) and reversed, and was then removed to this court upon the petition of the defendant, where it was

also tried twice (*ante*, 711) before a verdict was reached. It has always been customary in the two districts of this state to allow the prevailing party his costs in the state court up to the time of removal. This point was expressly passed upon by my predecessor, Judge LONGYEAR, in *Wolf v. Insurance Co.*, 1 Flip. 377; and it appears from his opinion that Judge WITHEY had made a similar decision in the western district. It is true a different rule seems to obtain in the second circuit, (*Clare v. Bank*, 14 Blatchf. 445; *Chadbourn v. Insurance Co.*, 31 Fed. Rep. 625,) but the propriety of such allowance in this district is too firmly established to be now disturbed. It is true these costs are not contemplated by sections 823 and 824, but, in our opinion, these sections were intended to apply only to cases originally commenced here. There is no doubt that cases removed from the state court are taken by this court in the precise condition in which they leave the state court, and that all orders made and rights accrued will be respected here. *Williams v. Conger*, 125 U. S. 397, 8 Sup. Ct. Rep. 933; *Loomis v. Carrington*, 18 Fed. Rep. 97; *Davis v. Railroad Co.*, 25 Fed. Rep. 786; *Bryant v. Thompson*, 27 Fed. Rep. 881. We see no reason why an inchoate right to costs which must ultimately become perfected by the entry of a judgment should not fall within this category. As the plaintiff originally began his action in the state court, and was forced into this forum against his will, it is manifest injustice that he should be put to any pecuniary loss by such action, and we should not so construe this statute unless its language inexorably demanded it. This exception is overruled.

2. The taxation of a double docket fee of \$20. The case was tried in May last, and the jury disagreed. The question is whether the plaintiff is entitled to an attorney's fee of \$20 upon this trial, as well as upon the second trial, which resulted in a verdict. In the case of *Stove-Works v. Perry*, (unreported,) decided in 1879, in which the verdict on the first trial was set aside, it was held that the docket fee was taxable but once, and we see no reason to change our opinion. We decided this case upon the authority of *Dedekam v. Vose*, 3 Blatchf. 77, 153, in which it was held that the docket fee of \$20 was taxable but once. This ruling was repeated by Mr. Justice NELSON in *Factory v. Corning*, 7 Blatchf. 16, though the facts upon which the disallowance was made do not appear from the report of the case. In *Strafer v. Carr*, 6 Fed. Rep. 466, an attempt was made to tax a docket fee upon a trial wherein the jury disagreed, and it was held by Judge SWING that the docket fee applied only to trials which resulted in a verdict and judgment. This case is precisely in point. There is no conflict between it and *The Bay City*, 3 Fed. Rep. 47, wherein I held that the right to the docket fee attached as soon as the trial was begun, although the case was discontinued before it was concluded. It is merely necessary that the language of Judge SWING be read in connection with the facts of the case, to see that there is no want of harmony in the two adjudications. In *Coy v. Perkins*, 13 Fed. Rep. 111, it was said by Mr. Justice GRAY, Judge LOWELL concurring:

"We are of opinion that, upon the face of the statute, the intention of the legislature is manifest that it is only where some question of law or fact

involved in or leading to the final disposition actually made of the case has been submitted, or, at least, presented, to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of the solicitor's or proctor's fee of \$20."

In this case it was held that where an order was obtained dismissing a bill with costs, without notice to the defendant or consideration of the case by the court, the docket fee of \$20 should not be allowed. In *Huntress v. Town of Epsom*, 15 Fed. Rep. 732, it was held by Judge CLARK that, where there had been two trials of a case, the first of which resulted in a disagreement of the jury, and the second in a verdict, but one docket fee of \$20 would be allowed. This case is also directly in point. I am aware that some recent cases in New York announce a different rule. *Schmieder v. Barney*, 19 Blatchf. 143, 7 Fed. Rep. 451; *Wooster v. Handy*, 23 Fed. Rep. 49. But we do not find this construction of the statute to have been adopted in other districts. The Michigan authorities are no guide to us in this connection, since by the express language of the statute an attorney's fee is allowed for "every trial" of issues of fact. How. St. § 9004. The language of the New York Code is the same, and for that reason the cases cited in *Schmieder v. Barney* are inapplicable. By section 824, the docket fee is allowable "on a trial before a jury," "or on a final hearing in equity or admiralty." It has always seemed to us that the words "trial" and "final hearing" contemplated in each case that examination of the law or facts which resulted in the final disposition of the case. We have always understood the law to be as stated by Judge DEADY in *Fisk v. Henarie*, 32 Fed. Rep. 427, that, "where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; and, where a verdict is set aside because it ought not to stand, the result is the same. The proceeding has miscarried, and the consequence is not a trial, but a mistrial." Upon the whole, while the question is not free from doubt, we prefer to adhere to the opinion originally expressed by us. This exception is therefore sustained.

SCRANTON STEEL CO. v. WARD'S DETROIT & LAKE SUPERIOR LINE.

(Circuit Court, E. D. Michigan. December 2, 1889.)

1. INSURANCE—CONTRACT TO INSURE.

A promise to insure, made by one whose business is to insure, is performed by issuing a policy. A like promise, made by one whose business is not to insure, is performed by the promisor procuring a policy in some responsible company to the full insurable value of the property.

2. SAME—AGREEMENT BY CARRIER TO INSURE.

Hence, where a transportation company agreed to carry a certain cargo, and to insure the same, it was *held* to have substantially satisfied its obligation by causing the cargo to be insured to the full amount of the loss sustained.

3. SAME—ESTOPPEL.

Plaintiff intrusted certain cargoes of rails to the Erie Railroad, to carry to Buffalo, and forward thence to Duluth by water. Defendant contracted with the agent of the road at New York to carry them from Buffalo to Duluth, and to insure them. It procured certificates of insurance to be issued, and deposited them with the agent of the road at Buffalo, of whom it received the cargo, but had no direct dealing with the plaintiff. *Held*, that the receipt and retention of these certificates by the agent of the road, without objection, estopped the plaintiff from objecting to the form of the policies or the amount of the insurance.

(Syllabus by the Court.)

This was an action to recover damages for the loss and injury to a cargo of 357½ tons of steel rails, which the defendant had agreed to carry from Buffalo to Superior City, Wis., and to insure against the perils of the sea. The first count of the declaration averred that the defendant promised and agreed with the plaintiff to carry said rails from Buffalo to Superior City, and also to insure the safe carriage of the rails as aforesaid against all the perils of the sea; that, in pursuance of such agreement, on or about November 6th, the defendant's steamer *Northerner* left Buffalo with the said cargo of steel rails, and before reaching Superior City was burnt and sunk, and her said cargo of rails thereby was lost, destroyed, or damaged; whereby defendant became indebted and liable to pay the plaintiff the amount of such loss. The second count averred a parol promise with the plaintiff to carry the rails and also to procure insurance for the safe carriage of the rails, to their full value, against perils of the sea. Breach, that the *Northerner* was burnt and sunk, whereby her cargo was lost and destroyed; that the defendant failed to procure insurance to the full value of said steel rails, according to its said agreement; whereby defendant became indebted to the plaintiff in the sum of \$5,000.

At the request of the parties the court found the following facts:

(1) Plaintiff is a manufacturer of steel rails, doing business at Scranton, in the state of Pennsylvania.

(2) Defendant is a common carrier of merchandise between ports upon the Great Lakes, and is the owner and proprietor of the steamer *Northerner*.

(3) Early in September, 1886, plaintiff, which had sold a large amount of rails to the Northern Pacific Railroad Company, deliverable at Duluth, Minn., and Superior City, Wis., made application to John S. Hammond, general freight agent of the New York, Lake Erie & Western Railroad, at New York, for a rate on 2,500 tons of steel rails to be shipped from Scranton to Superior City. He named a rate from Scranton to Buffalo, delivered on the docks of

the road. About the same time Capt. Eber Ward, manager of the defendant line, called upon Mr. Hammond, and agreed upon a rate of two dollars per ton from Buffalo to Superior City, and he (Ward) was to insure the same on the lakes. Ward did not know then, nor at the time of the loss, to whom the risks belonged.

(4) It is the custom for managers and agents of transportation companies upon the lakes to take out policies of insurance in responsible companies, running to themselves as agents, for account of whom it may concern, and covering all such cargoes as their customers may desire to have insured. Upon the receipt of any such cargoes the agent issues a certificate payable to himself for the benefit of whom it may concern, specifying the cargo, the amount insured, the name of vessel, and the port from and to which it is to be carried. In pursuance of such custom, the British-America Assurance Company, on May 12, 1886, issued to Capt. Ward, the defendant's manager, an open policy, a copy of which is hereto attached.¹

(5) The first shipment under the contract with Hammond was made Octo-

¹Cargo Policy.
Lake.

No. 128.

THE BRITISH-AMERICA ASSURANCE CO., OF TORONTO, ONTARIO.

By this policy of insurance, on account of Eber Ward, Ag't,
For account of whom it may concern:

Do make insurance, and cause the several persons indorsed thereon, or in book attached hereto, to be insured, upon all kinds of lawful goods, wares, merchandise, and produce, laden on board the good vessel or vessels, boat or boats, railroad or carriage, lost or not lost, at and from ports and places, to ports and places, on a lawful and regular route and voyage, for the several amounts, and at the rates as herein indorsed, subject to the conditions of this policy, or of any contract proposition covered by this policy, according to their true intent and meaning.

Beginning the adventure upon the said property from and immediately following the loading thereof, at the port or place named in this indorsement, and so shall continue and endure until the same shall arrive and be safely landed at the port of destination, and not to exceed forty-eight hours from the time of arrival.

Touching the adventures and perils which the said British-America Assurance Company is contented to bear and take upon itself, they are of the lakes, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment, or damage of the said property, or any part thereof, excepting all perils, losses, or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of or in navigating the said vessel, from theft, barratry, or robbery, or other legally excluded causes. And, in case of loss, or misfortune, it shall be lawful and necessary to and for the insured or insurer, their agents, factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured, or insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party; to the charges whereof the said company will contribute to such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and bullion, promissory notes and other evidences of debt, books of account, written securities, deeds, or other evidences of title to property of any kind, are not covered by this policy, unless expressly defined as so insured.

And, in case of loss, such loss shall be payable in thirty days after satisfactory proof thereof. Proof of interest of assured in said property and adjustments shall be made and presented at the office of this company; all sums owing by the assured to this company being first deducted or secured to the satisfaction of this company, before such loss shall be paid: Provided, always, and it is further hereby agreed, that if the said insurer shall have made any other insurance upon the property aforesaid, prior in date to this policy, then the said British-America Assurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and the said British-America Assurance Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And, in case of any insurance upon said property subsequent in date to this policy, the said British-America Assurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed

ber 7th, through Henry L. Chamberlain, of Buffalo, the agent of the defendant in its transportation business, and also the agent of Capt. Ward in his insurance business. The succeeding shipments were made October 12th, October 15th, October 19th, and November 3d. These shipments were all consigned to C. E. Bailey, engineer of the Eastern Minnesota Railroad, Superior, Wis., and all arrived in safety. Upon making such shipments in each case, Chamberlain made out a certificate of insurance, in the form hereto annexed, upon blanks signed by Ward as agent of the British-America Insurance Company, under the policy above named. These certificates were sent by him to O'Shea, agent of the New York, Lake Erie & Western Railroad at Buffalo, from whom the consignments were received. These certificates were retained by O'Shea, and were never sent to the plaintiff or to Hammond.

(6) On November 8, 1886, a shipment was made upon the propeller *Northerner* of 357½ tons of steel rails. The annexed certificate was issued by Chamberlain upon the blank furnished by Ward for \$11,797, and sent to O'Shea. This was at the rate of \$33.33 per ton, the value of the iron being \$38. This certificate was retained by O'Shea until July, 1887, when it was delivered to the agent of the plaintiff.

(7) In the course of the voyage through Lake Erie, and about November 12th, the *Northerner* took fire, burned to the water's edge, and sank. Her cargo was subsequently raised and delivered. Of the entire 357½ tons, 20 tons were worthless, and a total loss. Their value, at \$38 per ton, was \$760. The remaining 337½ tons were sold, at \$25 per ton, to the Northern Pacific Railroad, and this was their value. Consequently upon this portion of the shipment

hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made. And, in case of loss or damage to the property hereby insured, this company, its agent or representative at or nearest the first port of discharge, shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent, and amount of damage, by personal inspection, appraisal, or sale of the damaged property.

It is also agreed that the property be warranted by the insured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. It is furthermore hereby expressly provided that no suit or action against this company, for the recovery of any claim for loss or damage, upon, under, or by virtue of this policy, shall be sustained in any court of law or equity, unless such suit shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action shall be commenced, after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence and conclusive defense against the validity of the claim thereby so attempted to be enforced.

It is also agreed and understood that, in case of loss or damage under this policy, the assured, in claiming and accepting payment therefor, hereby, and by that act, assigns and transfers all his or their right to claim for such loss or damage, as against the carrier, or other person or persons, town or corporation, or the United States or foreign governments, to this company, and to prosecute therefor at the charge and for account of this company, if requested; to inure to their benefit, however, to the extent only of the amount the loss or damage and attendant expenses of recovery, paid or incurred by the said British-America Assurance Company; and any act of the insured, waiving or transferring, or tending to defeat or decrease, any such claim against the carrier, or such other person or persons, town or corporation, or United States or foreign governments, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of this company, for or on account of the risk insured for which loss is claimed.

And it is understood and agreed that this company or its agent shall have free access, at all reasonable hours, to the books, accounts, instructions, and correspondence of the assured, containing statements of, or which relate to, shipments and receipts covered by this policy; and this policy may be declared void by either party, on giving a written notice to that effect to the other party, but without prejudice to any shipment or liability made or incurred, prior to the service of such notice.

Deck Cargoes. It is understood that property covered by this policy on lake vessels shall be under deck, unless otherwise specified and charged for additionally in the in-

there was a loss of \$13 per ton, or \$4,388.50. Plaintiff has thereby suffered damages in the amount of \$5,148.50.

The following is the certificate referred to in findings 5 and 6:

No. 5,762. Lake Cargo. \$11,797.

BRITISH-AMERICA ASSURANCE COMPANY, TORONTO.

BUFFALO, NOV. 8, 1886.

This certifies that Eber Ward, manager, is insured under and subject to conditions of lake-cargo policy No. —, in the sum of eleven thousand seven hundred and ninety-seven dollars on three hundred fifty-seven and one-half tons steel rails, shipped on board of propeller Northerner, —, \$11,797, at and from Buffalo to Superior, Wis. Loss, if any, payable to assured or order on return of this certificate. This certificate is not valid unless countersigned by the authorized agent of the company at place of issue.

C. W. ELPHICKE & Co., General Agents.

J. J. HIGMAN, Marine Manager.

EBER WARD, Agent.

James C. Smith and John H. Bissell, for plaintiff.

Dwight C. Rexford, for defendant.

BROWN, J. The first count in the declaration charges the defendant transportation company with having agreed to carry and to insure. The

dorsement thereon, and deck cargoes are insured against total loss of packages only. The minimum rates of such loss to make a claim shall be ten per cent., except salt, which shall be twenty per cent. of the whole number of packages insured on deck, and in all cases, on deck risks, to be free from damage by wet, breakage, leakage, or exposure.

Warranted by the insured free from any claim for loss or damage arising from civil commotion, seizure, detention, or the consequences of any hostile act of the United States or foreign governments; also from any loss or damage from piracy or letter of marque, or the acts of any government hostile to the United States.

Warranted by the insured free from any damage or injury, from dampness or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty, or mouldy, except caused by actual water contact with the article damaged, and to be free from liability for leakage, on molasses or other liquids, or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against. If the voyage aforesaid shall have been begun, and shall have terminated, before the date of this policy, then there shall be no return of premium on account of such termination. No shipments to be considered as insured until approved and indorsed on book attached hereto, by Eber Ward, Ag't, the agent of this company at Detroit, Mich.

This policy is subject to the usages and regulations of the port of New York in all matters of adjustment and settlement of losses and averages not herein otherwise clearly specified and provided for, as may be stated by a competent and disinterested adjuster of marine losses, to be designated by the insurers; but no damage to be paid unless amounting to five per cent.

It is understood and agreed, as one of the conditions under which this policy is issued and indorsement made thereon, that, if the insurance is procured by any person or persons other than the assured, they shall be deemed the agent or agents of the assured, and not of this company, in any and all transactions relating to this insurance.

And it is hereby understood and agreed, by and between this company and the assured, that this policy is made and accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing.

In witness whereof the British-America Assurance company have caused these presents to be attested by their manager at Toronto. But this policy shall not be valid unless countersigned by C. W. Elphicke & Co., general agents of the British-America Assurance Company at Chicago, Ill.

Attested:

Countersigned at Chicago this 12th day of May, 1886.

J. J. HIGMAN, Marine Manager.

C. W. ELPHICKE & Co., General Agents.

INLAND MARINE DEPARTMENT.
C. W. Elphicke & Co.
Chicago, Ill.

second count differs from the first only in its averment of agreement to carry and to *procure insurance* to the full value of the rails. The agreement was an oral one between Hammond, agent of the Erie road, at New York, and Ward, the manager of the defendant line. While the conversation is somewhat differently stated by the two witnesses, I am satisfied, and have found as a fact, that Ward agreed to carry the rails, and to insure them, at two dollars per ton. The meaning of those words, then, becomes a question of construction for the court. Did Ward thereby intend that the defendant transportation company should insure these personally, or was it the intention that he, acting as agent for this line, should procure them to be insured in some responsible company? The authorities recognize a clear distinction between a contract of insurance and a contract to insure, in the fact that the former is executed and the other is executory. In the one case the action is upon the contract for the loss or damage sustained under the risk, while in the other the action is for a breach of the contract for not insuring, and the measure of recovery is the loss sustained thereby. The weight of authority is that a parol contract to insure will be enforced in equity even though the charter of the company requires its contracts of insurance to be in writing; the courts holding to a distinction between an executory and executed contract, and that the charter provisions can only be held to apply to the latter. This was the construction given by the supreme court of the United States to a statute of Massachusetts in *Insurance Co. v. Insurance Co.*, 19 How. 318. See, also, *Insurance Co. v. Shatt*, 94 U. S. 574; *Sanborn v. Insurance Co.*, 16 Gray, 448; *First Baptist Church v. Insurance Co.*, 19 N. Y. 305; Wood, Ins. § 11; May, Ins. § 23. Most of the cases in which the distinction is taken have arisen in actions against fire insurance companies for failing to issue policies in which the measure of damages is the same as if a policy had been issued. In such cases the courts would naturally interpret the contract to insure as a contract to issue a policy in the defendant company; but, where the promise is made by a person or corporation whose business is not to insure, the authorities indicate that it is satisfied by the promisor's procuring a policy in some responsible company to the value of the property insured. There is no doubt that when a factor receives goods on commission, with instructions to insure, he satisfies those instructions by procuring policies in a responsible company. Mechem, Ag. §§ 510, 1011. And it is difficult to see why a different construction should be given to the receipt of goods under an agreement to insure. Thus, in *Johnson v. Campbell*, 120 Mass. 449, it was held that a letter issued by a firm of commission merchants, inviting consignments of goods, and stating that they "will be covered by insurance as soon as received in store," did not import that they were personally to be the insurers of such goods, and that the agreement was performed by their obtaining reasonable and proper insurance against fire. The court observes:

"The circular issued by the firm of Johnson & Co., inviting consignments of goods, does not import that they personally were to be the insurers of such goods against fire. It is simply a promise that the goods shall be insured, or,

in the language of the circular, 'shall be covered by insurance as soon as received in store.' A promise to insure is fulfilled by obtaining a reasonable and proper security against a contingent loss. The commission which they were to charge upon sales was to compensate them for all their charges for guaranty, for effecting and maintaining insurance, and for certain incidental expenses, and services attending the reception and care of property that should be consigned to them."

In the case under consideration the promise was made by an incorporated navigation company whose business is to carry, but not to insure. Indeed, it is questionable whether a contract of insurance would not be beyond the scope of its powers. The evidence of custom establishes the fact that the managers of such companies provide themselves with what are termed "blank policies," running to themselves as agents, for account of whom it may concern; in pursuance of which they issue certificates upon all such cargoes as their customers may wish insured, deriving an incidental profit by the usual commission upon such certificates. Beyond this, the finding shows that four cargoes had previously been shipped under precisely the same circumstances; that similar certificates were issued and deposited with O'Shea, and received by him, without objection. To the argument that O'Shea was not the agent of the plaintiff to receive such certificates or to insure the cargo, it may be said that the cargo was intrusted to Hammond, acting as agent of the Erie road, to carry to Lake Superior and to insure; that neither Chamberlain nor Ward had any dealings whatever with the plaintiff, and I think discharged their entire duty in the matter of insurance by issuing certificates, and delivering them to the party of whom they received the cargo. The contracts to carry and to procure insurance were practically one contract, which was made with the Erie road, and plaintiff has no right now to step in and say that he is not bound by its acts in that connection. We think the receipt and retention of these certificates by O'Shea must be held to estop the plaintiff from making any objection to the form of the policy or to the amount of the insurance.

Aside from this, however, it is not shown that the plaintiff's loss was not fully covered by an insurance of which he was entitled to take the benefit. Had the loss been total, there might have been some question whether the obligation to insure would be satisfied by anything less than an insurance to the full insurable value of the property; but, as the insurance was more than double the loss sustained, it is difficult to see how the plaintiff was prejudiced by failure to insure to its full value. The policy is in the usual form of cargo policies,—the form which has been in use upon the lakes for 20 or 30 years,—and the provision against suit after one year is now so invariable in insurance policies that the court certainly cannot take judicial notice of the fact that it is unusual. The same remark may be made with regard to the provision concerning proofs of loss. Had these proofs been promptly made, as soon as the plaintiff was informed of the loss, and suit begun within a year, we see nothing in the way of a recovery. It is true that the certificate was issued in the name of "Eber Ward, Manager," and the loss, if any, payable "to assured

or order;" but the policy ran to "Eber Ward, Agent," "for account of whom it may concern;" and there is no question that, under the authorities, it may be shown whose interest was intended to be insured, in the same manner as if the plaintiff's name had been mentioned. Extrinsic evidence may always be resorted to for the purpose of ascertaining the interests intended to be covered. *Lee v. Adsit*, 37 N. Y. 86; *Castner v. Insurance Co.*, 46 Mich. 15, 8 N. W. Rep. 554. A policy upon a cargo in the name of A., "on account of whom it may concern," or with other equivalent terms, will inure to the interest of the party for whom it was intended by A.; provided he, at the time of effecting the insurance, had the requisite authority from such parties, or the latter subsequently adopted his act, (*Hooper v. Robinson*, 98 U. S. 528;) and, if an agent procure a policy of insurance in his own name, either the agent or the principal may sue thereon, (*Waring v. Insurance Co.*, 45 N. Y. 611.)

From the above statement of facts we find, as a conclusion of law, that the defendant has performed the contract set forth by the plaintiff in his declaration, and is entitled to judgment.

SCHLESINGER *et al.* v. SEEBERGER, Collector.¹

(Circuit Court, N. D. Illinois. July 18, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—SKINS DRESSED.

Skins dressed with the hair on, and sewed together in pieces 18 inches wide, and from 36 to 48 inches long, and used indifferently as rugs, mats, sleigh robes, and overcoat trimmings, are dutiable as "skins dressed and finished," under clause 461 of Heyl's Arrangement of the Customs Act of 1883, and not as "rugs," under clause 378 of said Arrangement, which expressly refers to wool and woollen goods.

At Law.

Shuman & Defrees, for plaintiffs.

W. G. Ewing, U. S. Dist. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiffs imported a quantity of skins dressed with the hair on, which were invoiced as "Chinese goatskins." They were tanned, so as to make the skins soft and pliable, and consisted of small pieces of skin sewn together, so as to make parallelograms of about 18 inches wide, and from 36 to 48 inches long. The collector assessed them for duty as "rugs," under clause 378 of Heyl's Arrangement of the Customs Laws, at 40 per cent. *ad valorem*. The plaintiffs paid the duty so assessed under protest, claiming that they should have been assessed as "skins dressed and finished," etc., under clause 461 of Heyl, at a duty of 20 per cent. *ad valorem*.

The proof shows that these goods are sold to some extent for the purpose of being used as floor rugs; that they are also sold for door mats

¹Reported by Louis Boisot, Jr., of the Chicago bar.

and vestibule mats, and are sometimes used for sleigh and carriage robes, and for trimming for overcoats, and such like uses. I do not think, from the proof, that the skins in question were necessarily intended to be used in the shapes in which they were sewn together when imported, but that it was expected that they might be ripped apart at the seams, and applied to the different uses for which they were in demand, either in the natural colors of the skins themselves, or after having been dyed and lined. It therefore seems to me that these articles are not so exclusively used as rugs, and applied to that use, as to make them dutiable as "rugs." They fall naturally within the law, and, it seems to me, within the spirit, of the provisions of clause 461, as "skins, dressed and finished," and in that condition are adaptable for various uses besides that of rugs. The clause under which the collector assessed them for duty is found in Schedule K, which in terms is intended to include "wool and woolen goods." Certainly, these are neither wool nor manufactures of wool, but come much more naturally within the group of goods called "Sundries," provided for in Schedule N of the act of 1883. The mere fact that they are used, or may be used, by some people for rugs does not necessarily bring them within the operation of the provision of the law which provides for a duty on "rugs" in the group of wool and woolen manufactures. The goods in question, it is true, may be, and to some extent are, used on floors in the manner that rugs are used; but this does not make them dutiable as "rugs," if they are elsewhere specifically described and provided for; and it seems to me they are so described and provided for under the terms "skins, dressed and finished," in clause 461; and, when so described, the use to which they may be applied does not determine their classification or rate of duty. Suppose they had been tanned into leather, I take it there would be no pretext but what they would be dutiable as leather in some of its forms, and not as rugs, although some person might buy and use them in place of rugs. I am therefore of opinion that the goods should have been assessed under clause 461 at a duty of 20 per cent. *ad valorem*, and the issue is found for the plaintiffs.

KEARY *et al.* v. MAGONE, Collector.

(Circuit Court, S. D. New York. January 9, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—SLATE BOOKS—PARCHMENT SLATES.

"Slate books," viz., memorandum books of which paper is a component material, of various sizes, from 8x2 inches to 8x5 inches, in length and breadth, having two covers, and from one to three leaves of paper, coated with a black surface, capable of being written upon with slate-pencil; and "parchment slates," being likewise composed of paper, in one or more folds, and covered with a white composition, to be written upon with lead-pencil,—found by the jury to be dutiable under Schedule M of the tariff act of March 3, 1883, as "Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act, fifteen per centum *ad valorem*," (Tariff Index, new, 388,) and not under schedule N, as "card-cases, pocket-books, shell-boxes, and all similar articles, of whatever material composed, and by whatever name known, not specially enumerated or provided for in this act, thirty-five per centum *ad valorem*." (Id. 410.)

At Law.

Suit to recover duties alleged to have been illegally exacted by the defendant, collector of the port of New York. It was proved upon the trial that the plaintiffs, in the year 1886, imported from Germany certain goods invoiced as "Slate Books" and as "Parchment Slates;" that the slate books were of various sizes, from 3 inches long by 2 inches broad to 8 inches in length by 5 inches in breadth; that they were composed of paper, and contained one, two, or three leaves, likewise of paper, and covered with a black coating or surface, suitable to be written upon with a slate-pencil; that some of these books contained a small slate-pencil, and that others did not; that these articles were known in the trade, at and prior to the passage of the tariff act of 1883, as "Slate Books;" that the so-called "Parchment Slates" were likewise composed of paper, folded once or twice, and covered with a white coating or surface, suitable to be written upon with a lead-pencil; that all these articles were assessed for duty at 35 per cent. *ad valorem* under the above-quoted provision of Schedule N (Tariff Index, new, 410) of the tariff act of March 3, 1883, and that plaintiffs paid the duties under protest, claiming that the said articles were dutiable under Schedule M, above-quoted, (Id. 388) at 15 per cent. *ad valorem*, as "manufactures of which paper is a component material," etc. The defendant proved by trade witnesses that pocket-books were of different materials and of various sizes, suitable to be carried in the pocket; and put in evidence a pocket-book, known as such in the trade at and prior to the passage of the tariff act of 1883, which pocket-book contained, besides the usual compartments for money, papers, etc., two leaves, covered with a white silicate surface, suitable for the writing of memoranda in lead-pencil, and with a small lead-pencil provided for that purpose. Defendant also put in evidence an article known to the trade in and prior to 1883 as a "card-case book-slate," with covers of leather, containing a pocket for cards, and two or three sheets of white silicate coated paper, with a small pencil for memoranda. Defendant's witnesses proved that card-cases were of different sizes and of various materials; that shell-boxes were made of paper or other substance, decorated with small shells; that such boxes were of different sizes, from 2 inches square and a couple of inches deep, to 12 inches square, and were used upon ladies' tables to contain small articles.

Stanley, Clarke & Smith, for plaintiffs.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (charging jury.) Paper is a substantial component of the articles imported here; therefore they fall within the enumeration of the 388th paragraph of the tariff, as manufactures of paper, or of which paper is a component material, and should pay a duty only of 15 per cent., unless they are found elsewhere specifically enumerated in the tariff. The defendant claims that they are so found in the 410th paragraph, which provides for a duty of 35 per cent. on "card-cases, pocket-books, shell-boxes, and all similar articles, of whatever material com-

posed, and by whatever name known." Of course these acts are to be interpreted in accordance with the understanding of the mercantile community, and you have therefore been informed by the witnesses called by both parties as to what the trade understood by the terms "card-cases," "pocket-books," and "shell-boxes" at the time when this act was passed. And both sides here agree that these articles were not at that time included in those specific designations; that they are not card-cases nor pocket-books nor shell-boxes. The claim of the defendant, however, is that they are articles similar to one or other of those particular trade articles thus enumerated. Similarity is not absolute likeness, and does not exclude the idea of difference. Likeness excludes the idea of difference. Similarity includes only the idea of casual likeness; and, in determining in this case the question of similarity, one important element which is usually taken into consideration is to be omitted, to-wit, the material of which they are composed. The paragraph expressly provides for articles similar to card-cases, pocket-books, or shell-boxes, no matter of what material they may be composed. In determining, then, the question whether these articles are substantially similar to a card-case, a pocket-book, or a shell-box, you are to take into consideration the other elements which go to make up the similarity of one object to another. With regard to each one of these articles, which are of different sizes, and somewhat different shapes, you are to consider, in determining its similarity to the pocket-book, card-case, or shell-box of commerce, its form, its shape, its size, its weight, its organization, or the co-relation of its parts; its use, and adaptability to use, with due regard to the relative prominence of its different parts, and to the relative importance of its different uses, if it subserves more than a single use. Applying that test, if you should reach the conclusion that these articles, or any of them, are similar to card-cases, pocket-books, or shell-boxes, as they were known to the trade when the act of 1883 was passed, then your verdict will be for the defendant; if you do not reach that conclusion, your verdict will be for the plaintiff; and if you find a similarity as to certain of the articles, and a dissimilarity as to others, then you may render a verdict for the defendant as to such of the articles as you find to be similar, and a special verdict as to those articles which you find not to be similar.

Verdict for plaintiffs.

BISHOP *et al.* v. ROMAINE.

(Circuit Court, E. D. New York. July 12, 1886.)

PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—SOLDERING MACHINES.

Claim 1 of letters patent No. 109,577, granted to William B. Bishop, November 23, 1870, for an improvement in machines for soldering can-caps, which describes "The ring or cup shaped soldering tool, G, for soldering the caps upon cans, substantially as herein shown and described," must be limited to a machine arranged to work in the manner described in view of the prior English patents to Carson, Forbes, and Hebert for hand soldering tools, with the part corresponding to G "ring or cup-shaped."

In Equity.

Bill by Ellen L. Bishop, as administratrix, and Charles E. Dexter, as administrator, of William B. Bishop, deceased, against John Romaine, to restrain infringement of patent.

Ernest C. Webb, for plaintiffs.

David A. Burr, for defendant.

BLATCHFORD, J. This suit is brought for the infringement of letters patent No. 109,577, granted to William B. Bishop, November 29, 1870, for an improvement in machines for soldering can-caps. The specification and drawings are as follows:

"To all whom it may concern: Be it known that I, William B. Bishop, of Brooklyn, in the county of Kings and state of New York, have invented a new and useful improvement in machines for soldering can-caps; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification, in which figure 1 is a side view of my improved machine, partly in section, to show the construction. Figure 2 is a horizontal section of the same, taken through the line, *a, a*, Fig. 1. Similar letters of reference indicate corresponding parts. My invention has for its object to furnish a simple, convenient, and effective machine for soldering caps upon sheet-metal cans; and it consists in the construction and combination of various parts of the machine, as hereinafter more fully described. A is the lower platform of the machine, which is securely attached to and supported by legs, B, of such a length as to raise the machine to a convenient height. C is the upper platform, which is connected to the platform, A, and supported by the rods, D, which have screw-threads cut upon one or both ends to receive nuts, which are screwed upon the said rods, one above and one below each platform, as shown in Fig. 1. This construction enables the two platforms to be adjusted at a greater or less distance apart, according to the height of the cans to be soldered. E is the furnace, in which the fire is formed to heat the soldering tool, and which is provided with a detachable cover, and with openings to admit the air to support combustion, and for the escape of the smoke and other products of combustion. F is the heater, which is a bar of cast-iron or other suitable material, placed vertically in the center of the furnace, E, with its lower end resting upon the center of the platform, C. The heater, F, is connected with the soldering iron, G, by a screw, which passes through a hole in the center of the platform, C, and which is formed upon either the heater, F, or soldering tool, G, and screws into the other of said parts, so that the soldering tool, G, may be kept hot by heat conducted to it from the heater, F. The soldering tool, G, may be made of copper, wrought-iron, cast-iron, or other suitable material; and its face is concave, to receive the cap to be soldered, and to give a ring-shape to its edge that comes in contact with the solder around the edge of the cap. The cap is held in place upon the can while being soldered by the rod, H, which passes down through the heater, F, and soldering tool, G, so that its lower end rests upon the said cap. The upper end of the rod, H, is weighted, to enable it to hold the cap securely in place while being soldered. I is the table, upon which the can is set to be operated upon, where it is secured in place by the bar, J, which is curved to receive the can between its arms, where it is held by the elasticity of the said arms; the ends of said arms being curved outward slightly to allow the can to be conveniently forced into place between them. The middle part of the elastic or spring bar, J, is attached to the upper end of the support, K, the lower end of which is secured to the table, I,

near one edge, by a screw, which passes through a slot in the lower end of the said support, K, and screws into the said table, I, as shown in Figs. 1 and 2, so that the position of the said bar, J, may be adjusted according to the size of the can. The table, I, is made circular in form, and is securely attached to the upper end of the vertical shaft, L, which passes down through and revolves in the lower platform, A, and in a support, M, attached to said platform, A, in such a way that the said shaft may have a vertical movement through its bearings. The lower end of the shaft, L, rests and revolves in a step pivoted to the end of the lever, N, which is pivoted to a support attached to the platform, A, and to the outer end of which is pivoted the upper end of the connecting rod, O, the lower end of which is pivoted to the treadle, P, the inner end of which is pivoted to the floor, or to suitable support, and the outer end of which projects into such a position that it may be conveniently reached and operated by the operator with his foot to raise the can to the soldering tool. To the shaft, L, is attached a bevel-gear wheel, Q, the teeth of which mesh into the teeth of the bevel-gear wheel, R, attached to the shaft, S, which revolves in bearings attached to the platform, A, and to the end of which is attached a crank, T, by means of which the vertical shaft, L, is revolved; the wheel, Q, being connected with the shaft, L, in such a way as to carry the said shaft, L, with it in its revolution, while allowing the shaft to have a free vertical movement. If desired, several sets of tables and soldering tools may be connected with the same crank-shaft, so that a number of can-caps, may be soldered at the same operation. Having thus described my invention, I claim as new, and desire to secure by letters patent: (1) The ring or cup shaped soldering tool, G, for soldering the caps upon cans, substantially as herein shown and described. (2) The revolving table, I, having also a vertical movement, in combination with the ring or cup shaped soldering tool, G, substantially as herein shown and described, and for the purpose set forth. (3) The combination of the adjustable elastic holder, J, K, with the revolving table, I, substantially as herein shown and described, and for the purpose set forth: (4) An improved machine for soldering can-caps, formed by the combination of the platform, A, feet, B, adjustable platform, C, adjusting and supporting rods, D, furnace, E, heater, F, ring or cup shaped soldering tool, G, weighted holding rod, H, table, I, adjustable holder, J, K, shaft, L, lever, N, treadle, P, gear-wheels, Q and R, shaft, S, and crank, T, with each other, substantially as shown and described, and for the purpose set forth."

It is not contended that any claim but the first has been infringed. An examination of the specification shows that Bishop did not understand that he had invented, or sought to claim, anything but a machine, or parts of a machine, to be operated in it with the mode of operation set forth. He says that his invention has for its object to furnish "a machine," and that "it consists in the construction and combination of various parts of the machine, as hereinafter more fully described." A furnace, in which to make a fire, surrounds a longitudinal vertical hollow metallic heater, F, which is heated by the fire, and communicates its heat, by conduction, to the soldering iron or tool, G, which is also of metal, and has a concave face, into which the cap to be soldered fits. The cap is held in place while being soldered by a rod, H, which passes down through the heater, F, and the soldering tool, G, and rests at its lower end on the cap, its upper end being weighted. The soldering tool is stationary, and does not rotate or revolve. But the can is set on a table below, which is arranged to lift it for the operation, and then lower it again, the table being circular, and set on the upper end of a

vertical shaft, which revolves horizontally, and carries the can around in contact, at its top, with the lower end of the tool.

There is no suggestion in the specification of the use of the soldering tool, G, as an independent movable hand tool, to be used apart from the machine, and apart from a revolving can. Moreover, the "ring or cup shaped soldering tool, G," as defined by the terms of the specification and claims, is confined to the part lettered G, and does not include the heater, F, or the rod, H, or any of the other parts specified in the fourth claim. The first claim, therefore, in claiming "the ring or cup shaped soldering tool, G, for soldering the caps upon cans, substantially as herein shown and described," claims only the cup-shaped or concave part, which is at the lower end of the heater, F, and wholly below the platform, C, and claims it only as a tool in the machine of the special form defined, and fixed with reference to a revolving can. The defendant has no machine. His entire apparatus is a hand tool, the part of which corresponding to the metallic heater, F, is of wood, and the apparatus is moved and rotated by the hand to do the soldering. Although the part of the apparatus which corresponds to the part, G, of Bishop, is concave, and its edge has a ring shape, yet hand soldering tools with the part corresponding to G, "ring or cup shaped," existed in the prior English patents to Carson and Forbes and Hebert. Hence the part, G, claimed in the first claim, must be limited to that part arranged to work in the machine in the manner described in the specification, and the claim is not infringed by the defendant. The bill is dismissed, with costs.

IMHAUSER v. HAUSBURG.

(Circuit Court, S. D. New York. January 2, 1890.)

1. PATENTS FOR INVENTIONS—VALIDITY—WATCHMAN'S TIME DETECTOR.

Letters patent No. 170,443, issued November 30, 1875, to William Imhauser, for watchman's time detector, is valid, when limited to the combination with a watchman's time detector containing clock-work, paper dial, and apparatus for pricking the same, of mechanism for detecting and recording any illicit opening of the case.

2. SAME—INFRINGEMENT.

Said patent is infringed by a device which records the fact of opening in the same way by the prick of a needle on the dial, and in which the needle is operated and moved in the same way as in the patented machine.

In Equity.

Bill by Elise Imhauser against Otto E. Hausburg, for infringement of letters patent No. 170,443, issued November 30, 1875, to William Imhauser, for watchman's time detector.

A. v. Briesen, for complainant.

Edwin H. Brown and *James H. Bowen*, for defendant.

LACOMBE, J. The prior state of the art does not warrant any broad construction of the complainant's patent. It must be limited to the de-

tails of the mechanism described. Though thus limited, however, infringement of it is none the less plain. Both articles (complainant's and defendant's) are watchman's time detectors of the same shape and size, containing clock-work, paper dial, apparatus for pricking the same, and, combined therewith, mechanism for detecting and recording any illicit opening of the case in which the whole apparatus is contained. In both articles the fact of opening is recorded by the prick of a needle on the paper dial. In both the needle is mounted at the free end of a spring, lying parallel with the dial, at a short distance from it; the needle being perpendicular to the paper dial on which it is to make its record. In both articles there is arranged in the hinged cover a projection with notched or cam head. When the cover is opened or closed, this notch or cam, by movement across the free end of the spring, causes the needle to move towards the paper far enough to punch a hole in it. After the cam or notch has passed beyond the free end of the spring, the latter, bearing the needle, resumes its normal position. The similarity between these two structures approaches closely to absolute identity.

When limited to the combination with a watchman's time detector of the particular mechanism above described, the evidence does not disclose any anticipation of complainant's apparatus. Thousands of these articles have been sold; both sides insist that the public accepts them; and there seems to be quite as much invention in devising them as was held sufficient to sustain the patents in *Palmer v. Johnston*, 34 Fed. Rep. 337; *Baldwin v. Conway Co.*, 35 Fed. Rep. 519; and *Safe-Deposit Co. v. Gas-Light Co.*, 39 Fed. Rep. 273. The evidence of prior public use by Abraham Newman of watchman's clocks with safety locks, anticipating complainant's invention, is unsatisfactory and unconvincing. Decree for complainant.

BERRYMAN v. AINSWORTH BOILER & PIPE COVERING CO.

(Circuit Court, D. Delaware. January 18, 1890.)

1. PATENTS FOR INVENTIONS—INVENTION—CASING FOR STEAM-PIPE.

The first claim of letters patent No. 276,044, issued to Peter Holt for caps for steam-pipe, April 17, 1883, viz., "the combination of a pipe and pipe-clothing with a cap made in two parts, for embracing both the clothing and pipe," is void, as covering any cap for covering the end of a pipe casing, it being admitted that the longitudinal division of sectional casings for pipes was old.

2. SAME—ANTICIPATION.

The device, consisting of a cap made in two parts, each part consisting of a semi-annular piece adapted to fit over the pipe-clothing, a smaller semi-annular piece adapted to fit over the pipe, and a beveled (semi-annular) connecting piece, is anticipated—no novelty being claimed for the longitudinal division—by patent to Harris 71,300, November 28, 1867, which shows a protective jacket, with one cylindrical portion embracing the pipe, and another the non-conducting material, and a conical connecting portion, and by model of patent to Riker 159,452, February 2, 1875, showing a metallic cap for embracing pipe-coverings.

In Equity. On final hearing, Bill by Samuel H. Berryman to restrain the infringement of patent No. 276,044.

Jerome Carty, for complainant.

Henry C. Conrad and *Arthur S. Browne*, for defendant.

WALES, J. This suit is brought for the infringement of letters patent No. 276,044, dated April 17, 1888, issued to Peter Holt for "a new and useful improvement in caps for steam-pipe clothing," and by him assigned to the complainant. The first claim of the patent, and which is the only one involved in this controversy, reads as follows: "The combination of a pipe and pipe-clothing with a cap, D, made in two parts, for embracing both clothing and pipe, substantially as set forth." Infringement is alleged in reference to this claim and to no other. The complainant contends that this claim covers broadly the idea and device of a new combination in the state of the art for preventing the disintegration of the ends of the non-conducting clothing with which steam or hot-air pipes are often covered. The defense is anticipation and non-infringement.

Various methods and contrivances had been in use, long before the date of Holt's patent, for covering steam and other pipes, in order to prevent the radiation of heat from steam-pipes, and to prevent freezing in water-pipes. The ordinary method was to surround the pipe with a covering composed of non-conducting material, such as hair, felt, or asbestos, secured to the pipe by means of an exterior canvas or metallic covering. In adjusting this covering at the joints of a pipe, or where it was desirable to have access thereto, or at any points in the pipe where branches were let off, it became necessary that a portion of the covering should be removed so that the pipe could be laid bare. Such exposed ends or portions of the covering had to be protected to prevent the ends from disintegrating and falling out. The usual means employed were to tie down the exterior canvas over the end of the covering, and bind it down to the pipe by twine or wire. Numerous devices and expedients have been invented for the purpose of effectually covering such pipes, and many patents were produced in evidence by the defendant to show what was old in this line at the date of the application for the Holt patent. The specification in the Holt patent describes his device and its object as follows:

"My invention, however, is not restricted to any kind of clothing, for all modern pipe-wrappings are apt to become disintegrated at the points where they are necessarily cut away for exposing the pipe wherever it is necessary to make attachments thereto. In order to prevent this, I use an annular cap, D, made in two exactly similar parts, as best observed in the prospective view, Fig. 3, each part consisting of a semi-annular piece, *d*, adapted to fit on the outside of the non-conducting clothing, a smaller semi-annular piece, *e*, to fit to the pipe, and the beveled connecting piece, *f*; the whole being preferably composed of sheet or cast metal, and provided with lugs receiving bolts by which the two parts are secured together, so as to inclose the clothing of the pipe at and near the end of the same. The intermediate beveled piece of one or both parts of the cap is of such a length that the beveled piece of one will overlap that of the other, thereby preventing all exposure of the end of the clothing, which, being thus contained within the cap, is not liable to be disintegrated."

The defendant's device, and for which letters patent No. 340,073, dated April 20, 1886, were secured, consists of a casing for pipes, and is composed of two cylindrical sections of sheet-metal, each section being made of two half cylinders, which are placed around the pipe to be inclosed, with their edges meeting. Adjacent sections overlap each other, as in the case of ordinary stove-pipe sections. The longitudinal edges of the halves of each section are bent outwardly, and locked together by strips of sheet-metal which have their edges bent inward. When the casing has thus been put around the pipe, the space between them is filled with a suitable non-conducting packing, such as asbestos or mineral wool. In order to permit access to the joints of a pipe without removing the casing, they are left exposed, and the casing is reduced at these points by a reduced section which is conical in shape, being, at its smaller end, of the diameter of the pipe, and expanding at its larger end to the dimensions of the rest of the casing. This reduced section is composed of two parts, which are locked together in the same manner as those of the cylindrical sections. No novelty is claimed for the manner of constructing or adjusting these outer casings, except at those points where it may be necessary to separate the joints of a pipe, or to lower it without removing the casing or disturbing the ends of the clothing. It is admitted, also, that the longitudinal division of the sectional casings and of the caps is not of modern invention.

The only question, then, is, does the Holt cap come within the definition of a "new and useful improvement," in view of the prior state of the art? The first claim, as broadly made and insisted on by the complainant, includes everything in the nature of a cap for covering the end of a pipe casing. In other words, the Holt patent is made to include a cap which would fit over the end of a casing like the circular cover or top of a pill-box, with a hole in the center for the pipe to pass through. Substitute metal for paper, and the cap and the cover are essentially the same. Such a construction of the claim goes very far, and practically defeats itself, as not being within the meaning of a "new and useful improvement." But, apart from this, it is very clear, from an examination of the defendant's exhibits, that the device of Holt, or its equivalent, had been in use before he made his application. The Harris patent, No. 71,300, dated November 26, 1867, for "fire-proof packing for smoke and hot-air flues," (defendant's Exhibit No. 10,) shows a protecting jacket which has one cylindrical portion embracing the pipe, and another cylindrical portion embracing the non-conducting material, and a conical uniting portion, thus constituting a cap protecting the end of the covering. The only distinction between this jacket, in the Harris patent, and the Holt cap, is that the latter is composed of two parts having longitudinal joints, and the former is made in one piece. As already stated, no novelty is claimed for making the cap in two pieces. The Riker patent No. 159,452, dated February 2, 1875, for "improvement in non-conducting coverings," (defendant's Exhibit No. 14,) is accompanied by a model which shows a metallic cap for protecting pipe-coverings which embraces the pipe and the pipe-covering in the same sense that the de-

endant's cap embraces both. There is therefore no originality in the Holt cap, and the complainant's bill must be dismissed. Decreed accordingly.

REED et al. v. SMITH et al.

(Circuit Court, E. D. Michigan. January 6, 1890.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—HARROWS.

The first claim of patent numbered 201,946, to De Witt C. Reed, for an improvement in harrows, covers the combination of a harrow frame and harrow tooth secured therein, so as to be longitudinally adjusted, and a fastening clip, constructed with two biting edges bearing against the tooth, the object of which is to hold it more rigidly in position than would be possible if the pressure were uniformly exerted over the whole width of the clip.

2. SAME.

In view of the state of the art, and of the limitations put by the patent-office upon the patentee's original claim, the second claim is restricted to the combination with a harrow frame, provided with a curved seat, of a curved tooth, and such a clip as is described in the first claim.

3. SAME—INVENTION.

The use of a curved tooth resting upon a curved seat had previously existed in a horse-rake, and the application of this device to a harrow is not invention.

4. SAME—INFRINGEMENT—USE OF EQUIVALENTS.

While the defendants did not literally infringe upon the Reed patent, since their clip was flat, and the seat was not curved, yet it was held that, giving the patentee the full benefit of the doctrine of mechanical equivalents, the three straight lines used by the defendants to form the arc of a circle were the equivalent of the curved line. In order that the working end of the harrow tooth be raised or depressed, it is necessary that the other end be curved, and it is desirable that it should rest upon a seat more or less curved; but whether this seat be a literal curve, or a series of straight lines, the general effect of which is a curve, is of no importance. *Held*, the defendants obtained the full benefit of the curved clip by the peculiar conformation of the seat with two shoulders, which performed the same function as the biting edges of the clip.

5. SAME.

The valuable feature in the patent is the two biting edges of the clip; and it makes no difference whether those biting edges are used as a seat with a straight clip bearing on the opposite surface, and between them, or whether a curved seat is used conforming to the shape of the tooth, and the biting edge clip on the opposite side. *Held*, therefore, that the second claim was infringed by the defendants.

(Syllabus by the Court.)

In Equity.

This was a bill in equity to recover for the infringement of letters patent No. 201,946, to De Witt C. Reed, for an improvement in harrows. His invention is described as consisting in a novel means for adjusting a spring tooth so as to give to its point a greater or less depth of cut, by making that portion of the tooth adjacent to the frame curved, and resting on a curved seat, securing it thereto by a clip, or its equivalent. The only substantial defense in the case was non-infringement. The cause was submitted to the court upon pleadings and proofs.

Howard & Roos and *N. H. Stewart*, for plaintiffs.

Parker & Burton, for defendants.

Brown, J., The many adjudications which have been made in this and other states sustaining this patent obviate the necessity of our con-

sidering at length all the former devices claimed as anticipations, and preclude the possibility of our holding that there is not a patentable novelty in the invention. It would have been more satisfactory if some of these opinions had been reduced to writing, as we could then have learned exactly what was decided, and upon what state of facts each decision was made. As it is, we are compelled to compare the patent with the infringing devices in each case; and, while this may afford a satisfactory basis for determining the exact question decided, we are left to conjecture, to a certain extent, the reasons which prompted the decision, and the evidence upon which it was based. While we are bound to hold this to be a valid patent, which we do, not only out of deference to these adjudications, but from our own examination of the case, we do not feel ourselves debarred from looking into the state of the art, and the proceedings in the patent-office, for the purpose of giving a construction to this patent, and ascertaining the scope of the invention.

A comparison of the claims as originally made with those allowed by the patent-office demonstrates, we think, that Reed considered himself, or wished to be considered, as a pioneer in the art of adjusting curved teeth longitudinally upon their seats, when, in fact, such adjustment, as applied to hay-rakes, had been known long before. While it may have added very materially to the practical value of the spring-tooth harrow, in view of the similar use and operation of the two instruments, it does not seem to us, in a legal aspect, to involve invention, or anything more than mechanical skill, to adapt the adjustment of rake teeth to the teeth of a spring-tooth harrow. The object is the same in each case, viz., to bring the teeth back into line when their proper alignment has been destroyed by their becoming bent or broken, in being brought into contact with obstructions. This was obviously the view adopted by the patent-office, as is evident by the action taken upon Reed's original claims. In his original specifications he states his invention to consist "in a novel means for adjusting the said tooth so as to give to its point a greater or less depth of cut, which is effected by making that portion of the tooth which is adjacent to the frame curved, and resting on a curved seat, and secure it thereto by a clip, or its equivalent, by the loosening of which the tooth may be thrown forward, or pushed back beneath its fastening, thus lowering or raising its point, as will be hereinafter set forth and claimed." Further on he states that "the cross-bar or loop portion of the clip is *preferably* formed concave upon its under side, and with a concavity greater than the corresponding portion of the harrow tooth; so that, when brought down to a firm bearing upon the tooth, this cross portion of the clip will find a firm bearing at its edges upon the tooth, and hold it snugly and rigidly upon its curved seat." In his drawings he presents several alternative forms of bars or clips; all of which, however, with possibly one exception, are made concave, so as to hold the tooth rigidly against the frame by two biting edges, instead of a flat surface. In his specifications he states other variations, and says that the principal feature of his invention is "that the tooth shall rest upon a curved seat, and be capable of being adjusted longitudinally through

its said seat, and thereby either elevate or depress its working point." And again:

"It is not absolutely essential that the under surface of that portion of the clip or plate that presses upon the tooth should be concaved, though it is preferable. Nor is it necessary that it should bear only upon the tooth at the edges of the plate, though it is preferable that it should be constructed to bear at its two edges upon the tooth."

He then proceeds to claim:

"(1) The combination with the frame, A, of a curved harrow tooth, made adjustable longitudinally upon its seat, for the purpose of raising or lowering its working point, substantially as and for the purposes described."

This is broadly a claim for every form of longitudinal adjustment of a curved harrow tooth upon its seat.

"(2) The combination, with a harrow frame provided with a curved seat, of a curved harrow tooth, made adjustable longitudinally upon the said curved seat, whereby its working point may be raised or lowered, substantially as and for the purposes described."

This differs from the first claim only in its limitation to a *curved seat*. Both these claims were rejected upon reference to the prior patents of Paddock and Hollingsworth for improvements in horse-rakes. The Paddock patent shows a curved spring tooth, resting upon a curved seat, and held in place by a bolt or clamping hook, one end of which is curved in a U shape, embracing the tooth, and the other end of which passes through the axle, to which it is secured by a nut. The Hollingsworth patent also shows a curved tooth, held upon a curved seat by a set-screw, which serves to secure the tooth rigidly to the bearing, and to admit of the forward or backward adjustment of the tooth.

"(3) The combination, with a harrow frame and harrow tooth, of a clip, or its equivalent, for securing the tooth to the frame, and made to bear at its edges upon the harrow tooth, substantially as and for the purposes described."

This claim seems to have been construed by the patent-office as a broad claim for a clip, or its equivalent, for securing the tooth to the frame, although it was limited to a clip made to bear at its edges upon the harrow tooth, and was rejected upon reference to the Edgar patent, which shows the teeth of a horse-rake secured to the cross-bar by a cap-plate or bar similar to a clip, although the seat does not appear to be curved.

"(4) The combination, with a harrow frame provided with a curved seat, of a curved tooth and clip, or its equivalent, D, substantially as and for the purposes described."

This claim was allowed to stand, and became the second claim of the patent. Some question was made upon the argument with regard to the proper position of the letter D. We think it should have read, "the clip, D, or its equivalent," as in the specifications "D" is described as "a clip whereby the tooth is secured upon its seat." In lieu of the first three claims was substituted the following, which was allowed to stand as the first claim of the patent:

"The combination, with a harrow frame and harrow tooth secured thereon, so as to be longitudinally adjusted, of a fastening clip, formed as described,

whereby only its transverse edges have bearing against the tooth, substantially as set forth."

Both of these claims are alleged to be infringed by the defendants. It is clear the first claim is for a fastening clip, constructed with two biting edges bearing against a tooth, the object of which is to hold it more rigidly in position than would be possible if the pressure were uniformly exerted over the whole width of the clip. This was the construction put upon it by Judge SEVERENS in the case of *Reed v. Nelson*, (unreported,) and is obviously correct. The second claim, broadly construed, covers a curved seat and curved tooth and clip, or its equivalent. Plaintiffs claim the clip need not be curved, and that the language of the claim is satisfied by a clip of any shape by which a curved tooth is fastened to a curved seat; but in view of the state of the art, as disclosed by the Paddock patent, we find it impossible to give it this construction. The drawings annexed to this patent exhibit very clearly a curved rake tooth, held in place upon a curved seat by a clip running through the axle, and bolted to it. As before observed, while the adaptation of this device to a harrow was undoubtedly a happy thought, and appears to have been the one thing necessary to insure the popularity and general use of the spring-tooth harrow, we do not think it belongs to that class of conceptions which the law dignifies by the name of "invention." Indeed, a person could hardly look at the Paddock device without noticing at once how easy it would be to adapt it to a harrow, and, if the patentee had seen or known of this device, such adaptation would probably have occurred to him long before. While he may have evolved his device of a curved tooth resting upon a curved seat from his own brain, if, in fact, the same device previously existed in a similar form, and had been applied to an instrument bearing such a close resemblance to a harrow as a horse-rake does, we are not at liberty to credit him with the invention. We find it impossible to escape the conclusion that the clip, which lies at the foundation of the plaintiff's patent, is limited to a curved clip with biting edges, designed to hold the tooth rigidly in its seat. This seems to have been the view of the patentee himself, as shown, not only from the drawings annexed to his patent, but from his action in consenting to the erasure of the word "preferably" from his specifications, leaving them to read, "the cross-bar or loop portion of the clip is formed concave upon its under side;" and also from his erasing the clause in which it was said not to be absolutely essential that the under surface of the clip should be concaved. The testimony of the blacksmith in whose shop the work was done, indicates that, after experimenting with a flat piece of iron for some time, Mr. Reed came back to his shop "with the piece of harrow frame and tooth to fix it over, because it was not tight enough, and could not hold it." Then he says: "Mr. Reed went and took a little more off of the wood, and had me to make him another plate, a little heavier and a little hollow, so that the edges of the plate would bear onto the tooth." Construing the second claim, then, as limited to the clip, D, described in the specifications and in the first claim, do the defendants infringe this patent? Literally, they do not, since their clip is flat, and the seat

is not curved; but, with all that, they have managed to appropriate all there is of value in this device. Considering the importance of this invention as bearing upon the utility of the spring-tooth harrow, and the restrictions we are bound by law to put upon these claims, we think that, so far as they are valid, we are bound to interpret them liberally, and to give the patentee the full benefit of the doctrine of mechanical equivalents. Now, the general shape of the seat used by defendants is a curve, and it only escapes being a literal curve by the fact that three straight lines are used, instead of the curved line, to form the arc of a circle. We had occasion, many years ago, in the case of *Ives v. Hamilton*, which was carried to the supreme court, and is reported in 92 U. S. 426, to hold a similar evasion as applied to the upright guides of a saw-mill to be an infringement. In this case the supreme court says:

"The substitution of guides at the top, made crooked by a broken line, instead of a curved line, is too transparent an imitation to need a moment's consideration. A curve itself is often treated, even in mathematical science, as consisting of a succession of very short straight lines, or as one broken line, constantly changing its direction; and many beautiful theorems were evolved by the early mathematicians on this hypothesis. At all events, in mechanics, when, as in this case, a broken line is used, instead of a regular curve, being deflected at one or more points by a very slight angle, and performing precisely the same office as a curve similarly situated, the one is clearly the equivalent of the other."

In order that the working end of the harrow tooth be raised or depressed, it is necessary that the other end be curved, and it is desirable that it should rest upon a seat more or less curved; but whether this seat be a literal curve, or a series of straight lines, the general effect of which is a curve, is of no sort of importance.

The chief difficulty in this case lies in the defendants' clip, which is flat. It will be observed, however, that they obtain the full benefit of the curved clip by the peculiar conformation of the seat with the two shoulders, which perform substantially the same functions as the biting edges of the clip; and, in connection with a flat clip pressing upon the tooth midway between the two shoulders, holds it rigidly in position. Now, as before observed, the valuable feature in this patent is the two biting edges of the clip; and it seems to us to make no practical difference whether the party seeking to avoid the patent uses these biting edges as a seat on which to rest the tooth with a band or straight clip bearing upon the opposite surface of the tooth, between the edges, or whether he uses a curved seat made to conform to the shape of the tooth, and a biting edge clip bearing upon the opposite surface to hold it in place. Such a reversal or interchange of functions is immaterial. The object in either case is to obtain a firmer grip upon the tooth by concentrating the pressure upon two or three points than is possible by distributing it uniformly over the entire surface of the clip. In this respect it is possible that defendants' device is superior to the plaintiffs', but we cannot say that it is not an infringement of their patent. Did we feel any doubt regarding this question of infringement, we should feel bound to resolve those

doubts in favor of the plaintiffs, in view of the large number of devices offered in evidence, all of which have been adjudged by different courts to be infringements of their invention, and some of which bear a much more distant resemblance to theirs than does the device used by the defendants here. Our conclusion upon the whole case is that the defendants have infringed the second claim of plaintiffs' patent, and there must be a decree in their favor for an injunction, with the usual reference to a master to assess their damages.

HOBBIE *et al.* v. JENNISON.

(Circuit Court, E. D. Michigan. March 4, 1882.)

PATENTS FOR INVENTIONS—INFRINGEMENT—VIOLATION OF TERRITORIAL RIGHTS.

The sale of a patented article by an assignee of the patent within his own territory carries the right to use it within territory owned by another, though it be known to both parties that a use outside the vendor's territory is intended.

(Syllabus by the Court.)

This was a common-law action for the infringement of letters patent No. 45,201, issued to one Wyckoff, November 22, 1864, for an improvement in gas and water pipes. The case was tried before the court upon substantially the following state of facts: Plaintiffs were the assignees of the patent for New York, New England, and all the eastern states north of the Carolinas, and carried on business as manufacturers of the patented pipe at Tonawanda, N. Y., with sufficient facilities for supplying the market in all the territory owned by them. Defendant's firm, which had consisted of himself and one Ayrault, was the assignee for the state of Michigan and other states, manufacturing the pipe at Bay City, in this state. This firm did business during the greater part of 1880, having succeeded the firm of Ayrault, Smith & Co., which manufactured at the same establishment during the years 1877, 1878, and 1879. Ayrault, Jennison & Co. were in turn succeeded, in the latter part of 1881, by a corporation located at the same place, and owning the same plant, under the name of the Michigan Pipe Company. Two suits have been already brought and carried through to judgment by the present plaintiffs as territorial owners of the Wyckoff patent, for similar infringements to those charged in this case,—one against members of the firm of Ayrault, Smith & Co., and the other against the Michigan Pipe Company. These suits were brought in the northern district of New York, and were decided by Judge Cox, whose decision is reported in 27 Fed. Rep. 656. No question was made in this case with regard to the title of the plaintiffs, nor the validity of the patent, but the case turned upon the legality of a certain sale of pipe made by the defendant's firm. On the 16th of April, 1880, Andrew Harvey & Son, of Detroit, wrote the defendants that they had about closed a contract to put in a steam-supply apparatus, with four miles of pipe, and wanted to

know the lowest cash price for wood casing for steam-pipe, adding: "I [Andrew Harvey] expect to leave the city in a few days, and wish to receive an answer before going." On the following day defendant's firm answered, stating they would sell them what steam-pipe casing they might need at \$20 per thousand feet, board measure, etc. Negotiations seem to have taken place at that time between Harvey and the Hartford Steam Company, of Connecticut, for laying a quantity of steam-pipe in that city; for, on the 5th of May, Mr. Loomis, secretary of the company, writes to Harvey & Son, accepting their proposition, and asking them to get prices of wood pipe, and send to him, "so we can get some ordered, and when they will commence to deliver it." On the 12th of May a contract was signed between the defendant's firm and Harvey & Son, by the terms of which defendant agreed to pay to Harvey & Son a commission of 10 per cent. on all orders sent them direct, and also upon all orders they might influence to take the casing, at the rate of \$20 per thousand feet on cars at Bay City. On the same day this contract was signed defendant's firm write Harvey & Son, giving the rate from Bay City to Hartford at \$55 a car, and saying that their understanding was that, under the arrangement made with defendant, Harvey & Son should make their best efforts to turn all their trade to defendant's firm, expressing the hope to hear from them soon in reference to the Hartford order.

On the same day a statement of prices for different sizes of casing was made out and given to Harvey, which Harvey & Son soon after inclosed to the Hartford Company in their letter of May 17th, and on June 3d Loomis writes to Harvey, saying that perhaps it was better to only give orders for one-half at present, and get firm at it. A memorandum of same date was sent by him of the pipe which would be required.

He also says that prices of wood pipe are too high; wants him to get it reduced, if possible, and make as good a contract for freight as possible. On the 10th of June Harvey telegraphed to defendant's firm requesting Ayrault to come down to Detroit on the first train for an order. On the following day an order in writing was signed by Harvey & Son for wooden pipe casing, to be shipped "to the Hartford Steam Supply Company;" the items being the same exactly, and one-half the quantity, (except in one instance,) specified in Loomis' memorandum of June 3d. On the 18th of June, Mr. Loomis, secretary of the company, sends directly to defendant's firm an order, in addition to the order given by Harvey & Son, of the remaining one-half of the casing specified in the memorandum of June 3d. The further correspondence between the parties relates to the manner in which the pipe was to be paid for, New York drafts being remitted directly from Hartford to defendant's firm, which remitted to Harvey & Son their check for the 10 per cent. commission agreed between them in their contract of May 12th. An additional order for 3,000 feet of casing was given to defendant's firm by Loomis, under date of July 30th; and some other small orders, given in the same manner, followed before the close of the season. The pipe was all laid down, under Harvey's direction, in the streets of Hartford.

James A. Allen and A. P. Jacobs, for plaintiffs.
George H. Lothrop and Wm. Jennison, for defendant.

BROWN, J. Plaintiffs' position in this case is that there was either a sale of the steam-pipe to Harvey & Son, with the knowledge that they were to resell to the Hartford Company, in which case the defendant would be held liable as an infringer, under the ruling in *Hatch v. Hall*, 30 Fed. Rep. 613, and *Hatch v. Adams*, 22 Fed. Rep. 434; or that Harvey was the agent of Ayrault, Jennison & Co. in selling to the Hartford Company, and that such sale was made in the state of Connecticut, in violation of plaintiffs' rights as the assignee of this territory. But about the only evidence which tends to show an agency on the part of Harvey is the agreement of May 12th, wherein Ayrault, Jennison & Co. agreed to pay Harvey & Son a commission of 10 per cent. upon all orders they might obtain for this casing. This agreement, however, was made a month after Harvey had notified them of his proposed contract to put in four miles of pipe for the Hartford Company, and a week after his proposed contract with such company had been accepted; and was undoubtedly made for the purpose of securing Harvey's influence in the sale of the pipe, not only in Hartford, but in other eastern cities. It is pertinent in this connection to notice that, on the 8th of May, Harvey wrote to Loomis, saying that he was sending all over for prices for iron pipe to be delivered at Hartford. In fact, Harvey, in his testimony, states that, before he had any communication upon the subject with Ayrault, Jennison & Co., he had closed the contract with the Hartford Steam Company to lay several miles of pipe for them. On the day following his contract of May 12th, Harvey writes to Loomis:

"I have been up to Saginaw, and have made inquiries about prices, and the best that they will do now is \$20 per thousand, board measure, delivered on board cars at Saginaw. But this company have split partnership, and there will be two firms manufacturing this next week, and I am figuring with them both, and will try to get it cheaper. I am also figuring about freight from different points, so as to get the cheapest freight to Hartford."

We think the other evidence completely rebuts any presumption of agency arising from the contract of May 12th. Not only does the correspondence between Harvey and the Hartford Company indicate that he was negotiating with defendant for them, but the pipe was shipped directly to them, and, except in the first instance, upon their order, and was paid for by them, as well as the freight from Bay City to Hartford. The books of Ayrault, Jennison & Co., which were also put in evidence, show that the account was kept with the Hartford Steam Company, a general statement of which account was sent them in a letter of November 19th. Considered in the light of surrounding circumstances, we are not prepared to accept the theory that Harvey & Son were the agents of the defendant, or that the sale of the pipe was made to them. Indeed, Harvey himself swears that he was acting as the agent of the Hartford Company in getting prices, and that Loomis relied upon him in the matter. We regard the contract of May 12th simply as an instance of a cus-

tom which may be common enough among purchasing agents, but to which no court has yet been found to lend its sanction. He was evidently acting for the Hartford Company, which was relying upon his judgment, zeal, and discretion in making the purchase, and had no right to take a commission from the defendant without at least disclosing that fact to his principal. *Mechem*, Ag. § 943; *Insurance Co. v. Insurance Co.*, 14 N. Y. 85; *Scribner v. Collar*, 40 Mich. 375.

As the pipe was delivered by defendant's firm upon the cars at Bay City, upon the written order either of Harvey & Son or the Hartford Company, there can be no serious question that this was a sale and delivery at Bay City, although, if the order had been verbal, it would probably be held, under the statute of frauds, that the property in the pipe did not pass until it had been received and accepted by the steam company in Hartford. This was the conclusion of Judge COXE in *Hobbie v. Smith*, 27 Fed. Rep. 656, arising out of a similar transaction by the defendant. See, also, *U. S. v. Shriver*, 23 Fed. Rep. 184; *Backman v. Jenks*, 55 Barb. 468, and other cases cited in Judge COXE's opinion.

The case, then, reduces itself to the simple question whether, conceding the sale to have been made at Bay City, the defendant can be held as an infringer by reason of his knowledge that the property was to be used in a territory of which plaintiffs held a monopoly; for we take it to be clear that if the sale had been innocently made, that is, with the expectation that the pipe was to be used in defendant's own territory, there could be no doubt that he would not be chargeable. Were this an original proposition, we should be strongly inclined to hold that the vendor of a patented article, who sells the same for the purpose of or knowing that it will be resold or used in territory belonging to another, is equally amenable to suit as if the sale were made in such other territory. The patent laws give to the patentee the exclusive right to use, as well as to manufacture and sell, within the territory properly belonging to him; but it is difficult to see how this right can be properly protected, if the assignee of other territory, who may perhaps possess greater facilities, superior energy, or a larger amount of capital than himself, may flood his territory with the patented article, by means of the easy device of selling and passing the property within the territory owned by himself. Indeed, the gist of the offense to the plaintiffs in this case consists, not more in the actual sale in their territory, than in the use of the article sold, since their own market has been impaired to the exact amount of the profits they would have realized from such sale if made by themselves. This seems to us not only a just and reasonable construction of the law, but in line with the long list of cases which hold that where a party makes one or more elements of a patented combination, with the intent that they shall be used in the completed combination, he is liable as an infringer. *Richardson v. Noyes*, 2 Ban. & A. 398; *Bowker v. Dows*, 3 Ban. & A. 518; *Wallace v. Holmes*, 9 Blatchf. 65; *Saxe v. Hammond*, 1 Holmes, 456; *Manufacturing Co. v. Zylonite Co.*, 30 Fed. Rep. 437; *Schneider v. Pountney*, 21 Fed. Rep. 403; *Travers v. Beyer*, 26 Fed. Rep. 450.

The supreme court, however, seems to have taken a different view of

this very question in the case of *Adams v. Burke*, 17 Wall. 453. In this case an undertaker purchased patented coffin lids of certain manufacturers, who held the right from the patentee to manufacture and sell in a circle whose radius was 10 miles, having the city of Boston as a center. The undertaker, however, lived outside of this circle, within a territory owned by the plaintiff, and made use of the coffin lids in his business. The owner of the territory in which he carried on his business brought suit against him as an infringer, and the court held that, the sale having been made by a person who had full right to make, sell, and use within his own territory, such sale carried with it the right to the use of the machine without as well as within such territory. The action in this case was brought against the user, but the court announced a principle of law which is equally applicable to the seller. If the user of the article is not liable to the patentee, it is because he purchased it of a person who had the legal right to sell it, and, if it were legal for him to buy, it was equally legal for the other party to sell. In the opinion of the court, as well as the dissenting opinion in this case, it is stated in substance that the question raised was whether an assignment of a patented invention for a limited district, such as a city, county, or a state, conferred upon the assignee the right to sell the patented article to be used outside of such limited district. We have sought to distinguish this case from the one under consideration, by searching for evidence that the sale was made under the belief that the property was to be used within the territory of the seller; but neither in the report of the case in the supreme court, nor in the circuit, (1 Holmes, 40,) is there an intimation that the sale was made with the expectation that the property would be used or consumed within the territory. Indeed, the inference from the fact that the purchase was made by an undertaker, whose place of business must have been known to the manufacturer, is decidedly the other way. If the sale had been made innocently, the importance of this fact would certainly not have escaped the attention of the court and counsel; and we think we are bound to accept the case as authority for the broad proposition that the sale of a patented article by an assignee within his own territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use outside of the territory is intended. The case was followed by Judge COXE in *Hobbie v. Smith*, 27 Fed. Rep. 656, and by Judge SAWYER in *McKay v. Wooster*, 2 Sawy. 373. It may, perhaps, admit of some doubt, especially in view of the strong dissenting opinion in that case, whether this doctrine will be adhered to should the question ever be reargued; but, of course, the case is the law unto this court, and must be followed, until overruled by the court which pronounced the opinion. We think it covers the case under consideration, and consequently there must be a judgment for defendant, with costs.

JOHNSON v. BROOKLYN & C. R. Co. SAME v. STEINWAY & H. P. R. Co. SAME v. LEWIS & FOWLER MANUF'g Co.

(Circuit Court, E. D. New York. December, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—RAILROAD SWITCHES

It having been heretofore held by the court (33 Fed. Rep. 499) that letters patent No. 117,198, granted to Thomas Newman, complainant's assignor, July 18, 1871, for an improvement in switches for horse railroads, were valid, *held*, that the device used by defendants in this suit was an infringement of such patent, and that the new evidence adduced in this case called for no modification of the previous decree.

In Equity. On bill for injunction.

Duncan, Curtis & Page, (Robert H. Duncan, of counsel,) for complainants.

Frost & Coe, (Louis W. Frost, of counsel,) for defendant.

LACOMBE, J. This patent was before Judge COXE in *Johnson v. Railroad Co.*, 33 Fed. Rep. 499. After investigating the state of the art as disclosed by an examination and comparison of the various patents put in evidence in that case, he reached the conclusion that Newman (complainant's assignor) was the pioneer inventor of a combination, being the first to produce a practical horse-railroad switch, which could be operated by the weight of the draught animals oscillating a tip-table, the verticle movement of which is converted by connecting mechanism into horizontal movements of a switch-tongue. Whatever improvements upon Newman's invention are found in the device used by defendants, the latter is plainly an infringement of his patent when thus broadly construed, and the only point left for discussion is whether or not the state of the art will warrant so broad a construction. This, however, has been decided by Judge COXE, and the only question is whether the new evidence presented in this case calls for any modification of that decision. Several prior patents, not before him, have, it is true, been introduced, but they do not show any more clearly an anticipation of the combination of the Newman patent than did the Sansom and Alexander patents, which were considered in the former case. Decree for complainant.

THE IBERIA.¹

THE UMBRIA.

FABRE v. CUNARD S. S. Co., Limited. DOLLARD v. SAME *et al.* HEMISPHERE INS. Co. v. SAME. NORD-DEUTSCHE INS. Co. v. THE UMBRIA *et al.* ARNOLD *et al.* v. SAME. COATES v. SAME. SWITZERLAND MARINE INS. Co. v. SAME. BRITISH & FOREIGN MARINE INS. Co. v. SAME. TRANSATLANTIC MARINE INS. Co. v. SAME.

(District Court, E. D. New York. January 9, 1890.)

1. COLLISION—FOG—WHISTLE AHEAD—GOING FULL SPEED.

It is a fault for the master of a vessel in a fog, on the high sea, who has slowed his vessel on hearing a whistle ahead, to afterwards ring for full speed ahead, on the supposition that the danger is past, and before the position and course of the other vessel are known.

2. SAME—BELIEF OF FUTURE DANGER.

A violation of article 13 of the international collision rules, by going full speed in a fog, requires, to excuse it, the existence of a present danger, and a necessity to go at full speed to avoid it; and a belief on the part of the master of such vessel that a danger may in a certain event arise in the future, to avoid which he gives the full-speed order, is not the excuse permitted by article 23.

3. SAME—FACTS IN SUIT.

The steam-ship Umbria had left the port of New York on one of her regular voyages to Liverpool, and had laid an easterly course along the Long Island shore, and was running at a speed of not less than 16 knots. A dense fog prevailed at the time. She had overtaken the steam-ship Normandie, and had left her astern on her starboard quarter so far as not to hear the Normandie's whistle. A faint whistle was heard ahead on the starboard bow of the Umbria, and then another whistle on the same bow, but more ahead than the first. The engine of the Umbria was slowed. Again the whistle was heard, and then the engine of the Umbria was put full speed ahead, her master supposing by the sound that the approaching vessel was clear of his course; or, as the official log stated, thinking that the approaching vessel would port for the Normandie, he ordered full speed ahead, to pass her. Shortly afterwards, nearly dead ahead, and on a course crossing that of the Umbria, appeared the steam-ship Iberia. The Umbria's wheel was put hard a-port, and her engines reversed, notwithstanding which she struck the Iberia on her port quarter, cutting her in two. The place of collision was several miles off Long Beach, on the Long Island coast, and some 12 miles east of the entrance to New York harbor. *Held*, that the cause of the collision was the erroneous order of the master of the Umbria to put that vessel at full speed in a fog, before the position and course of the vessel whose whistle had been heard were known.

4. SAME.

The French steam-ship Iberia, bound to the port of New York from the Persian gulf, was approaching the coast in a fog, steering W. N. W. for the Long Island coast, making about $3\frac{1}{2}$ or 4 knots an hour, sounding as she went and blowing a fog whistle. The whistle of the Umbria was heard a little on the port bow, some minutes before the collision which subsequently ensued. The course of the Iberia was thereupon changed to N. W., and she kept on blowing her whistle, in response to the Umbria's whistle, till the Umbria was seen through the fog near at hand, and heading for the Iberia's beam. The latter's engines were at once put full speed ahead, but she was struck by the Umbria and sunk. *Held*, that the porting of the Iberia was not a fault, and did not contribute to the collision.

5. SAME—APPROACHING NEW YORK HARBOR—CROSSING TRACK OF OUTGOING VESSELS.

There is no rule which forbids a vessel bound for New York harbor to approach the coast on a course crossing the track of vessels bound eastward from the port of New York.

6. SAME—OPINION EVIDENCE.

The opinion of experts, however intelligent and trustworthy, does not bind the conscience of the court.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

Action for damage by collision. The suit of Fabre against the Cunard Steam-Ship Company was to recover the value of the *Iberia*. The other suits were by insurers of cargo lost with the *Iberia*.

R. D. Benedict, for Cyprien Fabre and Nord-Deutsche Ins. Co.

Hand & Bonney, for Arnold and Coates.

John McDonald, for Dollard.

Butler, Stillman & Hubbard, for Switzerland Marine Ins. Co., British & Foreign Marine Ins. Co., Hemisphere Ins. Co., and Transatlantic Marine Ins. Co., *et al.*

Owen, Gray & Sturges, for Cunard S. S. Co., owner of the *Umbria*.

BENEDICT, J. These actions arose from a collision that occurred on the 10th day of November, 1888, between the steam-ship *Umbria* and the steam-ship *Iberia*, on the high seas, and present for determination the question whether that collision was caused by the fault of the *Umbria* or the fault of the *Iberia*, or by fault of both those vessels. The collision took place a little after 1 o'clock P. M., in a dense fog. The *Umbria*, a first-class steam-ship of 2,450 tons net register, and capable of making an average speed of 19½ knots an hour from New York to Liverpool, at half past 12 of the day in question, discharged her pilot at the outer buoy, and took an easterly course on her homeward trip from New York. The fog was dense, lifting at intervals. While the *Umbria* was proceeding in this fog at a rate of speed certainly not less than 16 knots an hour, a faint whistle was heard on her starboard bow. Then another whistle was heard on the same bow, but more ahead than the first. Then her engine was put slow. Again the whistle was heard, and then the engine was put full speed ahead. Shortly afterwards the *Iberia* appeared, crossing the course of the *Umbria*, nearly dead ahead of her, and but 800 or 900 feet away. The engines of the *Umbria* were at once reversed, but it was impossible to stop her in time, and she struck the *Iberia* on the port quarter, cutting her in two pieces, and causing her total loss. The *Iberia* was a steam-ship of 1,059 tons burden, bound from the Mediterranean to the port of New York. She had been in a dense fog since 8 o'clock in the morning, and was running with her engines at "easy," the lowest order short of stopping, having a speed of from 3½ to 4 knots an hour, on a W. N. W. course, sounding with the lead as she went. While so proceeding, the whistle of the *Umbria* was heard by her on her port bow. Her course was then altered two points to the northward, her engines still kept at "easy," and the fog signal blown from time to time, together with a short blast to indicate porting. The *Umbria*, when she appeared in the fog, was close to the *Iberia*, and heading directly for her port side. The engine of the *Iberia* was at once put full speed ahead, but, as already said, it was too late to avoid collision.

I think it may be fairly concluded that this collision would not have occurred had not the engines of the *Umbria* been put at full speed ahead after the whistle of the *Iberia* had been heard, and before she was seen.

No doubt the rate of speed at which the Umbria was running when the order to slow was given increased the momentum of the vessel, and aggravated the effect of the order "full speed ahead," when it was given, in this way conducing to the collision; but I think it may be taken for true that, if the engines of the Umbria had not been put at full speed just before the Iberia was seen, collision would have been avoided. I make my decision, therefore, to turn upon the question whether the order "full speed ahead" was a lawful order. In regard to the circumstances under which this order was given, two different statements have been made by witnesses called in behalf of the Umbria. On the main bridge of the Umbria at the time were the master, directing the navigation of his vessel, the second officer, and the extra third officer. The chief officer also came on the bridge, as the whistle was reported. The testimony of the chief officer is that the whistle was reported as he came on the bridge, when the master ordered the engines put "slow;" that in about a minute he heard the whistle; that the captain then ordered the engines put full speed ahead, saying, at the time, "She is well off, and we can go past her." The second officer says that the whistle was heard by him two points or more on the starboard bow; that the master then gave the order to slow the engine; that the whistle was again heard, still more ahead; that the captain then said, "She was well clear of our track, and to let her go full speed past her," and such order was given. The extra third officer was at the telegraph, and testifies to the order "slow," and the order "full speed ahead," and to having heard one whistle.

The testimony of these witnesses condemns the Umbria, for, according to their evidence, the Umbria, in defiance of the navigation rules, (article 13,) which required her to go at moderate speed, went at full speed, not in order to lessen or remove danger of collision, but because the master supposed there was no danger of collision. The illegality of the order is not affected by the fact that when the master of the Umbria, in violation of law, put his vessel at full speed in a dense fog, he was aware that in the fog somewhere ahead there was a vessel, conjectured by him to be on a course opposite his own. "Those in charge of a ship, in such a dense fog, * * * should never conjecture anything when they hear a whistle in such close proximity." *The Kirby Hall*, 8 Prob. Div. 71. And if it be true, as the officers of the Umbria seem to say, that the master of the Umbria put his vessel full speed ahead in a fog to pass an approaching vessel, whose whistles at the time were giving information that she was on a course crossing his own, the navigation of the Umbria was not only illegal, but reckless. Another account, somewhat different from that given by the first and second officers, is given in behalf of the Umbria. This account appears in the official log of the Umbria, in the following statement: "Hearing the whistle about three points on the starboard bow, and thinking he would port for the French steamer on our starboard quarter, ordered full speed ahead, to pass her." This log was written by the purser of the Umbria, who was not on deck at the time of the collision. He testifies that the mention in the official log of the master's thoughts at the time when he put the

Umbria at full speed was made without suggestion from the master, and because such was the common talk about the ship. According to the purser, the master first knew of the entry in the log when shown to him after it was made up, and then approved it. In the answer this account does not appear. The answer gives the reason for the order full speed ahead that the sound of the Iberia's whistle "indicated that she was well clear of the Umbria." When upon the stand as a witness the master gave the same reason for the order to put the Umbria at full speed as that stated in the official log, although I observe that in some places in his testimony he seems to agree with the other officers on the bridge; as, for instance, when he says: "I gave the order to slow. Then, thinking the whistle to be such a distance off, I gave the order of full speed to pass her, thinking she was going in the opposite direction."

The fact being that the French steamer, which was the Normandie, had been passed by the Umbria, and had not been seen nor heard for some time when the Iberia's whistle was heard, and that no one on the Umbria but the master appears to consider the Normandie as a feature in the collision, the entry in the official log has given opportunity for the argument that the reason there stated for going at full speed was an afterthought. Whether such be the origin of the excuse stated in the official log I find it unnecessary to decide, for the reason that, in my opinion, the reason stated in the official log for putting the vessel at full speed is not a legal excuse. Confessedly, the Umbria was put at full speed in a dense fog, in violation of article 13. The burden is therefore on the Umbria to show legal excuse for the order full speed. What is a legal excuse for such an order is stated in article 23, namely, the existence of an immediate danger, and a necessity to go at full speed in order to avoid it. But the excuse put forth in the official log, and by the master on the stand, is not the presence of an immediate danger, but the master's belief that a danger would arise in the future in case the Iberia should port to avoid the Normandie. This is not the excuse permitted by article 23. There must be a present danger and an apparent necessity to go at full speed in order to avoid that danger. The facts proved in this case to have been before the master of the Umbria at the time when he put his vessel at full speed do not disclose a present danger, nor justify a belief that the Iberia was about to port for the Normandie, nor show that the only course open to avoid the Iberia was to go full speed ahead. The master of the Umbria, when he heard the whistle of the Iberia, knew that the Umbria was in advance of the Normandie; that the Normandie had been neither seen nor heard for some time; and that the Umbria's whistle had been blowing continuously. In these facts there was nothing to justify the belief that the approaching vessel would disregard the Umbria, whose presence was made known by her whistles, and would change her course to avoid the Normandie, whose presence, so far as appeared, was unknown. If, then, the assumption by the master of the Umbria that the approaching vessel was bound on a course opposite to his own was justified, it still remains true that his excuse for going at full speed is nothing more than an unfounded apprehension that, in a certain con-

tingency, danger might arise. No justification for going at full speed in a fog is afforded by such a state of facts.

But the assumption of the master of the *Umbria* that the approaching vessel was on a course opposite to his own was unjustifiable. His ground for this assumption he states to be that in the course of his large experience he had never seen a vessel on a northerly course in this locality, in clear weather. This qualification, which appears more than once in his testimony, is suggestive, and points to the inference that the master knew that in this locality a vessel might be sailing northward in a fog. The case contains proof that for a steamer bound for New York, coming upon the coast from the south-east in a fog, the proper course is to steer W. N. W. for the coast, till she gets into 8 or 10 fathoms of water. The master's assumption that the passing vessel was sailing to the west—upon which assumption he confesses to have acted when he put his vessel at full speed—was therefore unfounded, and his excuse for disobeying article 13, of course, falls with it. No doubt the chances were in favor of the approaching vessel being bound west, but article 13 is not to be disobeyed on the chance that no ill will result. Instead of putting his vessel at full speed, what the master of the *Umbria* should have done was to stop until he was able to move on something more than the chance that the approaching vessel was sailing on a course opposite to his own. "In a dense fog," says the court in *The Kirby Hall*, already cited, "those on board the *Kirby Hall* were bound not to speculate, but to bring their vessel to a standstill on the water at once." "Under such circumstances, she had no right to act upon conjecture." WALLACE, J., *The City of New York*, 35 Fed. Rep. 604.

But two experts of character and intelligence have been called in behalf of the *Umbria*, who, it is claimed, testify that to put the *Umbria* at full speed, under the circumstances, was a proper maneuver; and, because no expert has been called to the contrary, it has been earnestly contended in behalf of the *Umbria* that it is an established fact in the cause that it was proper to put the *Umbria* at full speed, under the circumstances, and that all there is for the court to do is to say so. This contention seems to render it necessary to repeat here that the opinions of experts, however intelligent and trustworthy, do not bind the conscience of the court. Moreover, what the experts called in behalf of the *Umbria* say is, first, that the master of the *Umbria* was justified in assuming that the *Iberia* was sailing west. Upon this point, however, the case contains other testimony which justifies a different conclusion, and, if it be a question of nautical skill or science, which is doubted, the weight of the evidence upon this point is not with the experts called on behalf of the *Umbria*. The second conclusion of these experts is that, inasmuch as Capt. McMicken assumed that the *Iberia* was sailing west, his order to go full speed was proper, because he believed that a position of danger to the *Umbria* might arise in case the *Iberia* should port for the *Normandie*. I marvel to hear it contended that the law can be thus sworn away. No; the law still stands that a vessel called to answer for damages shown to have arisen from her going full speed in a fog must be held liable, unless

facts be proved which show to the court the existence of at least an apparent necessity to go at full speed to avoid some immediate danger. Judged by the law, the Umbria must be condemned.

Turning, now, to the Iberia, it remains to determine whether she also was guilty of fault that conduced to the collision. One fault charged against the Iberia, and strenuously insisted upon, is that she was on a course across the track of vessels leaving New York bound to the eastward. Cases are cited in support of this contention, which, however, are mostly, if not all, cases of river and harbor navigation. It is not proved here, and of course cannot be proved, that in the locality of this collision no course is proper except an east or west course. No statute nor rule nor custom proved forbids a vessel to cross the track of vessels leaving New York bound to the eastward. The Iberia was in a fog. She was sailing towards the Long island coast, sounding with her lead, and she had not yet reached 10 fathoms of water. Pilots called in this case declare such a course to be proper for her, under the circumstances, and that is my opinion.

Another fault charged on the Iberia is that she ported after hearing the Umbria's whistle, and before the Umbria was seen. Such action, under very similar circumstances, has been approved by courts. *The Frankland*, 1 Asp. 489; *The Lepanto*, 21 Fed. Rep. 655; *The Haskell*, (court of appeal, Eng. July 8, 1889.) As a matter of fact, the porting of the Iberia gave the Umbria more time to avoid her, which was what the Umbria needed, and I am unable to see that it in any way conduced to the collision.

Another charge against the Iberia is that she kept no proper lookout. But the Umbria's whistle was heard in due time, and the Umbria herself was seen as soon as possible. Want of lookout was no cause of this collision. Again, it is charged on the Iberia that her whistle was insufficient. As to this, all that is necessary to be said is that the proof shows that her whistle was sufficient to warn the Umbria at the distance of a mile, and to indicate to the officers on the Umbria that she was distant a mile on a course crossing the course of the Umbria. These are all the faults charged upon the Iberia that seem to deserve particular attention. So far as I am able to discover from a laborious examination of the testimony, the Iberia was guilty of no fault which conduced to the collision. My conclusion, therefore, is that the Umbria alone is liable for the damages caused by the collision in question. Let decrees to that effect be entered in the several causes.

THE BETA.

THE BELLE HOOPER.

GILKEY *et al.* v. THE BETA.

PICKFORD v. THE BELLE HOOPER.

(District Court, S. D. New York. December 30, 1889.)

COLLISION—BETWEEN STEAM AND SAIL—CROSSING COURSE—LOOKOUT—YAWING.

The steamer B. and the schooner B. H. were going on nearly opposite courses off Hatteras, and collided; the steamer striking the schooner on the starboard side at an angle of about 45 deg. On a conflict of evidence, *held*, that the steamer crossed the schooner's course from port to starboard, when, seeing both of the latter's lights, she ported, and then steadied before getting sufficiently to starboard to allow for the schooner's ordinary yawing; and that she did not early enough observe the schooner, and take means to keep out of the way; and that the steamer was alone in fault.

In Admiralty. Cross-libels for collision.

Wing, Shoudy & Putnam and *Mr. Burlingham*, for the Beta.

Owen, Gray & Sturgis, for the Belle Hooper.

BROWN, J. The above cross-libels grow out of a collision between the steam-ship Beta and the schooner Belle Hooper off Hatteras on March 26, 1889, whereby the schooner was so damaged that she sank on reaching Hampton Roads. The vessels were sailing on nearly opposite courses,—the steamer, on a course N. by E. $\frac{1}{2}$ E., at the rate of about nine knots per hour; the schooner, S. S. W., at the rate of about three knots. The collision occurred a little after 7 o'clock in the evening, the steamer's stem striking the schooner on the starboard side near the fore rigging, at an angle of about 45 deg. The wind was light from the N. E., the sea calm, and the weather a little hazy; but lights could be seen at a good distance. The evidence shows that when the vessels first came in view of each other's lights they were nearly end on, varying from this by less than half a point. On the part of the steamer, it is claimed that the schooner changed her course across the steamer's bows. But I am satisfied, from the whole evidence, that this defense is not sustained. It was the duty of the steamer to keep out of the way of the schooner. The lights of the latter were visible in ample time to enable the steamer to do so. And as I must find that the schooner held her course, and is in no wise to blame, and there was nothing in the way to prevent the steamer from avoiding her, it follows that the responsibility for the loss must fall upon the steamer.

In arriving at the above conclusion, I have not failed to observe carefully all that has been said by the master of the steamer, and by the other witnesses in her defense. But the theory presented by the master, his estimate of times and distances, of the amount of his porting, and of the amount to which he brought the schooner on his port bow, namely, some three or four points at a distance of three or four hundred yards, cannot possibly be correct, since the collision in that case could not pos-

sibly have happened when the steamer was going at about three times the rate of the schooner. The probability is that the steamer, first seen a trifle on the schooner's port bow, soon afterwards crossed the schooner's course, when, seeing both of the schooner's lights, the steamer ported until the schooner's green light was shut in, and the red only was seen; that the steamer then immediately steadied, whereas she ought to have gone much more to starboard, if she meant to take that method of keeping out of the way; that the schooner's green light almost immediately came into view again, and then the steamer ported hard, but the collision happened a few moments afterwards. The change in the schooner's lights was probably caused by the usual yawing that unavoidably happens to a vessel sailing, like the *Belle Hooper*, with the wind nearly aft. The mistake of the steamer, I think, was—*First*, in not seasonably observing the schooner, and in not taking the proper measures to avoid her early enough; and, *second*, that, when she determined to go to starboard, she did not port long enough or strong enough to give the schooner a sufficiently wide berth; in other words, she was shaving too close. *The Benefactor*, 8 Ben. 426, 14 Blatchf. 254; *The Zodiac*, 9 Ben. 171; *The Farnley*, 8 Fed. Rep. 629, 637; *The Laura V. Rose*, 28 Fed. Rep. 104, 108; *Wells v. Armstrong*, 29 Fed. Rep. 216, 218; *The City of Springfield*, Id. 923, 36 Fed. Rep. 568. No fault being established in the schooner, the libellants in the first case are entitled to a decree for damages and costs. The second libel must be dismissed, with costs.

MOULD v. THE NEW YORK.

(District Court, S. D. New York. December 31, 1889.)

COLLISION—DAMAGES—REMOTE AND PROXIMATE CAUSE—UNSEAWORTHY BOAT.

A canal-boat loaded with ice was caused to leak by the swells of the steamer *New York* passing negligently. The boat could not be docked there for repairs with the cargo on board, because not strong enough; and the cost of transferring the ice would equal or exceed its value. The canal-boat was therefore sent to New York without repair, a trip of 140 miles; but, being old and weak, she foundered within 12 miles of the city, and boat and cargo were a total loss. A fit and seaworthy boat for such business would have made the trip without foundering or losing the ice, notwithstanding the leak. *Held*, that the loss of the ice by the foundering was not the proximate result of the injury done by the *New York*, but of the canal-boat's previously unfit condition; and that the *New York* was responsible only for such loss and damage to the ice as would naturally result from such an injury to a seaworthy boat, such as increased melting or injury to the ice from the water, brought in contact with it by the leak; and that the libellant, having contributed to the injury by wrongfully filling in the channel, was entitled to half such damage only.

In Admiralty.

Hyland & Zabriskie, for libellant.

C. & A. Vansantvoord, for claimant.

BROWN, J. This libel was filed to recover for the loss of a cargo of ice, which was on board the canal-boat *O'Rourke* when she was injured

at the ice-house dock near Albany by the swells of the steamer New York in passing her. In the former case of *The New York*, 34 Fed. Rep. 757, the owner of the boat recovered the amount of the actual damage done to the boat at the dock. Damages for the entire loss of the canal-boat on the subsequent trip to New York, during which she foundered, and the cargo was lost, were excluded, on the ground that these additional damages were not the proximate results of the defendant's fault, but of the captain's subsequent venture with an unseaworthy boat. 38 Fed. Rep. 710. On appeal the judgment was affirmed in the circuit court, October 3, 1889.¹ In this suit by the owner of the cargo of ice, the case has been submitted on the same testimony as in the former case, and the decision as to the fault of the city of New York must be the same. Some additional proof has also been given, tending to show that a cargo of ice in the middle of August could not be transferred from one canal-boat to another without special facilities, which did not exist and were not attainable in the vicinity of this accident, without costing as much as the ice remaining after the transfer would be worth. From this it is contended that the necessary damage as to cargo was a total loss. The evidence also shows that the O'Rourke was not only a very old, weak, and rotten boat, but that she was also so light in her original construction that she could not be docked for repairs with her cargo of ice on board; also that she was overloaded by the libellant some two or three inches above her six-foot draft, which was the limit for which she was originally designed. It further appears that the libellant is the proprietor of the ice-house and of the dock; that the ice-house people had been in the habit of "dumping things off the dock, so as to narrow the channel for the last two years;" and that there were stones on the bottom along the end of the dock. Such dumping was a wrong for which the libellant is responsible. Its necessary effect was to render more likely such accidents as this, and to contribute to them. To what degree it did so in this case cannot be known. The libellant in the former case was not privy to this wrong, nor affected by it; the present libellant is. The state at much expense straightened, deepened, and diked this channel-way; whereupon the libellant proceeded to occupy a part of it, filled it up more or less, and now complains that the boat pounded on the bottom through the passing swell. The evidence, as it stands, indicates his responsibility for acts presumably contributing to the injury. This would prevent his recovery of more than half his damages.

But, upon the other facts of the case, I think the loss of the cargo by subsequent foundering was so much outside of the natural and proximate results of the steamer's fault as to preclude the libellant from recovering at all for that kind of loss. The O'Rourke was utterly unfit to engage in such business as carrying ice from Albany to New York. The libellant hired her for this purpose, knowing, or having means of knowing, her unfit condition. She was overloaded, as above stated, and on the trip down her bottom dropped out, and her deck was raised up

¹Not reported.

and carried off by the ice. Had she been ordinarily fit for this business, I cannot believe that this result would have happened. I have no doubt that she would not have foundered, but have delivered the cargo of ice in New York, notwithstanding the leak caused by the defendant's fault.

The proximate cause of the sinking of the boat, and the consequent loss of cargo, therefore, was not the injury done her at the dock, but her unfit and rotten condition, which alone made that injury result in loss. The defendant is in no way answerable for her rotten condition, or its results; but only for the natural and proximate effects of his fault, such as might be foreseen as likely to follow. *Railway Co. v. Kellogg*, 94 U. S. 469, 475; *Railroad Co. v. Reeves*, 10 Wall. 176, 191; *The Reba*, 22 Fed. Rep. 546, 548. The defendant is not chargeable with those ultimate consequences which came from the weakness and rottenness of the boat, but with those only that would naturally happen to a boat in a condition ordinarily fit for navigation. On this ground, old and weak boats are not allowed damages for the ordinary contacts of navigation. *The Gen. George G. Meade*, 8 Ben. 481; *The Chas. R. Stone*, 9 Ben. 182. In the absence of special notice to others, the risk of all those results that flow from the weakness of such boats is on those that use them. For this reason the damages in the former case were confined to the actual damage to the boat at the time and place of the injury, excluding the loss by foundering on the subsequent trip. As this foundering did not happen as the natural consequence of such an injury as this to a seaworthy boat, the loss of the ice thereby is not the natural and proximate result of the defendant's fault. There is not strictly any evidence of any other injury to the ice; but there was probably some loss and injury to the ice from increased leakage, and the more water thereby brought in contact with the ice to melt it, which would be the natural and proximate result of the defendant's fault, *i. e.*, the result of such an injury to a seaworthy boat. To half this damage and loss, if any such is proved, the libellant is entitled, (*The Keystone*, 31 Fed. Rep. 412, 416, affirmed on appeal;) otherwise the libel must be dismissed, but without costs.

RAYMOND v. THE ELLA S. THAYER.

(District Court, N. D. California. June 1, 1887.)

1. SEAMEN—WAGES.

Where a seaman, injured in a vessel's service, at his own solicitation, and against the advice of the master, obtains his discharge in an American port, and receives his wages to date, and a certificate for admission to the marine hospital, he cannot afterwards maintain a claim for wages to the end of the voyage.

2. SAME—EXPENSES OF MEDICAL TREATMENT.

Having been admitted to a United States marine hospital, and obtained a discharge therefrom at his own request, the vessel is not liable for expenses thereafter incurred by him at a private hospital.

In Admiralty. Libel for wages and expenses of treatment at a hospital.

Wm. Hoff Cook, for libelant.

Daniel T. Sullivan, for respondent.

HOFFMAN, J. I am clearly of opinion that the proofs in this case do not disclose such negligence on the part of the master as would render the employer responsible for injuries to an employe caused by the negligence of a co-employe, either on general principles or by the law of this state. To hold otherwise would be to make the ship-owner an insurer of every seaman against all accidents which might occur in the course of the voyage, which could not be shown to have been the result of his own negligence, or the irresistible violence of the elements.

The claims for wages to the end of the voyage, and for expenses at the German Hospital, must, I think, both be disallowed. A seaman injured in the ship's service is undoubtedly entitled to be cared for at the ship's expense, and to his wages until the end of the voyage. But he cannot claim wages to the end of the voyage when he has obtained his discharge at his own solicitation, and against the advice and even the expostulations of the master. The master urged him to remain on board, offering to provide for him medical advice and assistance, and to take him back to San Francisco. Had the libelant assented, he would, undoubtedly, have been entitled to wages up to the time of his arrival; but he insisted upon receiving his discharge, and going to Port Townsend Marine Hospital. The master thereupon paid him all the wages due him, gave him a certificate to enable him to obtain admission to the hospital, and paid his fare to Port Townsend. He remained at the hospital, under treatment, some 15 days, when he was discharged, at his own request. I know of no case where a disabled seaman, discharged in an American port, and at his own urgent solicitation, in order that he might be admitted to a United States marine hospital, has been allowed subsequent wages. In the case of *The W. L. White*, 25 Fed. Rep. 503, it is doubted by the learned judge whether a discharge of a disabled seaman, in a foreign port, by the United States consul, at the request of and on the payment of one month's extra wages by the master, would, under the act of June 26, 1884, c. 121, § 3, known as the "Dingly Act," be valid; but he admits that, if valid, it "would bar all claims for subsequent wages." And an alleged consent given by a seaman seriously sick or injured, and confined ashore, was held by Judge LOWELL to be inoperative. *Callon v. Williams*, 2 Low. 1. In this case it was also held that a consul at a foreign port has no right to discharge a seaman for disability arising from wounds received in the ship's service; "but the court observes that a fair contract, with a full understanding arrived at, might be upheld, though the man was more or less ill," even though the discharge was in a foreign port. But that a discharge in an American port, insisted on by the man, in order that he might go to a United States marine hospital, and reluctantly granted by the master, is a bar to a claim for wages until the end of the voyage, cannot, I think, be doubted.

That a seaman injured in the ship's service is entitled to be cured at her expense is not disputed. This, of course, means that he is to receive, at the vessel's expense, the ordinary medical assistance and treatment in cases of injury or acute disease, for a reasonable time. The ship is not bound to pay for his medication, for the cure of a chronic disorder, for an indefinite length of time. The accident to the libellant in this case produced, it is alleged, a double direct hernia, pronounced by the physicians to be incurable. He was under treatment at the Marine Hospital at Port Townsend for 15 or 16 days, when he was discharged at his own request. He had previously declined the master's offer to procure a physician, and to have him treated on board the ship. He now demands \$60 for six weeks' treatment at the German Hospital in this city. There is no evidence to show what treatment he underwent at the German Hospital, and none, except his own, to prove that he remained there for six weeks, or any other period. It would seem, from the nature of his injury, that all the medical relief he could obtain must have been furnished at the Marine Hospital. At all events, he might have remained there until medical means for his relief were exhausted. He chose to leave the hospital; and, if this be denied or doubted, he must have been discharged as cured; that is, as having obtained all the relief that the medical art could afford him. He came to this city, went to the German Hospital, where he remained, he says, six weeks. Why he might not have remained there, at the ship's expense, six months or six years, if his present claim be allowed, is not apparent. There is no evidence to show that his cure was not as complete, so far as his injury was curable, and so far as the ship was bound to defray the expenses of it, when he left the Marine Hospital as when he left the German Hospital. The character of the injury seems to indicate that it was. I think that, under the circumstances, the ship cannot be charged with the expense of the further medication, if any, which he had received at the German Hospital. Libel dismissed.

RICHTER v. THE OLIVE BAKER.

(District Court, S. D. New York. December 2, 1889.)

TOWAGE—NEGLIGENT LANDING OF TOW—COSTS DENIED.

The schooner C. libeled the tug O. B. for negligence in landing her at a wharf in the East river during a strong flood-tide, claiming that she was pressed against the wharf and damaged. Her witnesses were examined *de bene esse* before trial. The tug's witnesses, on the trial, averred that the schooner came along-side the end of the pier and made fast; that afterwards, wishing to go to the south side of the pier, she began to wind around the corner with the tide, under the supervision of the tug, but that the person in charge of the schooner's lines tightened them too suddenly, thereby bringing the schooner, which had no fenders, against the corner of the pier, causing the damage. The answer denied negligence, but did not state the above facts, and the libellant's witnesses were not examined as to them. *Held,*

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

that the claimant's uncontradicted evidence could not be disregarded, and that, if true, there was no negligence in the tug; and as the burden was on the schooner to show such negligence, and as the failure of the schooner to use fenders under the circumstances was plain carelessness, the libel should be dismissed, but, under the circumstances, as the answer did not set forth the specific facts, without costs.

In Admiralty. Action for damage caused by the alleged negligent landing of a tow.

Wing, Shoudy & Putnam, (C. C. Burlingham, of counsel,) for libelant.
E. G. Davis, for claimants.

BROWN, J. While the tug Olive Baker was landing the schooner China on the south side of the dock at Green Point, during a strong flood-tide, she was pressed against the southerly corner of the pier so as to damage a few planks, for which recovery is sought. The schooner was 25 years old, but I do not find that she was unfit for use. The libelant's account of the mode of landing, and of the circumstances under which the accident occurred, is very different from the account given by the respondents. The respondents' account seem to be supplemental to the libelant's; and, as it is sustained by three witnesses, I cannot disregard it. Their testimony shows that the schooner had come up along-side of the end of the pier, had got her lines out, and made them fast, and was waiting to know to which side of the pier she should go for a berth; that she was finally directed to go to the south side; that for that purpose the lines were ordered to be slackened by the pilot of the tug so that the schooner could be shoved ahead, when she would be swung in, by the tide, around the end of the pier; and that it was the design of the tug to allow the schooner's port quarter to bring up against the corner of the pier at the proper time, when the orders were given therefor by the pilot of the tug; but that the person in charge of the lines of the schooner, without orders from the tug, tightened his lines too soon, which caused the schooner to come too soon and suddenly against the corner of the pier, and that without the use of fenders. The flood-tide there is very strong. That is the usual mode of landing, and, so far as appears, the only proper mode of going upon the south side of the pier on the strong flood. The libelant's witnesses were examined *de bene esse*, and no allusion was made in examination or cross-examination to the question of the lines, nor was it set up in the answer as an affirmative defense, though negligence was denied. The burden of the proof is upon the libelant to show negligence. Though I have considerable misgiving about the testimony of respondents' witnesses as an exact account of the accident, I cannot reject it altogether; and, if the accident occurred while the vessel was winding around by means of lines partly fastened to the dock, inasmuch as there is no evidence on this subject in the libelant's case, I cannot find that there was any negligence by the tug in the mode of doing this proved; and the failure of the schooner to use fenders, even without express orders, under such circumstances, would be plain carelessness. I do not credit the contention that fenders would have been of no use. I am compelled, therefore, to dismiss the libel, because there is no proof of

negligence on the respondents' part, under the circumstances, in winding about the wharf, as sworn to by the respondents. But as the answer, though denying negligence, did not call attention to the specific facts upon which the defense relied, the dismissal must be without costs.

THE MARY K. CAMPBELL.

HOUGHTON *et al.* v. THE MARY K. CAMPBELL.

(District Court, S. D. New York. December 31, 1889.)

1. MARITIME LIENS—RUNNING ACCOUNT—APPLICATION OF PAYMENTS.

The special agents of a foreign vessel made advances for the vessel's account on various charges which were liens; also other advances, to the owners, of moneys which were not liens, but were advanced upon the credit of the freight moneys which were to be collected by them, as shown by the correspondence between the parties. All the debits and credits were put in one running account. *Held*, that the intention of the parties controls the application of payments; and that the intention here was that the freight moneys should be applied upon all lawful charges alike, and that such credits should accordingly be applied by the court to the debits chronologically, and that an attempted application by the creditor to non-lien charges, while preparing for suit, was too late.

2. SAME.

The vessel having been sold in prior proceedings, *held*, that the agents upon their libel *in rem* were entitled, as against the mortgagee, to claim out of the remnants and surplus such items of their unpaid account (after applying the credits chronologically) as were liens on the ship only, excluding advances to seamen made contrary to law, and their own commissions.

In Admiralty.

H. D. Hotchkiss, for libellant.

Wilcox, Adams & Macklin, for mortgagee.

BROWN, J. The application of payments of moneys received by a creditor, when not determined by the act of the parties at the time, should be made by the court in accordance with the common intention of the parties, where there is evidence, either express or by fair implication, of what the common intention was. This intention, when ascertainable, is controlling. I am satisfied from the correspondence and the evidence in this case that the libelants, the agents of the Mary K. Campbell in this port, in making their advances to the owners, made them upon the faith of the moneys to be collected by them on account of the Mary K. Campbell and her freight, and that such freight moneys were virtually pledged for these advances. All the charges, both for these advances, and for claims which were strictly maritime liens, were placed in one running account, and the moneys which were received by the libelants were in a like manner placed on the credit side of the same general account. Upon such a transaction the credits should be applied by the court chronologically to the earliest items in the account, in so far as the charges on the debit side are lawful charges; because that, and that only, carries out the intention of the parties. In *The J. F. Spencer*, 5 Ben. 151, there

does not appear to have been any such intention of the parties as in the present case. And in the case of *151 Tons of Coal*, 4 Blatchf. 368, Mr. Justice NELSON held that the application by the court of payments to items not liens "would be unobjectionable," if there had been no special application by the parties. To recover in this proceeding against the proceeds of the vessel, and as against the mortgagee, it is incumbent upon the libelant to establish a lien for the unpaid balance of the account. Applying the credits chronologically upon the lawful charges in the running account, as I find was the intention of the parties, the remaining items are partly liens and partly not. The amounts which were liens I make out to be \$231.95. For this sum, with interest, the libelants are entitled to a decree.

O'ROURKE v. PECK *et al.*

(Circuit Court, S. D. New York. July 7, 1887.)

WHARVES—INJURY TO VESSEL—LIABILITY OF LESSEE.

A libel *in personam* for the sinking of a canal-boat will lie against the occupants of a wharf under a lease which gave them general possession and control, but excepted and reserved the use of the premises for the purpose of loading and unloading coal, where the accident was caused by the dangerous condition of the bottom along-side the wharf, though libelant was coming there for the purpose of unloading coal for the parties authorized to use the premises for that purpose.

In Admiralty. On appeal from district court, 29 Fed. Rep. 223.

Libel *in personam* by Patrick O'Rourke against Joshua S. Peck and others, for the sinking of libelant's canal-boat. Respondents appeal from a decree for libelant.

Edward D. McCarthy, for libelant.

Flanagan & Hamlin, for respondents.

WALLACE, J. The defendants were in possession, as lessees and occupants, of the wharf at which the libelant's boat capsized; and it is conceded that the accident resulted from the unsafe and dangerous condition of the bottom of the river alongside the wharf, and without negligence on the part of the libelant. The general proposition is not disputed that the owner or person having the possession and control of such structure is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the structure or the access to it, which is known to him, and not to them, and which he has negligently suffered to exist. But it is insisted for the defendants that they are not liable to the libelant, because he was not at their wharf with his boat upon their invitation, but was there, at most, by a permission which was no more than

a bare acquiescence upon their part, and therefore they did not owe him any duty in reference to the condition of the premises.

The defendants' lease excepted and reserved from the premises demised the use of the premises for the purpose of loading or unloading coal, and the right to use the premises for the loading and unloading of coal was in the Consumers' Coal Company at the time of the accident to the libellant's boat, and had been for some time previously. At the time of the accident the wharf was used by the defendants for loading and unloading building materials, and by the Consumers' Coal Company for loading and unloading coal. The libellant came there with his boat to unload coal for the Consumers' Coal Company. As the libellant came to the wharf upon the express invitation of the Consumers' Coal Company, the case, upon the facts proved, would be clear against that company, if it, instead of the present defendants, had been sued. But it seems equally clear that the defendants, as occupants of the wharf, having the general possession and control, were under an obligation to keep the premises in a reasonably safe condition for the use of all persons who might lawfully resort there; and any person lawfully going there for the transaction of business to which the premises were appropriated had a right to assume, as against the defendants and all other persons in occupancy and control, that the structure itself, and the access to it, were in a reasonably safe condition. Upon this ground, and not because of the covenant in the defendants' lease to keep the premises in repair, the decree of the district court is affirmed.

CLEARY v. OCEANIC STEAM NAV. CO.

(Circuit Court, S. D. New York. December 23, 1889.)

WHARFINGERS—DUTY TO REPAIR.

In an action to charge the defendant for negligently allowing a wharf to get out of repair, the fact that the door and fastening were in good repair when the defendant assigned the right to collect wharfage and crange does not relieve the defendant from its duty to keep the wharf in a safe condition.

Motion for a New Trial.

Herman H. Shook, for plaintiff.

Wheeler & Cortis, for defendant.

Before LACOMBE and WHEELER, JJ.

PER CURIAM. There was sufficient in the evidence to warrant the jury in finding that the door or its fastening was in a condition of disrepair for a period long enough to justify the imputation of negligence. The fact, which was quite clearly shown, that the door and fastening were in good repair when the defendant assigned to the Spanish-American Company the right to collect wharfage and crange at the pier did not relieve the defendant from its duty to keep the wharf in safe condition.

THE JOSEPH LAUGHLIN v. THE JAS. RUMSEY.

(District Court, S. D. New York. January 20, 1890.)

SALVAGE—STRANDING—APPREHENDED DANGER—PROMPTNESS.

A tug-boat, going upon signal to the relief of a ferry-boat stranded in a dangerous position, though not in immediate peril, and lying by her and assisting in getting her off the rocks, is entitled to salvage compensation. The service being short, the labor light, and without danger to the salving vessel, *held*, \$300 is a reward sufficiently liberal to induce the promptest assistance in harbor cases.

In Admiralty. Libel for salvage.

Peter S. Carter, for libellant.

Carpenter & Mosher, for claimant.

BROWN, J. While the ferry-boat *Jas. Rumsey* was on her usual trip from Ninety-Ninth street, East river, to College point, at about half past 11 in the forenoon of July, 1889, she grounded on the rocks at Negro point. She signaled for assistance, and the steamer *Sylvan Shore* came along-side a few moments afterwards, and took off such of her passengers as wished to leave her. Soon afterwards several other tug-boats came in answer to her signals, and the libellant's tug, the *Laughlin*, was hired to remain by her, and give such assistance as might be needed. No price was named. The *Rumsey* had grounded on the point about amidships, heading eastward. The tide was strong flood. The point was a dangerous one, but she lay easy for the time being; and though upon an immediate examination of the *Rumsey* it was found that she was not leaking, and so far as appeared had not sustained any material injury, her situation was one of more or less danger, owing to the very rapid tide, from five to eight knots, and the tendency of the vessel in the rising tide to swing one way or the other, and possibly get again on the rocks, or suffer some twist, before she could be got under control by her own machinery; or, if her machinery should be obstructed in its full working power, she was liable to be carried on to Steep (Scaly) Rock on the other side, unless a tug was retained for assistance in an emergency. At the time when the *Laughlin* went to her the case was not one of immediate and present danger, but of a reasonable apprehension of danger, sufficient to bring the case within the line of salvage service. *The Plymouth Rock*, 9 Fed. Rep. 413. The *Laughlin* lay along-side of the *Rumsey* for about an hour and a half, when, in the rise of the tide, the *Laughlin*, working in conjunction with the *Rumsey's* engines, shoved her astern off the rocks, and then, by a line thrown to her stern quarter, checked the swinging of her stern in the strong flood-tide, and brought her to; whereupon she proceeded to College point, and thereafter performed her usual trips during the day. The *Rumsey* was taking the place of another boat laid up, and, to be safe against all contingencies, the services of the *Laughlin* were retained during two of those subsequent trips.

I can have no doubt, upon the foregoing facts, that when the *Laughlin* was hired compensation was contemplated by both parties on a salvage

basis, rather than a mere towage compensation at the ordinary rate of eight dollars an hour. The amount to be allowed must be determined with reference to the various elements on which such compensation is based. The ferry-boat was worth not over \$10,000; the tug, somewhat less. As it turned out, the damage to the *Rumsey* was small, and her working power unaffected; so that it is probable, or at least possible, that she might have taken care of herself without any aid. There is no evidence of any danger to the *Laughlin* in rendering the services she rendered. There was no occasion for daring, and no special skill. The actual service was short; it was attended by no difficulty, and by little labor. All the elements that enter into a salvage award exist herein but in a small degree. There were also plenty of other tugs ready to give any needed help. Four others, equally good, were in attendance. The *Laughlin* was selected instead of another tug, with whose master negotiations were already pending when the *Laughlin* arrived, because the *Laughlin* was at the time understood to have a wrecking pump that might possibly be serviceable. The *Laughlin* had no such pump, and none was in fact needed. These considerations preclude any large award. *The Baker*, 23 Fed. Rep. 109; award reduced, 25 Fed. Rep. 771. It is of great importance, however, in all cases of danger, or of apprehended danger, that, where a call for help is made, other boats able to aid should repair instantly to the place of danger; and, though the service finally found necessary may be comparatively small, the compensation allowed should be so far beyond the ordinary rates of daily work, and so liberal that there should never be the slightest hesitation in dropping ordinary business and running to the scene of danger. The rate of compensation must be such as to secure always the promptest assistance. Upon the above considerations I award the libelants \$300 and costs; two-thirds of the award to go to the owners of the tug, and of the remaining third \$25 to go to the master, and the rest to be divided among the master and the crew in proportion to their wages.

THE KIMBERLEY.

BAKER SALVAGE CO. v. THE KIMBERLEY.

(Circuit Court, E. D. Virginia. August 4, 1889.)

In Admiralty. On appeal from district court. See *ante*, 289.

Butler, Stillman & Hubbard, for appellant.

Sharp & Hughes, for appellee.

HARLAN, Justice. This cause having come on to be heard in this court upon the appeal of John Higgins, master of the steamer *Kimberley*, and the claimant of the said steamer, her cargo and freight money,

from the decree of the district court entered in this cause on the 29th of June, 1888, and upon the pleadings and proofs presented in the said district court, and having been submitted by Messrs. Sharp & Hughes, as proctors for the libelant, and Messrs. Butler, Stillman & Hubbard, as proctors for the claimant, it is now by the court ordered, adjudged, and decreed as follows:

First. That the services in the libel mentioned are salvage services of a high degree of merit.

Second. That the libelant do recover of the said steam-ship Kimberley, her cargo and freight money, the sum of \$100,000, with interest thereon from this date until the date of payment; and the costs.

Third. And it appearing to the court that by a consent decree entered in the district court on April 23, 1888, registered bonds of the city of New York of the par value of \$200,000 were authorized to be transferred to Charles G. Ramsey and Walter H. Taylor as trustees, and have been so transferred, in trust to hold the same until the final decree of said court or of any appellate court to which the cause might proceed, and directing the said trustees, 10 days after service of such final decree, to sell and convert into cash the said bonds, or such portion of them as might be necessary, and out of the proceeds to satisfy any decree that might be rendered in favor of the libelant, if the same should not be previously satisfied or appealed from, and directing them also to pay the surplus of such bonds, if any, to the National Board of Marine Underwriters, as guarantors for the said John Higgins; and it appearing, further, that by the said decree of April 23, 1888, and by the final decree of the district court in this cause, that other bonds (of a class to be approved by the libelant's proctors) were directed to be transferred to the said trustees upon the like trust; and it appearing that they have been so transferred to the said trustees,—it is further ordered, adjudged, and decreed by the court that the said trustees do proceed to execute the said trust as set forth in the said decree of April 23, 1888, 10 days after the service upon them of a copy of this decree.

ÆTNA LIFE INS. CO. v. DAVEY.

(Circuit Court, D. New Jersey. September 27, 1889.)

At Law. On motion to set aside verdict, and for new trial.

For report of charge on first trial, see 20 Fed. Rep. 482. On motion for new trial, see Id. 494. For report of opinion reversing the judgment, and granting a new trial, see 8 Sup. Ct. Rep. 331. For report of charge on second trial, see 38 Fed. Rep. 650.

John Linn and *Cortlandt Parker*, for plaintiff.

Theron G. Strong and *Jos. D. Bedle*, for defendant.

Before **BRADLEY**, Justice, and **WALES**, J.

PER CURIAM. We feel compelled in this case to set the verdict aside, and grant a new trial, on the ground that it was contrary to the weight of the evidence, and the instructions of the court. It was a condition of the policy that "if he [the insured] shall become so far intemperate as to impair his health, or induce *delirium tremens*, or if his death shall result from injuries received while under the influence of alcoholic liquor, this policy shall become and be null and void." The proof of the physician who attended the deceased in his last illness, and of others immediately around him, was so positive on this subject, and so free from contradiction, that it is difficult to conceive how the breach of the condition could be proved, if it was not proven in this case. The evidence on the subject of his general habits was of a negative character, the witnesses never having seen the deceased intoxicated, and cannot outweigh the positive evidence. The court is always reluctant to interfere with the verdict of the jury on this ground, and will not do so where the evidence is really conflicting. But if it is apparent that the jury disregarded the evidence, and that they must have acted under some misapprehension or prejudice, it is the duty of the court to correct their error, and set aside the verdict. We think that this was the case here. It is argued that a second verdict on the facts will not be interfered with. That rule has qualifications. The former verdict was set aside, not for an error of the jury, but for errors in the charge of the court; and hence the case does not come within the reason of the rule. It is where the evidence is conflicting, and the judgment of the jury upon it is twice called in question, that the rule applies. Let the verdict be set aside, and a new trial granted.